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Volume 4

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- The official judgment number is inserted immediately beneath the case name;
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  (i) the official judgment number is inserted before the usual report citations in the case lists and on the first occasion when the case is cited in the text. Thereafter, only the report citations are given;

  (ii) All 'at' references are to the official paragraph number rather than to a page of a report, with the paragraph number in square brackets but not in bold;

  (iii) The 'at' reference is only given in conjunction with the first report cited; eg [2001] 4 All ER 159 at [16], [2001] AC 61. If an 'at' reference is included on the first occasion when the case is cited, it also appears alongside the official judgment number.

For the avoidance of doubt, these changes do not apply to reports of judgments delivered before 11 January 2001 or to the citation of such cases in other reports.

# CITATION

These reports are cited thus:

**[2003] 4 All ER**

# REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

## Halsbury's Laws of England

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (1996 reissue) para 9 refers to paragraph 9 on page 24 of the 1996 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

## Halsbury's Statutes of England and Wales

The reference 14 *Halsbury's Statutes* (4th edn) (2003 reissue) 734 refers to page 734 of volume 14 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 269 refers to page 269 of the 2001 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

## Halsbury's Statutory Instruments

The reference 14 *Halsbury's Statutory Instruments* (2001 issue) 201 refers to page 201 of the 2001 issue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

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**Adamson v Halifax plc** .. .. .. .. .. .. .. .. .. **CA 423**

——Negligence – Whether disabled woman entitled to recover costs of bringing up healthy child attributable to her disability where child conceived as a result of negligently-performed sterilisation

**Rees v Darlington Memorial Hospital NHS Trust** .. .. .. .. .. **HL 987**

——Personal injury – Whether claimant in personal injury action able to recover damages in respect of gratuitous care – Approach to assessing awards

**Giambrone v JMC Holidays Ltd (formerly Sunworld Holidays) (No 2)** .. .. .. **Judge MacDuff QC 1212**

**DISCOVERY** – Collateral use of information obtained – Litigant applying to use documents subject to restriction order in different proceedings – Whether documents 'disclosed' voluntarily – Approach to lifting of restriction order

**SmithKline Beecham plc v Generics (UK) Ltd** .. .. .. .. .. **CA 1302**

**DISCRIMINATION** – Disability discrimination – Whether employment tribunal having jurisdiction to hear complaint relating to benefit arising from employment relationship and complaints relating to provision of references and failure to return employee's property after termination of employment

**Relaxion Group plc v Rhys-Harper** .. .. .. .. .. .. .. **HL 1113**

——Racial discrimination – Whether employment tribunal having jurisdiction to hear complaint relating to benefit arising from employment relationship after termination of employment and complaint of discrimination based on employer's failure to comply with reinstatement order

**Relaxion Group plc v Rhys-Harper** .. .. .. .. .. .. .. **HL 1113**

**DISCRIMINATION (CONT'D)** – Sex discrimination – Whether employment tribunal having jurisdiction to hear complaint relating to benefit arising from employment relationship after termination of employment – Whether tribunal having jurisdiction to hear complaint of sex discrimination with regard to employer's alleged failure to carry out proper investigation of allegation of sexual harassment

**Relaxion Group plc v Rhys-Harper** .. .. .. .. .. .. .. **HL 1113**

**DIVORCE** – Financial provision – Contribution by each of the parties to welfare of family – Whether concept of 'special contribution' by money-making partner legitimate in justifying unequal division of assets

**Lambert v Lambert** .. .. .. .. .. .. .. .. .. .. .. **CA 342**

——Financial provision – Husband bringing divorce proceedings in Germany – Wife subsequently bringing divorce proceedings in England – Judge granting wife's application for maintenance pending suit – Whether maintenance order 'provisional measure'

**Wermuth v Wermuth** .. .. .. .. .. .. .. .. .. .. **CA 531**

**EASEMENT** – Communal garden – Whether right to enjoy communal garden totally excluding any use of land by owners

**Mulvaney v Gough** .. .. .. .. .. .. .. .. .. .. .. **CA 83**

——Right to park cars – Land which could accommodate parking for no more than six cars – Whether right to park six cars on land during working hours capable of existing as easement

**Batchelor v Marlow** . .. .. .. .. .. .. .. .. .. .. **CA 78**

**EDUCATION** – Permanent exclusion of child of compulsory school age from school – Whether breach of right to education

**A v Head Teacher and Governors of Lord Grey School** . .. **Stanley Burnton J 1317**

**ENVIRONMENT** – Protection – Defendant confirming site as site of special scientific interest – Claimants having interest in site of special scientific interest – Whether defendant having discretion not to confirm

**Fisher v English Nature** .. .. .. .. .. .. .. .. **Lightman J 366**

**EVIDENCE** – Revenue suspecting that appellants failing to disclose details of assets and putting questions to appellants at 'Hansard' interview – Whether appellants' answers admissible at subsequent trial for cheating the public revenue

**R v Gill** .. .. .. .. .. .. .. .. .. .. .. .. .. **CA 681**

——Rule of procedure requiring expert's report to state all material 'instructions' – Whether 'instructions' including material supplied by instructing party to expert as basis on which he had been asked to advise

**Lucas v Barking, Havering and Redbridge Hospitals NHS Trust** .. .. **CA 720**

**FINANCIAL SERVICES** – Financial Services Authority (FSA) – Prohibition order – Whether FSA having power to make prohibition order in disciplinary proceedings

**R (on the application of Davies) v Financial Services Authority** .. .. **CA 1196**

**HOUSING** – Local authority – Local authority bringing automatic possession proceedings after secure tenancy terminated by operation of law – Whether breach of right to respect for home

**Harrow London BC v Qazi** .. .. .. .. .. .. .. .. **HL 461**

**HUMAN RIGHTS** – NHS hospital trust admitting liability for death of child in hospital before coming into force of human rights legislation – Availability of relief for breach of convention right in national courts

**R (on the application of Khan) v Secretary of State for Health** .. .. **CA 1239**

——Right to a fair hearing – Employment tribunal's decision referring to authorities which parties had had no opportunity to address – Proper approach for determining whether hearing rendered unfair in such circumstances

**Sheridan v Stanley Cole (Wainfleet) Ltd** .. .. .. .. .. .. **CA 1181**

——State's obligation to investigate death in circumstances where state arguably in breach of substantive obligation under convention right to life – Whether state's investigatory obligation requiring public inquiry with participation of deceased's family

**R (on the application of Amin) v Secretary of State for the Home Dept** .. **HL 1264**

——State's obligation to investigate death in circumstances where state arguably in breach of substantive obligation under convention right to life – Whether state's investigatory obligation requiring public inquiry with participation of deceased's family

**R (on the application of Khan) v Secretary of State for Health** .. .. **CA 1239**

**IMMIGRATION** – Asylum seeker – Determination of age of unaccompanied asylum seeker claiming to be under 18 years old – Guidance

**R (on the application of B) v Merton London BC** .. .. **. Stanley Burnton J 280**

——Leave to enter – Pre-entry clearance system at Prague Airport – Claimants Czech Roma – Whether system contrary to international refugee convention – Whether system discriminating against Czech Roma

**European Roma Rights Centre v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)** .. .. **CA 247**

**INCOME TAX** – Transaction in securities – Whether payment of dividend transaction in securities

**IRC v Laird Group plc.** .. .. .. .. .. .. .. .. .. **HL 669**

**INSOLVENCY** – Bankruptcy – Bankrupt bringing proceedings for negligence against professional advisers for failure to prevent making of bankruptcy order – County court holding that trustee in bankruptcy had no interest in right of action – Whether open to professional advisers to contend that right of action vested in trustee

**Mulkerrins v PricewaterhouseCoopers (a firm)** .. .. .. .. .. **HL 1**

**INSURANCE** – Liability insurance – Defendants insuring claimants against negligent advice – Representatives providing negligent advice – Whether individual policyholders' claims falling within aggregation clause – Whether series of claims constituting 'related series of acts or omissions'

**Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd..** .. .. .. .. .. .. .. .. .. **HL 43**

**LANDLORD AND TENANT** – Recovery of possession – Statutory provision requiring court to make order for possession of assured shorthold periodic tenancy if landlord serving notice specifying last date of period of tenancy and requiring possession thereafter – Whether notice valid if not specifying last date of period of tenancy but requiring possession on day known to be day immediately following last day of period

**Fernandez v McDonald** .. .. .. .. .. .. .. .. .. **CA 1033**

**LIMITATION OF ACTION** – Claimant seeking to rely on three-year limitation period in negligence action in respect of latent damage where facts relevant to cause of action not known at date of accrual – Loss adjuster aware of potential claim – Whether knowledge of loss adjuster appointed by claimant's insurers in subrogated claim attributable to claimant – Whether claimant's cause of action prima facie time-barred

**Graham v Entec Europe Ltd (t/a Exploration Associates)** .. .. .. **CA 1345**

——When time begins to run – Patient bringing action against surgeon – Parties settling proceedings and subsequently embodying settlement agreement in consent order – Whether time running for limitation purposes in contribution proceedings from date of agreement or date of consent order

**Knight v Rochdale Healthcare NHS Trust** .. .. .. .. .. .. **Crane J 416**

**MAGISTRATES** – Jurisdiction – Justices ruling no case to answer due to mistaken belief as to admissibility of evidence – Justices rescinding decision and convicting defendant – Whether justices functi officio

**Steward v Director of Public Prosecutions** . .. .. .. .. .. **DC 1105**

**MEDICAL TREATMENT** – Consent to treatment together of each of male and female gamete providers in treatment involving in vitro fertilisation, freezing and storage of embryos – Whether implantation of embryo in female gamete provider 'treatment together' – Whether requirement for consent by both partners contrary to right to respect for private and family life

**Evans v Amicus Healthcare Ltd** . .. .. .. .. .. .. .. **Wall J 903**

**MENTAL HEALTH** – Patient – Consent of patient not required for medical treatment given him for mental disorder from which he was suffering – Specified disorder being mental illness – Patient treated for psychopathic disorder – Whether treatment for psychopathic disorder requiring patient's consent

**R (on the application of B) v Ashworth Hospital Authority** .. .. .. **CA 319**

**MISTAKE** – Mistake of law – Money paid under mistake of law – Whether action for restitution time-barred – Whether payments of advance corporation tax made under mistake of law – Whether English law recognising claim in restitution to recover taxes paid under mistake of law

**Deutsche Morgan Grenfell Group plc v IRC.** .. .. .. .. .. **Park J 645**

**MORTGAGE** – Sale – Exercise of power of sale by mortgagee – Purchaser deceiving vendor mortgagee – Whether sale liable to be set aside

**Corbett v Halifax plc** .. .. .. .. .. .. .. .. .. .. **CA 180**

**NEGLIGENCE** – Accusations of child abuse made against parents – Accusations later proving unfounded – Whether duty of care owed by local authority to parents and children

**D v East Berkshire Community Health NHS Trust** .. .. .. .. **CA 833**

**PARTNERSHIP** – Dissolution – Whether accepted repudiatory breach of partnership deed dissolving partnership

**Mullins v Laughton (Note)** .. .. .. .. .. .. .. **Neuberger J 94**

**PRACTICE** – Ancillary relief – Arrangement involving acquisition, retention, use or control of criminal property – Guidance

**P v P (ancillary relief: proceeds of crime)** .. .. .. .. .. .. **Fam D 843**

**PRACTICE (CONT'D)** – Coal mining hand arm vibration syndrome (vibration white finger) actions – Commencement of proceedings

**Practice Direction (Coal Mining Hand Arm Vibration Syndrome (Vibration White Finger))** .. .. .. .. .. .. .. .. **CA 318**

——Clinical negligence actions – Best practice in multi-track actions in county courts and High Court for published and unpublished literature upon which expert witness proposing to rely

**Wardlaw v Farrar (Note)** .. .. .. .. .. .. .. .. .. **CA 1358**

——Criminal proceedings – Consolidation of existing practice directions, practice statements and practice notes – Amendment – Appeals against sentence – Provision of notice to the prosecution

**Amendment to the Consolidated Criminal Practice Direction (Appeals against sentence—the provision of notice to the prosecution)** .. .. .. .. .. .. .. .. .. **CA 665**

——Transfer of proceedings from or to the Technology and Construction Court – No order transferring case listed in Queen's Bench Division to Technology and Construction Court drawn up – Whether fatal procedural error

**Fawdry & Co (a firm) v Murfitt (Lord Chancellor intervening)** .. .. .. **CA 60**

——Whether exclusion of existence of duty of care of local authority in performance its statutory duties to children constituting breach of right to fair trial

**D v East Berkshire Community Health NHS Trust** .. .. .. .. .. **CA 796**

**PRISON** – Access to legal adviser – Prisoner instructing foreign lawyer – Whether foreign lawyer falling within definition of 'legal adviser'

**R (on the application of Van Hoogstraten) v Governor of Belmarsh Prison** .. .. .. .. .. .. .. .. .. **Jackson J 309**

**PROCEEDS OF CRIME** – Declaratory relief – Claimant seeking consent of police to transfer moneys related to suspect transaction – Police refusing consent – Whether appropriate for claimant to seek declaration that moneys not proceeds of crime

**Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit** .. .. .. .. .. .. .. ..**Tomlinson J 1225**

**RATES** – Valuation – Aggregate rateable value of hereditaments occupied for the purpose of generating electricity – Order containing annual formula calculating value based on generating capacity – Whether order ultra vires

**R (on the application of Edison First Power Ltd) v Central Valuation Officer HL 209**

**ROAD TRAFFIC** – Driving while unfit to drive through drink – No evidence called from doctor taking specimen of blood at police station – Whether requirement for doctor to give evidence mandatory

**Steward v Director of Public Prosecutions** .. .. .. .. .. .. **DC 1105**

**SENTENCE** – Custodial sentence – Statutory scheme providing for release of offender on licence rather than unconditionally – Whether scheme incompatible with convention prohibition on heavier retrospective penalties when applying to offences committed before scheme's implementation

**R (on the application of Uttley) v Secretary of State for the Home Dept** .. **CA 891**

**SENTENCE (CONT'D)** – Custodial sentence – Statutory provision empowering court to extend until end of sentence licence period in respect of sexual offences – Whether provision applying to sentence imposed for offence committed before its implementation

**R v T** .. .. .. .. .. .. .. .. .. .. .. .. **CA 877**

——Custodial sentence – Statutory provision empowering court to extend until end of sentence licence period in respect of sexual offences – Whether such extension violating convention prohibition on heavier retrospective penalties if imposed in respect of offence committed before provision implemented

**R v R** .. .. .. .. .. .. .. .. .. .. .. .. **CA 882**

——Custodial sentence – Whether convention right requiring periodic review of lawfulness of continued detention of offender who had served commensurate element of sentence

**R (on the application of Giles) v Parole Board** .. .. .. .. .. **HL 429**

——Life imprisonment for second serious offence – Whether imposition on mentally ill offender of automatic life sentence for second serious offence compatible with provisions of human rights convention

**R v Drew** .. .. .. .. .. .. .. .. .. .. .. .. **HL 557**

——Mandatory life sentence – Transfer of claimant from prison in Scotland to prison in England – Tariff fixed by Secretary of State of greater length than that recommended by trial judge in Scotland – Whether imposition of longer tariff heavier penalty than the one applicable at the time offence committed

**R (on the application of McFetrich) v Secretary of State or the Home Dept** **DC 1093**

——Manslaughter – Proper approach to sentencing where death caused in context of other criminal activity

**R v Wacker** .. .. .. .. .. .. .. .. .. .. .. .. **CA 295**

——Possession of an offensive weapon in a public place – Guidance

**R v Poulton** .. .. .. .. .. .. .. .. .. .. .. .. **CA 869**

**SHIPPING** – Suit barred unless brought within one year after delivery of goods or date on which goods should have been delivered – Claim brought within one year of delivery at second port but more than one year from notice of readiness at original discharge port – Whether claim time-barred

**Trafigura Beheer BV v Golden Stavraetos Maritime Inc** .. .. .. **CA 746**

**SOCIAL SECURITY** – Claimant's large family living in two houses – Whether both houses one dwelling occupied as the home for the purposes of capital disregards

**Miah v Secretary of State for Work and Pensions** .. .. .. .. **CA 702**

——Disability living allowance – Care component – 'Cooking test'

**Moyna v Secretary of State for Work and Pensions** .. .. .. .. **HL 162**

——Retirement pension – Entitlement

**Secretary of State for Work and Pensions v Nelligan** .. .. .. .. **CA 171**

**TORT** – Whether there was a general common law tort of invasion of privacy – Whether damages were recoverable for intentionally causing emotional distress which did not constitute psychiatric injury

**Wainwright v Home Office** .. .. .. .. .. .. .. .. **HL 969**

**TRADE MARK** – Registration – Effect of registration – Whether owner of registered trade mark having statutory right to use mark overriding another person's common law passing off rights

**Inter Lotto (UK) Ltd v Camelot Group plc** .. .. .. .. .. .. **CA** **575**

**WILL** – Forfeiture clause – Clause leaving entire estate to two beneficiaries in event any other beneficiary contested will – Whether condition valid

**Nathan v Leonard** .. .. .. .. .. .. .. .. **John Martin QC** **198**

# House of Lords petitions

This list, which covers the period 1 August 2003 to 4 December 2003, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

**Donoghue v Folkestone Properties Ltd** [2003] 3 All ER 1101. Leave to appeal refused 9 October 2003 (Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Scott of Foscote).

**R v Simpson** [2003] 3 All ER 531. Leave to appeal refused 28 October 2003 (Lord Bingham of Cornhill, Lord Hobhouse of Woodborough and Lord Rodger of Earlsferry).

**Cinderella Rockerfellas Ltd v Rudd** [2003] 3 All ER 219. Leave to appeal refused 3 November 2003 (Lord Hoffmann, Lord Hope of Craighead and Lord Scott of Foscote).

**Deutsche Morgan Grenfell Group plc v IRC** [2003] 4 All ER 645. Leave to appeal refused 4 December 2003 (Lord Bingham of Cornhill, Lord Hoffmann and Lord Walker of Gestingthorpe).

# Mulkerrins v PricewaterhouseCoopers (a firm)

[2003] UKHL 41

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD MILLETT, LORD SCOTT OF FOSCOTE AND LORD WALKER OF GESTINGTHORPE

7, 31 JULY 2003

*Insolvency – Bankruptcy – Bankrupt's estate – Vesting in trustee – Cause of action – Bankrupt bringing proceedings for negligence against professional advisers for failure to prevent making of bankruptcy order – Trustee in bankruptcy claiming right of action vesting in him – County court holding that trustee had no interest in right of action – Whether open to professional advisers to contend that right of action vested in trustee*

The claimant owned a small but profitable business. She had outstanding debts, from a previous business, for which she and her then husband were both liable. After a bankruptcy petition was presented against her, she consulted the defendants, who were licensed insolvency practitioners. They advised her that she had a good chance of obtaining an individual voluntary arrangement (IVA), which would allow her to carry on the business and pay her creditors out of the profits. She accepted that advice, and the defendants undertook to prepare an IVA proposal. However, she was made bankrupt and her business was closed down. Just before her discharge from bankruptcy, she brought proceedings for negligence against the defendants, complaining of their failure to prevent the making of the bankruptcy order. In those proceedings, she claimed general damages for loss of status and business reputation, but the major part of her claim was for financial loss arising from the closure of the business. The claimant's trustee in bankruptcy considered that her right of action was vested in him for the benefit of her creditors. In a subsequent application by the claimant in the bankruptcy proceedings, the district judge held that the trustee had no interest in the claimant's right of action. The trustee did not appeal that decision. The claimant subsequently served her statement of claim, but the defendants, who had had no notice of the hearing before the district judge, applied to strike out part of the claim, contending that they should be sued by the trustee. The deputy judge dismissed the application, but his decision was reversed by the Court of Appeal. On the claimant's appeal to the House of Lords, their Lordships

considered whether it was, in fact, open to the defendants to challenge the practical effect of the district judge's order.

**Held** – It was not open to the defendants to challenge the practical effect of the district judge's order. Right or wrong, that order had clearly and decisively determined the issue between the only two possible contenders to the right of action against the defendants. Its effect, binding on the trustee in bankruptcy, had been to declare that the right of action had not been affected by the bankruptcy. From the moment the right of action arose, it was at all material times in the legal and beneficial ownership of the claimant. If the trustee in bankruptcy, as the only possible rival claimant, was bound by the order, its practical effect was not open to challenge by the defendants. The claimant's right of action had to be taken to form no part of the bankrupt estate available to her creditors, and she was at liberty to pursue it in her own name and for her own benefit. Accordingly, the appeal would be allowed (see [1], [2], [19], [20], [41], [45], [46], below).

Dicta of Lord Hoffmann in *Stein v Blake* [1995] 2 All ER 961 at 972 considered.

**Notes**

For causes of action vesting in a trustee in bankruptcy, see 3(2) *Halsbury's Laws* (4th edn) (2002 reissue) para 435.

**Cases referred to in opinions**

*Beckham v Drake* (1849) 2 HL Cas 579, 9 ER 1213, HL.

*Bell (a bankrupt), Re* [1998] BPIR 26, BC SC.

*Crown Estates Comrs v Dorset CC* [1990] 1 All ER 19, [1990] Ch 297, [1990] 2 WLR 89.

*Eaton (decd), Re, Shaw v Midland Bank Executor and Trustee Co Ltd* [1964] 3 All ER 229, [1964] 1 WLR 1269.

*Grady v Prison Service* [2003] EWCA Civ 527, [2003] 3 All ER 745.

*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417, [1994] 1 AC 85, [1993] 3 WLR 408, HL.

*Moritz (decd), Re, Midland Bank Executor and Trustee Co Ltd v Forbes* [1959] 3 All ER 767, [1960] Ch 251, [1959] 3 WLR 939.

*Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193, [2000] Ch 352, [2000] 2 WLR 755, CA.

*Smith v Croft (No 2)* [1987] 3 All ER 909, [1988] Ch 114, [1987] 3 WLR 405.

*Stein v Blake* [1995] 2 All ER 961, [1996] AC 243, [1995] 2 WLR 710, HL.

*Weddell v JA Pearce & Major (a firm)* [1987] 3 All ER 624, [1988] Ch 26, [1987] 3 WLR 592.

*Wilson v United Counties Bank Ltd* [1920] AC 102, [1918–19] All ER Rep 1035, HL.

**Cases referred to in list of authorities**

*Airey, Re* (1989) 70 OR (2d) 326, Ont SC.

*Aitchison and Tuvaiti v NZI Life Superannuation Nominees Ltd* [1996] BPIR 215, NZ HC.

*Berridge, Re* (2002) 117 ACWS (3d) 374, Alta QB.

*Bowker v Evans* (1885) 15 QBD 565, CA.

*Brandstaetter, Re* (1984) 36 BR 369, Bkrtcy D Wis; *affd* (1985) 767 F 2d 324, US Ct of Apps (7th Cir).

*Brandt's (William) Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, [1904–7] All ER Rep 345, HL.

*Brewer v Dew* (1843) 11 M & W 625, 152 ER 955.
*Brodie, Re* [1969] 1 OR 285, Ont SC.
*Bryant v Commonwealth Bank of Australia* (1997) 75 FCR 545, Aust FC.
*Bullock v Goodluck and the Transport Commission* (1983) 48 ALR 217, Tas SC.
*Campbell (a bankrupt), Re* [1996] 2 All ER 537, [1997] Ch 14.
*Chippendall v Tomlinson* (1785) 4 Doug KB 318, 99 ER 900.
*Collins v Official Receiver, Re Heenan* [1996] BPIR 552, Aust FC.
*Cork (as trustee in bankruptcy for Rawlins) v Rawlins* [2001] EWCA Civ 202, [2001] 4 All ER 50, [2001] Ch 792, [2001] 3 WLR 300.
*Cottrell, Re* (1989) 876 F 2d 540, US Ct of Apps (6th Cir).
*Cox v Journeau (No 2)* (1935) 52 CLR 713, Aust HC.
*Crofton v Poole* (1830) 1 B & Ad 568, 109 ER 898.
*Cummings and Fuller v Claremont Petroleum NL* [1998] BPIR 187, Aust HC.
*Davis v Trustee in Bankruptcy of the Estate of Davis* [1998] BPIR 572.
*Dawson v Great Northern and City Rly Co* [1905] 1 KB 260, [1904–7] All ER Rep 913, CA.
*Dove v Banhams Patent Locks Ltd* [1983] 1 WLR 1436.
*Edmonds Judd v Official Assignee* [2001] BPIR 468, NZ CA.
*Egan v Grayson* (1956) 8 DLR (2d) 125, Alta SC.
*Ex p Graham, Re Job* (1870) 21 LT 802.
*Faryab v Smith* [2001] BPIR 246, CA.
*Faulkner v Bluett* (1981) 52 FLR 115, Aust FC.
*Gano v Alberta Motor Assn Insurance Co* (1998) 76 ACWS (3d) 489, Alta QB.
*Gibson v Carruthers* (1841) 8 M& W 321, 151 ER 1061, [1835–42] All ER Rep 565.
*Giles v Thompson* [1993] 3 All ER 321, [1994] 1 AC 142, [1993] 2 WLR 908, HL.
*Glegg v Bromley* [1912] 3 KB 474, [1911–13] All ER Rep 1138, CA.
*Griffiths v Civil Aviation Authority* [1997] BPIR 50, Aust FC.
*Haig v Aitken* [2000] 3 All ER 80, [2001] Ch 110, [2000] 3 WLR 1117.
*Hamilton v Official Receiver* [1998] BPIR 602.
*Hatchard v Mège* (1887) 18 QBD 771, DC.
*Heath v Tang, Stevens v Peacock* [1993] 4 All ER 694, [1993] 1 WLR 1421, CA.
*Hinckley Island Hotel Ltd, Re, Craig v Humberclyde Industrial Finance Group Ltd* [1998] 2 BCLC 526, [1999] 1 WLR 129, CA.
*Hodgson v Sidney* (1866) LR 1 Exch 313, Ct of Exch.
*Hollister, Re* [1926] 3 DLR 707, Ont SC.
*Holmes v Goodyear Tyre & Rubber Co (Aust) Ltd* (1984) 55 ALR 594, Qld SC.
*Howard v Crowther* (1841) 8 M & W 601, 151 ER 1179.
*Hunt v Severs* [1994] 2 All ER 385, [1994] 2 AC 350, [1994] 2 WLR 602, HL.
*Ibeneweka v Egbuna* [1964] 1 WLR 219, PC.
*James, Ex p, re Condon* (1874) LR 9 Ch App 609, [1874–80] All ER Rep 388, LJJ.
*Kavanagh, Re, ex p The Bankrupt v Jackson (The Trustee)* [1950] 1 All ER 39n, CA; *affg* [1949] 2 All ER 264, DC.
*Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38, [1987] AC 189, [1987] 2 WLR 312, HL.
*Khan v Official Receiver* [1997] BPIR 109, CA.
*Leach v Official Assignee* [1975] 1 NZLR 83, NZ SC.
*Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961, [1992] 1 WLR 1.
*McMahon (a bankrupt), George, Re* [1932] NZLR 1196, NZ SC.
*Minna Craig Steamship Co and James Laing v Chartered Mercantile Bank of India, London and China* [1897] 1 QB 460, CA.
*Muir's Trustee v Braidwood* 1958 SC 169.

*Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 All ER 854, [1992] 1 WLR 498.
*Official Assignee v Dowling* [1964] NZLR 578, NZ SC.
*Official Receiver v Davis* [1998] BPIR 771.
*Papaloizou, Re* [1999] BPIR 106.
*Patel v Jones* [2001] EWCA Civ 779, [2001] BPIR 919; *affg* sub nom *Jones v Patel and the London Borough of Brent* [1999] BPIR 509.
*Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL.
*Potts, Re, ex p Taylor* [1893] 1 QB 648, CA.
*Pressos Cia Naviera SA v Belgium* (1995) 21 EHRR 301, [1995] 17849/91, ECt HR.
*Rae, Re* [1995] BCC 102.
*Rahall v McLennan* (1996) 66 ACWS (3d) 407, Alta QB.
*Richter, Re* [1929] NZLR 364, NZ SC.
*Ritenburg v Crown Trust Co* (1961) 33 DLR (2d) 498, Alta SC.
*Roberts, Re* [1900] 1 QB 122, CA.
*Rogers v Spence* (1846) 12 Cl and Fin 700, 8 ER 1586, HL; *affg* (1844) 13 M & W 571, 153 ER 239, Ex Ch.
*Rose v Buckett* [1901] 2 KB 449, CA.
*Ryal v Rowles* (1749) 1 Ves Sen 375, 27 ER 1074.
*Sibley v Nason* (1907) 196 Mass 125, Mass SC.
*Sierra Switchboard Co v Westinghouse Electric Corp* (1986) 789 F 2d 705, US Ct of Apps (9th Cir).
*Silk v Osborn* (1794) 1 Esp 140, 170 ER 305.
*Smith v Braintree DC* [1989] 3 All ER 897, [1990] 2 AC 215, [1989] 3 WLR 1317, HL.
*Steel Wing Co Ltd, Re* [1921] 1 Ch 349, [1920] All ER Rep 292.
*Stock v London Underground Ltd* (1999) Times, 13 August, [1999] CA Transcript 1412.
*Three Rivers DC v Bank of England* [1995] 4 All ER 312, [1996] QB 292, [1995] 3 WLR 650, CA.
*Tignor v Parkinson* (1984) 729 F 2d 977, US Ct of Apps (4th Cir).
*Timmings v Treadgold* [1923] NZLR 73, NZ SC.
*Trendtex Trading Corp v Crédit Suisse* [1981] 3 All ER 520, [1982] AC 679, [1981] 3 WLR 766, HL.
*Vickery (a bankrupt), Trustee of the property of v Modern Security Systems Ltd* [1998] 1 BCLC 428, CA.
*Vine, Ex p, re Wilson* (1878) 8 Ch D 364, CA.
*Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 1 All ER 843, [1955] 2 QB 584, [1955] 2 WLR 919, CA.
*Wenlock v Moloney* (1967) 111 So Jo 437, CA.
*Wright v Fairfield* (1831) 2 B & Ad 727, 109 ER 1314.

**Appeal**

The claimant, Barbara Anne Mulkerrins, appealed with permission of the Appeal Committee of the House of Lords given on 29 April 2002 from the order of the Court of Appeal (Kennedy, Laws and Jonathan Parker LJJ) on 13 December 2000 ([2001] BPIR 106) allowing an appeal by the defendant firm, PricewaterhouseCoopers (PwC), from the order of Jules Sher QC, sitting as a deputy judge of the High Court, on 15 February 2000 ([2000] BPIR 506), whereby he held on the trial of a preliminary issue that Ms Mulkerrins had title to sue PwC in negligence and dismissed PwC's application to strike out the statement of claim as disclosing no reasonable cause of action. The Official Receiver was given permission to intervene in the appeal. The facts are set out in the opinion of Lord Millett.

*Ivan Krolick* and *Jeremy Gordon* (instructed by *Hewetts*, Reading) for Ms Mulkerrins.
*Robin Knowles QC* and *John Briggs* (instructed by *Boyes Turner*, Reading) for PwC.
*Stephen Davies QC* and *Brian Watson* (instructed by *TLT Solicitors*, Bristol) for the Official Receiver.

Their Lordships took time for consideration

31 July 2003. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

[1] My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Walker of Gestingthorpe and Lord Millett. I am in full agreement with them and for the reasons which they give I would allow the appeal and make the order which Lord Walker proposes.

**LORD NICHOLLS OF BIRKENHEAD.**

[2] My Lords, I have had the opportunity of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. For the reasons he gives, with which I agree, I would allow this appeal and make the order he proposes.

**LORD MILLETT**

[3] My Lords, Ms Mulkerrins claims damages from her former professional advisers PricewaterhouseCoopers (PwC) for having negligently failed to protect her from bankruptcy. Her claim has yet to be tried and her allegations have not been established. Even allowing for this, however, she has been shamefully ill served by her former advisers, by the law of insolvency, and by the civil justice system.

[4] At the beginning of the story Ms Mulkerrins owned a freehold property where she ran a small but profitable business as the proprietor of a nursing home. She faced the prospect of bankruptcy as a result of the failure of a business which she and her husband had formerly carried on together. The situation was tailor-made for an individual voluntary arrangement (IVA). Bankruptcy would destroy the business and yield relatively little for the creditors. An IVA, on the other hand, would preserve the business and enable the creditors to receive payments from the income of the nursing home. She consulted PwC, who were licensed insolvency practitioners, and on their advice made all the necessary arrangements to enter into an IVA with a view to avoiding bankruptcy.

[5] Despite this Ms Mulkerrins has been made bankrupt and the nursing home has been closed down by the Official Receiver, who did not have the funds to carry it on. She alleges that this would not have happened but for PwC's negligence. Her attempts to obtain redress have been thwarted at every turn. First, she had to fight off her trustee in bankruptcy, who somewhat implausibly claimed that her cause of action had vested in him for the benefit of the creditors. She won that round when the district judge in the Reading County Court sitting in bankruptcy ruled that her trustee had no interest in the claim (because her creditors had none). He did not appeal and she duly brought proceedings against PwC. They strongly objected to being sued by their own former client. Taking advantage of their own alleged wrong in failing to take the necessary steps to prevent her bankruptcy in the first place they insisted that, now that she had become bankrupt, they should be sued by her trustee. This was more than a little impudent, even brazen. It meant that Ms Mulkerrins had to fight the same battle

all over again. She effectively won again before the deputy judge in the High Court ([2000] BPIR 506), but PwC had greater determination (or resources) than the trustee, and this time she was taken to the Court of Appeal ([2001] BPIR 106), where she lost. Her action has been struck out. She has now been discharged from bankruptcy and the trustee has been released, with the result that the Official Receiver has become trustee in his place: see s 300(2) of the Insolvency Act 1986. He is under the trustee's ordinary duty to realise the assets of the bankrupt estate for the benefit of the creditors. Relying on the decision of the Court of Appeal he has conducted an auction of Ms Mulkerrins' claim and proposes to distribute most of the proceeds to the creditors, despite the fact that they are bound by an order of the bankruptcy court that it is an asset in which they have no interest at all.

[6] Ms Mulkerrins has thus lost her business, had her claim for redress struck out, and faces the prospect of losing the value of her business for a second time. But for an order of a district judge she would now be suffering the ultimate misfortune of being a party to a leading case in your Lordships' House brought to resolve one of the more intractable problems in the law of insolvency. This is the problem which was recently considered by the Court of Appeal in *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193, [2000] Ch 352 namely to what extent does a 'hybrid' claim of a bankrupt vest in his trustee on bankruptcy. A hybrid claim is constituted by a single cause of action which is partly for personal injury or loss of reputation (to which the creditors are not entitled) and partly for financial loss (to which they normally are).

[7] Ms Mulkerrins claims damages for having been made bankrupt. Her claim is a 'hybrid' one, for she claims damages for loss of reputation as well as damages for loss of assets and earning capacity. By far the greater part of her claim, however, is for financial loss arising from the closure of the business by the Official Receiver. This would not have occurred but for the bankruptcy, and was a readily foreseeable and indeed virtually inevitable consequence of the making of the bankruptcy order. She seeks to be placed in the financial position she would have been in if PwC had acted with proper skill and care and she had been made the subject of an IVA instead of a bankruptcy order.

[8] The first question is: what was the effect of the order of the bankruptcy court? The dispute which it was called upon to decide was whether the chose in action which represented Ms Mulkerrins' claim against PwC was an asset which had vested in the trustee for the benefit of the creditors or remained vested in Ms Mulkerrins for her own benefit. The district judge held that the trustee had no interest in the claim. In the High Court the deputy judge considered that this referred to the beneficial interest; he held that the effect of the district judge's order was that title to sue had vested in the trustee but he held it in trust for Ms Mulkerrins and not for the creditors. This was rejected by the Court of Appeal. Jonathan Parker LJ observed ([2001] BPIR 106 at 116 (para 61)) that—

> 'the district judge was not in any way concerned with accountability, or with the beneficial ownership of the cause of action. She was concerned only with the legal ownership: with the question—Who can sue PWC? The district judge was not contemplating that the Trustee would be accountable for anything. She was contemplating that it would be *Ms Mulkerrins* who would sue, not the Trustee ...'

[9] This is true so far as it goes, but it is not the whole truth. The district judge was certainly dealing with the legal title to the chose in action—the right to sue

PwC. But she was not dealing with the bare legal title. She ruled that the trustee had no interest in the claim, and her reasoning shows that she meant no interest at all whether at law or in equity. She considered that the claim had not vested in the trustee because it was not an asset which was available to the creditors, that is to say it was not part of the bankrupt estate. She did not overlook the basic rule that, with few exceptions, the property of a bankrupt vests in his trustee for the benefit of his creditors; or that at least so much of a chose in action as represents a claim to compensation for financial loss vests in him. To her credit she recognised that Ms Mulkerrins' claim was of an unusual kind, as neither the deputy judge nor the Court of Appeal seems to have done. It was a claim for damages for being made bankrupt. As she put it, 'the bankruptcy itself is the cause of action'. The district judge did not consider that a claim of this character could vest in the trustee for the benefit of the creditors; though she seems to have considered that this was a matter of timing which made the cause of action after-acquired property.

**[10]** Both the deputy judge and the Court of Appeal thought that the district judge's decision was wrong. The cause of action did not arise after the bankruptcy order but in the same instant as the bankruptcy order. The Court of Appeal distinguished between 'the *Ord v Upton* world', which they thought was the real world, and 'the artificial world' created by the district judge's order. As between the parties to a judicial decision, however, it does not matter whether the decision is right or wrong. As I observed in *Crown Estates Comrs v Dorset CC* [1990] 1 All ER 19 at 23, [1990] Ch 297 at 305, res judicata (or to give it its full name estoppel per rem judicatam) is a form of estoppel which gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to relitigate the same question, even though the decision may be wrong. If it is wrong, it must be challenged by appeal or not at all. As between themselves, the parties are bound by the decision, and may neither relitigate the same cause of action nor reopen any issue which was an essential part of the decision. The doctrine comes into its own only when the decision is wrong; if it is right, it merely serves to save time and costs.

**[11]** The district judge's order, therefore, bound the trustee and through him the creditors. As between Ms Mulkerrins and the creditors, her claim against PwC and its proceeds belonged to her and did not form part of the bankrupt estate available to them. The Court of Appeal, with respect, overlooked the fact that, whatever world PwC inhabited, the trustee and the creditors lived in the world created by the district judge's order.

**[12]** PwC, of course, were not parties to the proceedings in the bankruptcy court. They were not given notice of the proceedings and took no part in them. They are not, therefore, bound by the order of the district judge. But this does not mean that they can simply ignore it or that they are unaffected by it. It means only that they cannot be prejudiced by it. They cannot relitigate the issue, not because it is res judicata as against them, but because they have no legitimate interest in doing so.

**[13]** The general rule is that the benefit of a contract may be assigned to a third party without the consent of the other contracting party. If this is not desired, it is open to the parties to agree that the benefit of the contract shall not be assignable by one or either of them, either at all or without the consent of the other party. There is nothing objectionable in this; a party is entitled to insist that he deal only with the particular party with whom he has contracted: see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 at 429, [1994] 1

AC 85 at 105 per Lord Browne-Wilkinson. But unless he takes the precaution of including in the contract a prohibition of assignment, he has no right to object to it. A debt is freely assignable both at law and in equity without the debtor's consent. Section 136 of the Law of Property Act 1925 requires notice of the assignment to be given to the debtor if it is to be effective at law; it does not require his consent.

**[14]** An assignment of a claim for unliquidated damages in tort may be open to challenge on the grounds of maintenance and champerty; but not on the ground that such an assignment needs the consent of the proposed defendant. It is now established that a trustee may properly discharge his duty to obtain the best price for the assets of a bankrupt estate by assigning the bankrupt's claim against a third party. It is common ground that PwC could not have prevented the trustee from reassigning Ms Mulkerrins' claim against them back to her had the district judge's decision gone the other way.

**[15]** The reason that the debtor's consent is not required to an assignment of a debt is that the assignment cannot prejudice him. The assignment is subject to equities, which means that any set-off which the debtor may have against the assignor can be asserted against the assignee. On bankruptcy the trustee is in no better position than his bankrupt; a creditor's right to sue his debtor vests in his trustee subject to equities. It would have been inappropriate to allow PwC to take any part in the proceedings in the bankruptcy court. They were brought to resolve a dispute between Ms Mulkerrins on the one hand and her creditors, represented by the trustee, on the other. PwC were debtors with an adverse interest to Ms Mulkerrins and her estate. They could not be prejudiced by the vesting of Ms Mulkerrins' claim vesting in her trustee; and a fortiori they could not be prejudiced if it remained in her. They had no legitimate interest in the question to be decided.

**[16]** In the event no question of assignment arose. The district judge held that the claim did not vest in the trustee but remained vested in Ms Mulkerrins despite her bankruptcy. PwC are being sued by their own former client, the very person to whom they owed a duty of care. In the circumstances their protests have a very hollow ring to them.

**[17]** So far I have been content to assume that the decision of the district judge may have been wrong. But it should not be assumed that it was. Ms Mulkerrins' claim is an unusual one, for she complains of PwC's failure to prevent the making of a bankruptcy order against her. She claims damages representing the difference between her financial position as a result of the bankruptcy order and the financial position she would have enjoyed if she had entered into an IVA instead. Treating this claim as being wholly or mainly a claim in respect of financial loss, and even assuming that (contrary to the view of the district judge) it was not after-acquired property, it would be very surprising if a claim of this character could be made available to the creditors. They would be claiming damages for the making of the very bankruptcy order under which their claim arose. The greater part of their claim would represent damages for the closure of the nursing home, even though it was a going concern when it supposedly vested in the Official Receiver and was closed down by him. The creditors have received the full value of the bankrupt estate. The damages which Ms Mulkerrins claims represent the value of what she lost by the making of the bankruptcy order; but while this could have been available to the creditors under an IVA, it could never have been made available to them in a bankruptcy.

[18] The Court of Appeal assumed that the claim vested in the trustee because it was wholly or largely a claim for financial loss, without considering the particular nature of the claim. The question has not been argued before us and is not covered by authority. I prefer to express no concluded view upon it, but to leave it open for decision when the need arises, while expressing the view that it should not be taken to be concluded by the judgment of the Court of Appeal in the present case.

[19] It is sufficient to dispose of this case by saying that, right or wrong, the district judge's order bound the trustee and through him the creditors. Ms Mulkerrins' claim must be taken to form no part of the bankrupt estate available to her creditors, and she is at liberty to pursue it in her own name and for her own benefit. In agreement with my noble and learned friend, Lord Walker of Gestingthorpe, whose speech I have had the advantage of reading in draft and with which I agree, I would allow the appeal.

**LORD SCOTT OF FOSCOTE.**

[20] My Lords, I have had the advantage of reading the opinions of my noble and learned friends Lord Millett and Lord Walker of Gestingthorpe. I agree with them and for the reasons they give I, too, would allow this appeal and make the order Lord Walker has proposed.

**LORD WALKER OF GESTINGTHORPE.**

[21] My Lords, on the making of a bankruptcy order the bankrupt's estate vests automatically in the trustee in bankruptcy as soon as he becomes trustee. The bankrupt's estate is widely defined (s 283(2) of the Insolvency Act 1986), subject to some exceptions (including business equipment and household necessities) as comprising 'all property belonging to or vested in the bankrupt at the commencement of the bankruptcy'. Property is widely defined (s 436 of the 1986 Act) as including—

> 'money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property'.

That is the effect of ss 283, 306 and 436 of the 1986 Act, which replaced similar but by no means identical provisions in a succession of earlier statutes.

[22] However, the wide language used in successive statutes to describe the bankrupt's estate was from an early stage interpreted by the court as excluding rights of action which are classified as personal to the bankrupt, rather than relating to his property. The most notable early case was the decision of your Lordships' House in *Beckham v Drake* (1849) 2 HL Cas 579, 9 ER 1213, but the report of counsel's argument in that case refers to numerous authorities going back to the time of Lord Mansfield. The point was explained as follows by Erle J ((1849) 2 HL Cas 579 at 603–604, 9 ER 1213 at 1222), one of the judges who advised the House:

> 'This was an action on a contract for hiring and service, whereby the plaintiff was to serve for seven years, and the defendant to pay weekly wages during that time; and the breach was a dismissal during the seven years. The plaintiff, after this breach, and before the commencement of the action, became bankrupt; and the question is, whether this cause of action passed

from the plaintiff to his assignees. The general principle is, that all rights of the bankrupt which can be exercised beneficially for the creditors do so pass, and the right to recover damages may pass though they are unliquidated ... This principle is subject to exception. The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property. Thus it has been laid down that the assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law ...'

**[23]** The line of authority includes the decision of your Lordships' House in *Wilson v United Counties Bank Ltd* [1920] AC 102, [1918–19] All ER Rep 1035. Major Wilson had left England on active service soon after the beginning of the First World War, leaving his business affairs (which seem to have been in a fairly precarious state) in the hands of his bank. The jury found that the bank had failed in its duty to supervise his business affairs and to take reasonable steps to maintain his credit and reputation. Major Wilson was made bankrupt and he and his trustee in bankruptcy joined in an action against the bank. The jury awarded damages of about £45,000 for depreciation in the bankrupt's business and estate caused by the bank's negligence (although the House was not unanimous as to whether this finding was justified on the evidence) and £7,500 for damage to his credit and reputation. The former sum was recoverable by the trustee in bankruptcy, and the latter by the bankrupt personally, even though (as Lord Atkinson observed ([1920] AC 102 at 128, [1918–19] All ER Rep 1035 at 1038)) the damages arose from the same breach of contract.

**[24]** *Wilson's* case can therefore be described as a hybrid claim, the term used by Aldous LJ in *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193 at 203, [2000] Ch 352 at 366. That case was concerned with a claim which a bankrupt labourer (aged 30 at the time of his bankruptcy) brought against a doctor who had treated him, some years before his bankruptcy, for back pain. Liability was admitted and the claim was substantial, including over £170,000 for loss of past earnings and over £730,000 for loss of future earnings. The Court of Appeal, following the decision of the Supreme Court of British Columbia in *Re Bell (a bankrupt)* [1998] BPIR 26, held that both parts of the claim for loss of earnings formed part of the estate, and that Mr Ord himself was entitled only to the damages for pain and suffering. Aldous LJ (with whom Kennedy and Mantell LJJ agreed) summarised the decision as follows ([2000] 1 All ER 193 at 207–208, [2000] Ch 352 at 371):

'The authorities are only consistent with the conclusion that the trustee is entitled to the damages for past and future loss of earnings and is not entitled to the damages for pain and suffering. As there is a single cause of action, it vested in the trustee. There is in my view nothing in that conclusion which imposes practical difficulties with which the law cannot deal. The trustee as constructive trustee would have to account to the bankrupt for the property which he obtained inadvertently or by arrangement in an action which vested in him for the benefit of the creditors. The idea that the cause of action should vest in the bankrupt would not be acceptable and compulsory joinder of both could lead to difficulties when the claim for loss of earnings was small compared with the potential costs of the litigation. In such a case,

> the trustee, if the cause of action vested in him, would have to consider carefully his duty to the bankrupt and would probably, if requested, assign the cause of action to him.'

[25] The most recent authority is the decision of the Court of Appeal in *Grady v Prison Service* [2003] EWCA Civ 527, [2003] 3 All ER 745. It concerned a claim for unfair dismissal made by an administrative officer who had been a bankrupt about a year after the termination of her employment. The Court of Appeal (in a judgment of the court delivered by Sedley LJ) observed (at [14]) that there is 'no bright line' between personal rights of action and those which form part of a bankrupt's estate, but (at [24]) that all the reasoning in the authorities—

> 'tends to place on the non-vesting side of the line a claim which is primarily directed at the restoration of a contractual relationship in which the claimant's skill and labour are the essential commodity'.

[26] The Official Receiver, who was given leave to intervene in this appeal, has (both in his petition for leave and in his printed case) placed before your Lordships some thoughtful and well-researched submissions, including a helpful survey of Commonwealth and United States authorities. He has drawn attention to the apparently anomalous results which can flow from accidents of timing of different stages in the prosecution of a right of action, and to the practical problems which may arise from a trustee in bankruptcy prosecuting a hybrid right of action, partly on behalf of the creditors and party on behalf of the bankrupt himself. But in the event your Lordships did not find it necessary, and did not consider it appropriate, to hear all argument on these points. That is because the very unusual facts of the present appeal permit it to be disposed of on much narrower grounds, and make it an unsuitable case for exploration of the wider issues.

[27] The appellant, Ms Barbara Mulkerrins, is an experienced state registered nurse. In 1995 she was separated from her husband (Mr Woodward, to whom she is no longer married). She was running a small nursing home in Berkshire providing specialised 24-hour care for four mentally disabled adults. Ms Mulkerrins was the sole proprietor of the business, and owned the freehold of the property, subject to a mortgage. The residents were paid for by a care association, and the high level of fees (£650 per resident per week) reflected the labour-intensive nature of the business.

[28] Considered on its own, the nursing home was financially viable. But Ms Mulkerrins had outstanding debts, for which she and her husband were both liable, in connection with a property business. On 25 October 1994 a builders' merchant presented a bankruptcy petition against Ms Mulkerrins in the Reading County Court. After some adjournments it was due to be heard on 26 June 1995. Ms Mulkerrins consulted insolvency practitioners, Coopers & Lybrand, now PricewaterhouseCoopers (PwC). Mr Rutlen of PwC advised her to apply to the county court for an IVA under Pt VIII of the 1986 Act. He advised that she had a good chance of obtaining an IVA under which she would for a period of three years pay to her creditors £500 a month out of the profits of the nursing home business. Ms Mulkerrins accepted that advice. She paid PwC an amount on account of their charges and PwC undertook to prepare an IVA proposal with a partner in PwC as the nominee. PwC attended the hearing on 26 June 1995 and an interim order was made suspending the bankruptcy proceedings. The petition was adjourned to the next open date (subsequently fixed as Monday 21 August

1995). An application to continue the interim order was to be made on Friday 18 August 1995. The nominee was required to lodge a report with the court by Wednesday 16 August 1995. a

[29] Then, as the deputy judge (Mr Jules Sher QC) said in his judgment ([2000] BPIR 506 at 508) disaster struck. Ms Mulkerrins was due to go to Ireland for about a fortnight for a family reunion on the twenty-fifth anniversary of her father's death. Her case (which PwC denies) is that she asked Mr Rutlen whether b she should attend court on either the Friday or the Monday and was told that it was unnecessary. She went to Ireland. PwC did not lodge the nominee's report on the Wednesday. It reached the court by post on the Thursday (with a letter stating that the nominee did not propose to attend, but requesting continuation of the interim order) but these documents did not get placed before the district c judge. On Friday 18 August 1995 no one appeared and the district judge discharged the interim order. On Monday 21 August 1995 there was again no appearance, and Ms Mulkerrins was adjudicated bankrupt.

[30] She heard this news by telephone on Thursday 24 August 1995. By then the Official Receiver had learnt of the existence of the nursing home (which was d apparently unknown to the petitioner) and had visited it. He formed the view that the business must be closed down at once. He arranged with Berkshire Social Services for the residents to be moved to other accommodation and on the afternoon of 23 August 1995 he obtained an order from the district judge authorising him 'in the absence of the bankrupt' to close down the business. The order records that the district judge heard representations by telephone from e solicitors instructed by PwC. The residents were moved out on 24 August 1995. There was subsequently an application (paid for by PwC) to annul the bankruptcy order, but it failed. In any case the nursing home business had by then effectively ceased to exist.

[31] Naturally enough, Ms Mulkerrins was extremely upset. She wished to f sue PwC for breach of their professional duty. Towards the end of 1995 Mr Blake of KPMG was appointed as her trustee in bankruptcy. There were some without prejudice discussions between Ms Mulkerrins' solicitors, Mr Blake, and PwC and its solicitors (particulars of these discussions were ordered to be struck out of Ms Mulkerrins' reply). But nothing significant came of them and on 19 August 1998 (just before her discharge from bankruptcy) Ms Mulkerrins issued a writ g against PwC. Her statement of claim was served on 17 May 1999. It claimed general damages for 'loss of status and business reputation' and special damages for the loss of her assets, including the nursing home.

[32] The considerable interval between the issue of the writ and the service of h the statement of claim is explained, at least in part, by discussions which took place between Ms Mulkerrins and Mr Blake. Each claimed to be the proper person to prosecute the claim against PwC. In order to resolve the difference of opinion Ms Mulkerrins made an application to the Reading County Court. It was an ordinary application in her bankruptcy proceedings, made under s 303 of the 1986 Act, which provides: j

> '(1) If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit.

(2) The trustee of a bankrupt's estate may apply to the court for directions in relation to any particular matter arising under the bankruptcy.'

[33] There was a contested hearing before District Judge Henson on 3 February 1999 (that is, about ten months before *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193, [2000] Ch 352 was decided by the Court of Appeal). Both sides were represented by counsel. The district judge heard argument, adjourned for a short while to consider the matter and then gave judgment. There is no official transcript but there is a full note prepared by the trustee in bankruptcy's solicitor. A covering letter from the solicitor indicates that it was common ground between counsel that there could only be one cause of action in respect of the damage to her reputation and the financial loss, and that it was therefore a question as to whether the entire cause of action vested in the trustee in bankruptcy or in Ms Mulkerrins.

[34] The district judge's reasoning is recorded as follows in the note:

'I have to say that I agree with the applicant. The bankruptcy itself is the cause of action and could not accrue until the bankruptcy order was made. I do not think the argument that the cause of action arose before the bankruptcy order, as a result of which the bankruptcy order was inevitable, is convincing and I do not believe the definition of property can include the bankruptcy of this person.'

The relevant part of the order was the declaration:

'The respondent has no interest in the following chose in action, namely a right of action by the applicant against Coopers & Lybrand (a firm) for personal injuries, loss and damage arising out of her bankruptcy which was caused by their negligence and breach of contract as licensed insolvency practitioners.'

The heading to the order as drawn up contains two errors. It refers to s 303(2) (rather than s 303(1)) and it refers to the respondent as KPMG (rather than Mr Blake). But no one has suggested that either error casts any doubt on the substance of the order. Mr Knowles QC (appearing in your Lordships' House for PwC) accepted that 'no interest' means what it says—that is no interest at all, legal or equitable.

[35] There is no suggestion that this order was in any way collusive. On the contrary, it was clearly made after vigorous argument. It has never been appealed, probably because the trustee in bankruptcy had no funds available. At a hearing which took place before another district judge at the end of 2001, it was suggested that the order of 3 February 1999 might be discharged or revoked under s 375(1) of the 1986 Act, which provides that every court with bankruptcy jurisdiction may review, rescind or vary any order made by it in the exercise of that jurisdiction. But it would be extraordinary to contemplate rescinding an order which has now stood for over four years, and has been acted on in litigation which has now reached your Lordships' House. Mr Davies QC for the Official Receiver very properly recognised that that is no longer a practical possibility.

[36] PwC were not given notice of the hearing on 3 February 1999 and did not know that it was taking place. The first they heard of it was in a letter dated 1 April 1999 from Ms Mulkerrins' solicitor. The absence of notice to PwC is at the heart of their submission that the order of 3 February 1999 was wrong, that it does not bind PwC, and that it should for practical purposes be ignored. The

Official Receiver (who became involved in the matter again after Mr Blake's discharge) did indeed appear to disregard the order in negotiations which he conducted, during 2001, for the assignment of the cause of action in which (according to the order of 3 February 1999) he had no interest.

**[37]** On 7 September 1999 PwC applied to strike out part of Ms Mulkerrins' claim. This application overlapped a preliminary issue which had been directed by the master. On the very eve of the hearing before the deputy judge the Court of Appeal handed down judgment in *Ord*'s case. This led to rapid reassessment of both sides' arguments and the enlargement of the scope of the strike-out application.

**[38]** In his judgment the deputy judge referred to the two elements of Ms Mulkerrins' claim as the personal loss and the financial loss. He was satisfied that PwC's breach of contract (if eventually established at trial) occurred on Friday 18 August 1995 at the latest. He rejected the submission that the right of action could be regarded as after-acquired property (which does not vest automatically in the trustee in bankruptcy but may be acquired by him under s 307 of the 1986 Act, subject to the qualifications set out in that section). The deputy judge listed, and proceeded to reject, four arguments which had been relied on by Mr Krolick on behalf of Ms Mulkerrins ([2000] BPIR 506 at 516):

> '(1) The decision of the Reading County Court in Bankruptcy is binding upon the defendants; (2) In the alternative, it is an abuse of process to assert that the cause of action is vested in the trustee in bankruptcy; (3) The defendants are estopped from denying the cause of action is vested in the claimant; (4) The decision of the Reading County Court in Bankruptcy was correct, and the cause of action is vested entirely in the claimant.'

**[39]** The deputy judge then turned (at 520) to a fifth argument, which he himself had prompted:

> 'Although, as I have held, the defendants are not bound by the Reading County Court judgment, the [trustee in bankruptcy] is; and, once the time for appealing that judgment went by, the position as between the claimant and him became permanent and clear: as between the two of them it was she who was entitled to the claim against the defendants and all the damages that might be awarded in pursuance of that claim. The corollary is that, as against the claimant, the [trustee in bankruptcy] was not entitled to such damages for the benefit of the creditors. In short, once the time for appealing had gone by, the claimant's beneficial entitlement to the claim against the defendants was unassailable. The defendants are not bound by the judgment of the Reading County Court but they cannot challenge the fact that it was made and the consequence that the claimant became beneficially entitled to the claim and its proceeds. The same is not true of the legal title to the claim. That, as I have held, was vested in the [trustee in bankruptcy] and, as the defendants are not bound by the judgment, they remain entitled to assert, as they do of course assert, that the legal title remains vested in the [trustee in bankruptcy]. If he sued, and recovered, he would hold the proceeds upon trust for the claimant. Even in the absence of the Reading County Court proceedings, he would have been a trustee of that part of such proceeds as represented damages in respect of the personal loss: see *Ord v Upton*. The effect of the Reading County Court judgment was to extend her beneficial entitlement from the damages in respect of the personal loss to all the

damages recovered, irrespective of whether they represented personal or financial loss.'

[40] The deputy judge then referred to the decision of Scott J in *Weddell v JA Pearce & Major (a firm)* [1987] 3 All ER 624, [1988] Ch 26, and to some well-known authorities discussed by Scott J in his judgment. The deputy judge concluded that Ms Mulkerrins' proceedings were not a nullity, but that the Official Receiver should be joined as a defendant. On that basis, he dismissed the strike-out application and determined the preliminary issue in favour of Ms Mulkerrins.

[41] PwC appealed to the Court of Appeal ([2001] BPIR 106), which took the same view as the deputy judge had taken on the arguments raised in Ms Mulkerrins' respondent's notice. But the Court of Appeal took a different view on what had become the main issue. Jonathan Parker LJ (with whom Kennedy and Laws LJJ agreed) referred in his conclusions (at 116 (para 60)) to what he called the '*Ord v Upton* world', and then (in para 61) to what he called the artificial world of the Reading judgment (of 3 February 1999). He said:

> 'The difficulty with this [the deputy judge's approach], to my mind, is that the district judge was not in any way concerned with accountability, or with the beneficial ownership of the cause of action.'

That is so, up to a point. On 3 February 1999 Aldous LJ's judgment in *Ord*'s case lay in the future, and the notion of a trustee in bankruptcy being accountable (as a constructive trustee) in respect of part of the recovery to be achieved by prosecuting a right of action was, I think, unheard of. But it is, with respect, incorrect to say that the district judge was not in any way concerned with the beneficial ownership of the right of action and (as Jonathan Parker LJ went on to say) that she was concerned only with legal ownership. The fact is that she was concerned with both legal and beneficial ownership, viewed globally and without any need for differentiation between them. That was the all-or-nothing choice which counsel had placed before her as their agreed position. Whether it was right or wrong, the order of 3 February 1999 clearly and decisively determined the issue between the only two possible contenders for the right of action against PwC. But the Court of Appeal treated it as an 'artificial world' and concluded that the deputy judge's reasoning was fallacious. The Court of Appeal allowed the appeal, determined the preliminary issue against Ms Mulkerrins, and dismissed her action.

[42] In his oral submissions to your Lordships Mr Knowles concentrated (as I have already mentioned) on the fact that PwC had not had notice of the hearing on 3 February 1999. He accepted that if the trustee in bankruptcy had made a legal assignment of his right of action to Ms Mulkerrins, or if Ms Mulkerrins had obtained the right to sue in the trustee's name, PwC would have had to put up with the consequences, unwelcome though they were. But in the absence of such an assignment PwC could, he said, object to being faced with a claimant who has legal aid, and is likely to be unable to pay PwC's costs if her claim ultimately fails. This potential problem about costs gave PwC a sufficient interest to give them standing to oppose the making of the order, had they known of the application.

[43] In my opinion this submission is mistaken, for reasons which were explained by Lord Hoffmann in *Stein v Blake* [1995] 2 All ER 961 at 972, [1996] AC 243 at 260:

'It is a matter of common occurrence for an individual to become insolvent while attempting to pursue a claim against someone else. In some cases, the bankruptcy will itself have been caused by the failure of the other party to meet his obligations. In many more cases this will be the view of the bankrupt. It is not unusual in such circumstances for there to be a difference of opinion between the trustee and the bankrupt over whether a claim should be pursued. The trustee may have nothing in his hands with which to fund litigation. Even if he has, he must act in the interests of creditors generally and the creditors will often prefer to receive an immediate distribution rather than see the bankrupt's assets ventured on the costs of litigation which may or may not yield a larger distribution at some future date. The bankrupt, with nothing more to lose, tends to take a more sanguine view of the prospects of success. In such a case the trustee may decide, as in this case, that the practical course in the interests of all concerned (apart from the defendant) is to assign the claim to the bankrupt and let him pursue it for himself, on terms that he accounts to the trustee for some proportion of the proceeds. It is understandable that a defendant who does not share the bankrupt's view of the merits of the claim may be disappointed to find that notwithstanding the bankruptcy, which he thought would result in a practical commercial decision by an independent trustee to discontinue the proceedings, the action is still being pursued by the bankrupt. His disappointment is increased if he finds that the bankrupt as plaintiff in his own name has the benefit of legal aid which would not have been available to the trustee. Similar considerations apply to an assignment of a right of action by the liquidator of an insolvent company to a shareholder or former director. In such a case there is the further point that the company as plaintiff can be required to give security for costs. The shareholder assignee as an individual cannot be required to give security even if (either because he does not qualify or the legal aid board considers that the claim has no merits) he is not in receipt of legal aid.'

Lord Hoffmann concluded that the systemic defect, if there was one, lay in the arrangements for legal aid and costs orders and not in the law of insolvency. His observations were directed to a different situation (where the trustee in bankruptcy assigned a right of action for financial loss which had undoubtedly vested in him) but they are also relevant to the present case.

[44] PwC's grievance about its likely inability to recover its costs, if Ms Mulkerrins is ultimately unsuccessful, would not in my opinion have given it the right to be heard on the application under s 303 of the 1986 Act. Under r 7.7(4) of the Insolvency Rules 1986, SI 1986/1925 the district judge could no doubt have directed that notice of the application should be given to PwC, but that would in my opinion have been a very unusual step to take. The district judge cannot be criticised for not having taken it. The hearing was an exercise of the court's supervisory jurisdiction over the bankruptcy process, and PwC was a stranger to that process, with interests directly opposed to those of both the creditors and the bankrupt herself. Even if PwC had happened to be a creditor, the conflict of interest would have reduced their claim to be heard on a question of this sort (compare the practice of the Chancery Division on a summons to consider whether trustees should take proceedings against a defendant who happens to be a beneficiary, as explained in *Re Moritz (decd), Midland Bank Executor and Trustee Co Ltd v Forbes* [1959] 3 All ER 767, [1960] Ch 251 and *Re Eaton (decd)*,

*Shaw v Midland Bank Executor and Trustee Co Ltd* [1964] 3 All ER 229; and, on a comparable situation in the Companies Court, *Smith v Croft (No 2)* [1987] 3 All ER 909 at 957, [1988] Ch 114 at 185–186).

**[45]** If (as I think) PwC had no right to be heard on the question of entitlement to the right of action, it is irrelevant that PwC was not bound by the district judge's order in such a way as to create an estoppel per rem judicatam. There is a statement in Spencer Bower, Turner and Handley *Res Judicata* (3rd edn, 1996) p 130 (para 251):

> 'An English judicial decision which operates upon a thing by effecting a disposition of it determines its status and may be set up by, or against, any member of the English public, as conclusive *in rem*.'

But it is simply not necessary to explore this difficult area. In relation to the points raised in Mr Krolick's respondent's notice in the Court of Appeal it may be accepted that the order of 3 February 1999 was erroneous, and that it does not bind PwC by estoppel per rem judicatam or indeed by any other form of estoppel. But as the deputy judge said, the order certainly did bind the trustee in bankruptcy who was the only other possible contender for title to the right of action. The substantial effect of the order was not to assign the right of action, but to declare that it had not been affected by the bankruptcy. From the moment that the right of action arose, it was at all material times in the legal and beneficial ownership of Ms Mulkerrins. If the trustee in bankruptcy, as the only possible rival claimant, was bound by the order, its practical effect was not open to challenge by PwC.

**[46]** It was not necessary for the deputy judge to direct that the Official Receiver (who is now performing the residual functions of the trustee in bankruptcy) should be joined as a defendant to the proceedings. For these reasons and for the further reasons given in the speech of Lord Millett, with which I agree, I would allow the appeal and restore the deputy judge's order, other than his direction for joinder of the Official Receiver.

*Appeal allowed.*

Celia Fox Barrister.

# Re Pantmaenog Timber Co Ltd (in liquidation)

# Official Receiver v Meade-King (a firm) and others

[2003] UKHL 49

HOUSE OF LORDS

LORD STEYN, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD MILLETT AND LORD WALKER OF GESTINGTHORPE

3 JUNE, 31 JULY 2003

*Company – Compulsory winding up – Examination of officer of company etc – Production of documents – Directors disqualification proceedings – Statutory provision empowering court on application of office-holder of company in liquidation to require any person to produce documents relating to company's affairs – Whether power could be invoked solely for purpose of obtaining evidence in directors disqualification proceedings – Insolvency Act 1986, s 236 – Company Directors Disqualification Act 1986, s 7(4).*

The Official Receiver became provisional liquidator of a company on its compulsory winding up by the court. Subsequently, the Official Receiver, acting on the direction of the Secretary of State, instituted disqualification proceedings against two former directors of the company under the Company Directors Disqualification Act 1986 (the Disqualification Act). For the sole purpose of obtaining evidence for use in those proceedings, the Official Receiver, who had by then ceased to be the company's liquidator, applied to the court, under s 236[a] of the Insolvency Act 1986, for orders requiring the production of documents by three professional firms which had acted for the company at the material time. Section 236 empowered the court, on the application of the 'office-holder', to require any person whom the court thought capable of giving information concerning the dealings, affairs or property of the company, to produce any documents in his possession relating to those matters. The expression 'office-holder' was defined to mean the administrator, administrative receiver, liquidator or provisional liquidator of the company, but s 236 extended it to include the Official Receiver, whether or not he was the liquidator, in a case where the company was being wound up by the court. The district judge made the orders sought, but they were discharged on appeal by the judge on the ground that the purpose of s 236 was to assist the liquidator of a company in carrying out his functions as liquidator, and that those functions did not include bringing disqualification proceedings against the company's former directors. The judge's decision was affirmed by the Court of Appeal. On the Official Receiver's appeal to the House of Lords, their Lordships were required to determine whether the Official Receiver was entitled to have recourse to s 236 for the sole purpose of obtaining evidence for use in disqualification proceedings. In dealing with that question, their Lordships considered whether an affirmative answer would be contrary to, or render otiose, s 7(4)[b] of the Disqualification

a Section 236, so far as material, is set out at [58], below

Act—a provision which empowered the Secretary of State or the Official Receiver to require existing or former office-holders to furnish him with such information with respect to any person's conduct as a director of the company, and to produce and permit inspection of such papers relevant to that person's conduct as such a director, as the Secretary of State or Official Receiver might reasonably require for the purpose of determining whether to exercise, or of exercising, any of his functions under s 7.

**Held** – The powers conferred by s 236 of the Insolvency Act 1986 could be lawfully exercised, whether on the application of the Official Receiver or of a liquidator or other office-holder, solely or principally to obtain evidence for use in proceedings under the Disqualification Act. Section 236 contained no express limitation on the purpose for which it might be invoked, and the sole implicit limitation in that section was that it could be invoked only for the purpose of enabling the applicant to exercise his statutory functions in relation to the company which was being wound up. Whether the applicant was the Official Receiver or the liquidator or other office-holder, those functions included the provision of information to the Secretary of State or the Official Receiver which was relevant to the bringing or continuing of disqualification proceedings. Moreover, although s 7(4) of the Disqualification Act did not oblige the office-holder to invoke s 236 of the Insolvency Act 1986 in order to obtain the information for which the Secretary of State had asked, it did not forbid it. On the contrary, it brought the provision of such information to the Secretary of State for the purpose of disqualification proceedings squarely within the functions of the liquidator. Nor would s 7(4) be otiose if the Official Receiver could invoke s 236 to require the office-holder to provide information in relation to disqualification proceedings. It might not be unreasonable in a particular case for the office-holder to refuse to invoke s 236 at the expense of the estate where the sole purpose of the application was to enable the Secretary of State or the Official Receiver to bring or continue disqualification proceedings. Furthermore, disqualification proceedings often concerned the conduct of a director in relation to more than one company. Unless the other companies were also in compulsory liquidation and the Official Receiver of the lead company obtained authority to act as Official Receiver of those companies, s 236 would not enable him to obtain information in respect of them. Accordingly, the appeal would be allowed (see [1]–[3], [17], [31], [64], [67], [71], [72], [75], [76], [88], below).

Dicta of Vinelott J in *Re Polly Peck International plc, ex p the joint administrator* [1994] BCC 15 at 16 approved.

Decision of the Court of Appeal [2001] 4 All ER 588 reversed.

**Notes**

For inquiry into company's dealings and for request for information from office-holders, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) paras 2439, 2880.

For the Insolvency Act 1986, s 236, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 904.

For the Company Directors Disqualification Act 1986, s 7, see 8 *Halsbury's Statutes* (4th edn) (1999 reissue) 844.

b Section 7(4) is set out at [42], below

**Cases referred to in opinions**

*Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1992] 2 All ER 856, [1993] Ch 1, [1992] 2 WLR 991, CA.

*British and Commonwealth Holdings plc (Joint administrators) v Spicer & Oppenheim (a firm)* [1992] 4 All ER 876, [1993] AC 426, [1992] 3 WLR 853, HL.

*Campbell Coverings Ltd, Re* [1953] 2 All ER 74, [1953] Ch 488, [1953] 2 WLR 1135, CA.

*Campbell Coverings Ltd (No 2), Re* [1954] 1 All ER 222, [1954] Ch 225, [1954] 2 WLR 204.

*Levitt (Jeffrey S) Ltd, Re* [1992] 2 All ER 509, [1992] Ch 457, [1992] 2 WLR 975.

*London and Globe Finance Corp Ltd, Re* [1903] 1 Ch 728, [1900–3] All ER Rep 891.

*North Australian Territory Co, Re* (1890) 45 Ch D 87, CA.

*Paget, Re, ex p Official Receiver* [1927] 2 Ch 85, [1927] All ER Rep 465, CA.

*Polly Peck International plc, Re, ex p joint administrators* [1994] BCC 15.

*Seagull Manufacturing Co Ltd (in liq), Re* [1993] 2 All ER 980, [1993] Ch 345, [1993] 2 WLR 872, CA.

*Tweddle (John) & Co Ltd, Re* [1910] 2 KB 697, CA.

**Cases referred to in list of authorities**

*Barnes, Ex p* [1896] AC 146, [1895–9] All ER Rep 1275, HL.

*Blackspur Group plc, Re* [1998] 1 WLR 422, CA.

*Carecraft Construction Co Ltd, Re* [1993] 4 All ER 499, [1994] 1 WLR 172.

*Castle New Homes Ltd, Re* [1979] 2 All ER 775, [1979] 1 WLR 1075.

*Circle Holidays International plc, Re, Secretary of State for Trade and Industry v Smith* [1994] BCC 226.

*Civil, Naval and Military Outfitters Ltd, Re* [1899] 1 Ch 215, CA.

*Cloverbay Ltd (Joint administrators) v Bank of Credit and Commerce International SA* [1991] 1 All ER 894, [1991] Ch 90, [1990] 3 WLR 574, CA.

*Esal (Commodities) Ltd, Re* [1989] BCLC 59, CA.

*Grayan Building Services Ltd (in liq), Re* [1995] Ch 241, [1995] 3 WLR 1, CA.

*Khanna v Lovell White Durrant (a firm)* [1994] 4 All ER 267, [1995] 1 WLR 121.

*Launchexcept Ltd, Re, Secretary of State for Trade and Industry v Tillman* [2000] 1 BCLC 36, CA.

*Minotaur Data Systems Ltd, Re, Official Receiver v Brunt* [1999] 3 All ER 122, [1999] 1 WLR 1129, CA.

*O'Toole v Mitcham* (1977) 2 ACLR 471, Vict SC.

*Rolls Razor Ltd, Re* [1968] 3 All ER 698.

*Schofield, Ex p, Re Firth* (1879) 12 Ch D 337, CA.

*Secretary of State for Trade and Industry v Ettinger, Re Swift 736 Ltd* [1993] BCLC 896, CA.

*Secretary of State for Trade and Industry v Hickling* [1996] BCC 678.

*Silkstone and Dodworth Coal and Iron Co, Re, (Whitworth's Case)* (1881) 19 Ch D 118, CA.

*Smith v Braintree DC* [1989] 3 All ER 897, [1990] 2 AC 215, [1989] 3 WLR 1317, HL.

*Three Rivers DC v Bank of England (No 4)* [2002] EWCA Civ 1182, [2002] 4 All ER 881, [2003] 1 WLR 210.

*Westmid Packing Services Ltd, Re* [1998] 2 All ER 124, CA.

*Williams (Rex) Leisure plc, Re* [1994] 4 All ER 27, [1994] Ch 350, [1994] 3 WLR 745, CA; *affg* [1993] 2 All ER 741, [1994] Ch 1, [1993] 3 WLR 685.

**Appeal**

The Official Receiver appealed with permission of the Appeal Committee of the House of Lords given on 22 July 2002 from the decision of the Court of Appeal (Kennedy and Chadwick LJJ) on 25 July 2001 ([2001] EWCA Civ 1227, [2001] 4 All ER 588, [2002] Ch 239) dismissing his appeal from the decision of Judge Weeks QC, sitting as a judge of the High Court at Bristol, on 14 November 2000 ([2001] 1 WLR 730) allowing an appeal by Andrew Thomas George Hay, a defendant to disqualification proceedings brought by the Official Receiver under the Company Directors Disqualification Act 1986, from the orders of District Judge Frenkel made at Bristol County Court on 2 October 2000 under s 236 of the Insolvency Act 1986, requiring three third party professional firms, Meade-King, Wadge Rapps & Hunt and Grant Thornton, to produce within seven days documents in their possession relating to Pantmaenog Timber Co Ltd, a company in compulsory liquidation, of which Mr Hay had formerly been a director. The firms took no part in the proceedings before Judge Weeks, the Court of Appeal or the House of Lords. Mr Hay took no part in the proceedings before the House of Lords. The facts are set out in the opinion of Lord Millett.

*Jonathan Crow* and *Malcolm Davis-White QC* (instructed by the *Treasury Solicitor*) for the Official Receiver.

*Philip Jones* (instructed by the *Treasury Solicitor*) as amicus curiae.

Their Lordships took time for consideration.

31 July 2003. The following opinions were delivered.

**LORD STEYN.**

[1] My Lords, for the reasons given in the opinions prepared by my noble and learned friends Lord Hope of Craighead, Lord Millett and Lord Walker of Gestingthorpe I would also allow the appeal.

**LORD HOFFMANN.**

[2] My Lords, for the reasons given by my noble and learned friends, I too would allow this appeal.

**LORD HOPE OF CRAIGHEAD.**

[3] My Lords, the facts and legislative background have been described and analysed by my noble and learned friend Lord Millett, whose speech I have had the privilege of reading in draft and with which I am in full agreement. I should like to add just a few words of my own, simply to explain why I have come to the same conclusion as he has done on the issue which is before us in this appeal.

[4] The question is whether the powers conferred by s 236 of the Insolvency Act 1986 on the office-holder of a company which is in liquidation or is the subject of administration or receivership proceedings can lawfully be exercised for the purpose only of obtaining evidence for use in disqualification proceedings under s 6 of the Company Directors Disqualification Act 1986 (the Disqualification Act). The expression 'office-holder' is defined in s 234(1) of the Insolvency Act 1986. It means the administrator, the administrative receiver, the liquidator or the provisional liquidator, as the case may be. For the purposes of s 236 the expression includes, in the case of a company which is being wound up by the

court in England and Wales, the Official Receiver, whether or not he is the liquidator. a

[5] The applications with which this case is concerned were made by the Official Receiver. At the time they were made on 26 September 2000 he was not the liquidator of the company, as a liquidator was appointed in his place in June 2000 under s 137 of the Insolvency Act 1986. But the issue is of interest to all office-holders as defined in s 234(1), not just to the Official Receiver of a b company which is being wound up by the court in England and Wales who is not its liquidator. This is because the powers conferred by s 236 are exercisable by anyone else who for the time being in relation to the company is an office-holder within the meaning of s 234(1). The jurisdiction which is given to the court to make the order does not distinguish between different kinds of office-holder. But the fact that they are exercisable by the Official Receiver, whether or not he is the c liquidator, as well as by the persons mentioned in s 234(1), has an important bearing on the purpose or purposes for which those powers may be exercised.

[6] Had it not been for the extended meaning which is given to the expression 'office-holder' by s 236(1), one might have thought that the powers in ss 235 and 236 were conferred on the liquidator (to take the example of a d company which is in liquidation) solely to assist him in the task of getting in and realising the assets of the company for the benefit of the creditors. It is clear that this is the purpose for which s 234 was enacted. Sections 235 and 236 appear in the same group of sections. At first sight they appear to have been designed to assist the liquidator to carry out these tasks as quickly and effectively as possible. e Sections 234 and 236 replace with modifications, and extend to administration and receivership proceedings, ss 551 and 561 of the Companies Act 1985 which re-enacted ss 258 and 268 of the Companies Act 1948. Those sections were included in a group of sections dealing with the general powers of the court in the case of a winding up by the court. They were enacted long before the introduction by Pt II of the Insolvency Act 1985 of the procedure now contained f in ss 6 and 7 of the Disqualification Act for the disqualification of unfit directors of insolvent companies.

[7] But account must now be taken of the fact that s 100 of the Insolvency Act 1985, which replaced s 561 of the Companies Act 1985 and was the immediate predecessor of s 236 of the Insolvency Act 1986, enabled the Official Receiver to apply to the court for an order under that section 'whether or not he is g the liquidator of the company'. This provision, which was enacted for the first time in s 100(6) of the Insolvency Act 1985, is now incorporated in s 236(1) of the Insolvency Act 1986. It is plain that its purpose is to assist the Official Receiver in the performance of his investigative role, even although he may not for the time being be the liquidator for the company. The effect is to extend the scope of the h powers which are now conferred by s 236. In his case, at least, it cannot be said that they may be used only for the purpose of getting in and realising the assets of the company for the benefit of the creditors.

[8] In my respectful opinion Chadwick LJ's conclusion in the Court of Appeal ([2001] EWCA Civ 1227 at [37], [2001] 4 All ER 588 at [37], [2002] Ch 239), that j those powers are conferred solely for the better discharge by the liquidator of his functions in the winding up begs the question which lies at the heart of this appeal. I think that it is self-evident that the powers are conferred for the better discharge of those functions or, in the case of administration or receivership proceedings, for the better discharge of their functions in those proceedings by the relevant office-holders. The question that has to be asked and answered is,

what are those functions? Are they confined to the basic tasks of getting in and managing or realising the assets of the company?

**[9]** The wording of s 236 contains no such limitation. It is not concerned solely with the transfer of the property of the company to the office-holder. Its scope is indicated by sub-s (3), which provides that the court may require any of the persons mentioned in sub-s (2) to submit an affidavit to the court containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in para (c) of sub-s (2). The matters mentioned in sub-s (2)(c) are 'the promotion, formation, business, dealings, affairs or property of the company'. There may be a question as to how the court should exercise its discretion when it is making an order under this section. But the jurisdiction which the court is given is expressed in the widest terms.

**[10]** No mention is made of the Disqualification Act in s 236. But there is no doubt that these two measures are intended to be read together (see s 21 of the Disqualification Act which provides for the interaction of the two statutes, s 22 which ensures that the terms and expressions that they use are compatible and s 25 which states that they are to come into force simultaneously). There is also a close and important link between s 236(3) of the Insolvency Act 1986 and s 7(3) of the Disqualification Act. Section 236(3) describes the information which may be the subject of an order made by the court under that subsection on the application of the office-holder. Section 7(3) provides for the making by the office-holder of a report to the Secretary of State if it appears to him that the conditions for disqualification in s 6(1) of the Disqualification Act are satisfied as respects a person who is or has been a director of the company. Information gathered under s 236(3) which leads to this conclusion must be reported.

**[11]** I would conclude that the functions of the office-holder include the making of a report to the Secretary of State under s 7(3) if he comes into the possession of information that leads to the conclusion that the conditions for disqualification are satisfied. As Vinelott J observed in *Re Polly Peck International plc, ex p joint administrators* [1994] BCC 15 at 16, the purposes of the liquidation, the administration or the receivership, as the case may be, must include the gathering of information as to the conduct of the affairs of the company and those responsible for it in order that the office-holder can report to the Secretary of State as he is required to do by s 7(3) (see also *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1992] 2 All ER 856 at 890, [1993] Ch 1 at 47–48 per Stuart Smith LJ).

**[12]** Section 7(4) of the Disqualification Act provides that the Secretary of State or the Official Receiver may require the liquidator, administrator or administrative receiver of a company, or the former liquidator, administrator or administrative receiver of a company, to furnish him with such information relevant to any person's conduct as a director of a company as he may reasonably require for the purpose of determining whether to exercise, or of exercising, his functions under that section. Here again the language of the subsection is in the widest terms. There is not even the qualification which is built into s 236(3) of the Insolvency Act 1986, that the information requested must be in the possession or under the control of the office-holder. The only qualifications are that the information must be relevant and the requirement must be reasonable.

**[13]** What then are the conclusions that are to be drawn from these provisions? The Secretary of State and the Official Receiver are both given the power to require information to be furnished to them under s 7(4) of the

Disqualification Act by an office-holder or former office-holder. But the Secretary of State cannot apply to the court for an order under s 236 of the Insolvency Act 1986. Only the Official Receiver can do so, whether or not he is the liquidator. Furthermore, while all the office-holders mentioned in s 7(4) can apply to the court for an order under s 236, former office-holders cannot do so. The use of the present tense in s 234(1) of the Insolvency Act 1986, which is incorporated into s 236(1) by reference, indicates that this group of sections is designed to assist the office-holders while they are in office and not afterwards. This pattern may appear to be untidy, but it is a consequence of the width of the powers conferred by s 7 of the Disqualification Act. It does not provide a reason for reading those powers narrowly.

**[14]** Then there is the question whether the fact that the Official Receiver has power to require information to be given to him by the office-holders and former office-holders under s 7(4) renders the use by him of s 236 for the purpose of disqualification proceedings otiose (see [2001] 4 All ER 588 at [38] per Chadwick LJ). Here again the pattern may appear to be rather untidy. The powers conferred on the Official Receiver by s 236 are confined to information about the particular company which is being wound up or is in administration or receivership. The power to require information to be furnished by an office-holder or former office-holder under s 7(4) extends to the office-holders and former office-holders of 'a company'. It enables information to be obtained about the person's conduct as a director or former director of more than one company. In the case of former office-holders, the only information that can reasonably be required of them is information which is already in their possession or under their control. But existing office-holders have the power given to them by s 236 to seek out more information about the matters mentioned in sub-s (2)(c) than they already have. These features suggest that the correct approach is to treat these provisions as complementary to each other, and that it would be wrong to read them as having been designed to be read narrowly.

**[15]** There is a further reason for taking a broad view of these provisions and reading them generously. The overriding purpose of the disqualification regime is to protect the public interest. Success or otherwise in the prosecution of cases for an order under s 6 of the Disqualification Act will depend on the amount and quality of the information that is available. A narrow interpretation of s 236, confining its reach to information which the office-holder needs to get in the property of the company, would increase the risk that instances of commercially culpable conduct will go unpunished. That would not serve the public interest, and it is hard to believe that it was intended by Parliament. Moreover there is nothing in the wording of s 236 to prevent an office-holder, other than the Official Receiver, seeking to make use of the powers under that section for disqualification purposes. Nor is there anything in the wording of s 236 read with s 7(4), when read together, to prevent the Official Receiver from using the same powers for those purposes whether or not he is the liquidator.

**[16]** There are practical considerations, too, which point to the same conclusion. Information sought under s 236 may be of use for more than one purpose. Information gathered solely for the purpose of getting in and managing or realising the property of the company may be relevant also for disqualification purposes. It may be quite unclear before the information has been ingathered and scrutinised whether it contains anything to suggest that the conditions mentioned in s 6(1) are satisfied as respects any of the directors or former directors of the company. Yet if it does contain information to that effect the

office-holder is obliged to report the matter to the Secretary of State under s 7(3). Is the office-holder to be stopped from getting in such information deliberately, while he is plainly under a duty to report if he obtains it unexpectedly or by accident? A limitation on the powers conferred by s 236 which gave rise to artificial distinctions of that kind would be unsatisfactory. It would require clear language before one could regard this as having been intended by the Act. I do not find any such language, so I would reject an interpretation of the section which had that effect.

[17] For these reasons, and those given by my noble and learned friend Lord Millett, I too would allow the appeal.

**LORD MILLETT.**

[18] My Lords, the question in this appeal is whether the Official Receiver can have recourse to the powers conferred by s 236 of the Insolvency Act 1986 for the sole purpose of obtaining evidence for use in disqualification proceedings against a former director.

THE FACTS

[19] Pantmaenog Timber Co Ltd (the company) ceased trading in 1997 and was compulsorily wound up by the Bristol County Court on 17 June 1999. The Official Receiver thereupon became provisional liquidator of the company.

[20] In due course the Official Receiver reported to the Secretary of State under s 7(3) of the Company Directors Disqualification Act 1986 (the Disqualification Act) that in his view the conduct of Mr Andrew Hay and Mr Peter Hay as directors of the company made them unfit to be concerned in the management of a company. The Secretary of State considered that it would be expedient in the public interest that disqualification orders should be made against them, and he directed the Official Receiver to bring proceedings for that purpose.

[21] The Official Receiver instituted such proceedings in the Bristol County Court in February 2000. He made three allegations of misconduct against the defendants. (i) They had caused the company to redeem its preference shares before paying its unsecured creditors and the balance of a fine which had been imposed on the company by the local magistrates' court. (ii) They had failed to ensure that the company maintained adequate accounting and other records. (iii) They had caused the company to contravene its felling licence.

[22] The redemption of the preference shares, which was the most serious of the misconduct alleged, took place after Mr Andrew Hay had resigned as a director in December 1997. This raised the question whether he had nevertheless continued to act as a de facto director of the company after that date.

[23] The Official Receiver filed evidence with a view to showing that despite his resignation Mr Andrew Hay had continued to act as a director of the company until it was wound up in June 1999. In September 2000 he applied to the Bristol County Court under s 236 for orders for the production of documents by two firms of solicitors and a firm of accountants which had acted for the company at the material time. The Official Receiver conceded that his sole purpose in seeking such orders was to obtain evidence for use in the disqualification proceedings.

[24] Mr Andrew Hay objected to the production of the documents in question. None of the firms concerned had any objection to the production of the documents or to the orders sought, but the documents were obviously

confidential and they naturally wished to have the protection of a court order before producing them to the Official Receiver. a

[25] Meanwhile, believing that there might be assets to be recovered for the benefit of creditors, the Official Receiver had asked the Secretary of State to appoint an insolvency practitioner as liquidator in his place under s 137 of the Insolvency Act 1986. A partner in a well-known firm of accountants was duly appointed liquidator in June 2000. It then came to light that, unknown to the b Official Receiver, the company's name had been struck off the register and the company had been dissolved in November 1999.

[26] The dissolution of the company meant that disqualification proceedings could not be brought in the name of the Official Receiver or in the county court. The existing proceedings were thus irregularly constituted. The Official Receiver c accordingly applied for and obtained an order for the proceedings to be transferred to the High Court and for the Secretary of State to be substituted as applicant. He also obtained an order for the company's name to be restored to the register. This had the effect of treating the company as having continued in existence as if it had never been dissolved. It retrospectively regularised the d disqualification proceedings and the appointment of the liquidator in place of the Official Receiver and all steps taken by either of them since the dissolution of the company.

[27] The s 236 application was made in the winding up and not in the disqualification proceedings and so remained with the Bristol County Court. In October 2000 the district judge made the orders sought. They were discharged e on appeal by Judge Weeks QC on the ground that the purpose of s 236 was to assist the liquidator of a company in carrying out his functions as liquidator, and these did not include bringing disqualification proceedings against the company's former directors. The Court of Appeal dismissed the Official Receiver's appeal.

[28] After the dismissal of his appeal the Official Receiver was able to obtain f the production of relevant documents from one of the firms of solicitors concerned by the service of a witness summons in the disqualification proceedings.

[29] The disqualification proceedings were subsequently tried by Neuberger J in the High Court. Neither of the defendants attended the hearing. On 28 January 2003 Neuberger J made orders disqualifying each of the defendants g from being concerned in the management of a company. Mr Peter Hay was disqualified for five years and Mr Andrew Hay for seven years.

[30] The resolution of the present appeal can thus no longer affect the outcome of the proceedings which gave rise to it. Neither of the defendants to the disqualification proceedings and none of the firms concerned in the s 236 h applications have taken any part in the hearing. The House is greatly indebted to counsel appointed as amicus curiae for the assistance he has given on the proper disposal of the appeal.

[31] The House gave the Official Receiver leave to appeal because the case raises an important question of principle and one which is not confined to cases j where the Official Receiver is involved. The question is whether the powers conferred by s 236 can lawfully be exercised, whether on the application of the Official Receiver or of a liquidator or other office-holder, solely or principally to obtain evidence for use in disqualification proceedings; or whether their exercise is confined to cases where such use is at most incidental to the recovery and distribution of the company's assets among its creditors and contributories.

PROCEEDINGS FOR A DISCRETIONARY DISQUALIFICATION ORDER

[32] The power of the court to make a disqualification order prohibiting a person from being concerned in the management of a company was introduced by s 75 of the Companies Act 1928 (subsequently consolidated as s 275 of the Companies Act 1929) on the recommendation of the Report of the Company Law Amendment Committee, Cmd 2657 (1926) under the chairmanship of Mr Wilfrid Greene KC. Application for an order was to the court having jurisdiction to wind up the company and could be made by the Official Receiver or the liquidator or any creditor or contributory of the company. Except where there had been a conviction the power was limited to cases where it appeared in the course of a winding up that any business of the company had been carried on with intent to defraud and the maximum period for which a disqualification order could be made was five years. The power to make such an order was discretionary. The grounds upon which a disqualification order could be made were later extended by s 33 of the Companies Act 1947 (subsequently consolidated as s 188 of the Companies Act 1948) following the Report of the Committee on Company Law Amendment, Cmd 6659 (1945) under the chairmanship of Cohen J.

[33] The grounds upon which a disqualification order could be made were further extended by s 28 of the Companies Act 1976 and s 9 of the Insolvency Act 1976. Section 28 of the Companies Act 1976 covered the case where a person had been persistently in default in relation to statutory requirements for returns, accounts or other documents. Application was to the High Court and could be made only by the Secretary of State. This was the first occasion on which the function of applying for a disqualification order was given to the Secretary of State, but it was unavoidable given that it was not a requirement that the company should be insolvent or in the course of winding up. The Secretary of State was not given power to obtain evidence from third parties, but this was not necessary since all the relevant information would have been in the possession of the Registrar of Companies.

[34] Section 9 of the Insolvency Act 1976 covered the case where a person had been a director of more than one company which had gone into liquidation while insolvent and his conduct as a director of any of those companies made him unfit to be concerned in the management of a company. Application in England and Wales was to the High Court and in Scotland to the Court of Session. Where the person against whom the order was sought was a person who was or had been a director of a company which was being wound up by the court, the application had to be made in England and Wales by the Official Receiver and in Scotland (where there is no office of Official Receiver) by the Secretary of State; where the relevant company was being wound up voluntarily it had to be made by the Secretary of State. The application could not be made by a liquidator or other office-holder or by a past or present member or creditor; and it was made by the Secretary of State only where it could not be made by the Official Receiver.

[35] The powers of the court to make disqualification orders were further extended by s 93 of the Companies Act 1981. The power to make an order remained discretionary, but the maximum period of disqualification was extended to 15 years. Application to a court with jurisdiction to wind up the company could now be made by the Secretary of State or the Official Receiver or by the liquidator or any past or present member or creditor of any company in relation to which the person against whom an order was sought had committed or was alleged to have committed an offence or default. These provisions were

consolidated in ss 295–299 of the Companies Act 1985 and Pt I of Sch 12 thereto and are now contained in ss 2–5 of the Disqualification Act.

**[36]** Sections 2–4 of the Disqualification Act give the court a discretionary power to make a disqualification order in prescribed circumstances (conviction of an indictable offence in connection with the promotion, formation, management, liquidation or striking off of the company; persistent breaches of companies legislation; fraud or breach of duty as an officer or liquidator of the company). Section 5 gives the magistrates' court a discretionary power to make a disqualification order on summary conviction for failure to comply with statutory requirements for filing returns, accounts or other documents. As under the 1981 and 1985 Acts application for an order under ss 2–4 may be made to a court with jurisdiction to wind up a company by the Secretary of State or the Official Receiver or by the liquidator or any past or present member or creditor of a company in relation to which the person against whom an order is sought has committed or is alleged to have committed an offence or other default (see s 16 of the Disqualification Act). The individual is protected from oppressive use of the jurisdiction by the discretion of the court to decline to make an order.

PROCEEDINGS FOR A MANDATORY DISQUALIFICATION ORDER

**[37]** The Disqualification Act introduced the new concept of mandatory disqualification. Section 6 obliges the court to make a disqualification order if it is satisfied that the defendant's conduct as a director of a company makes him unfit to be concerned in the management of a company. The court has no discretion to decline to make an order. The minimum period of disqualification is two years and the maximum period is 15 years. Application for an order under s 6 is to the court by which the company is being wound up; if the company is being wound up voluntarily, any court which has jurisdiction to wind it up; and if the company is in administration, to the court which made the administration order (see s 6(3)). This has since been amended to include the case where the company is in administrative receivership.

**[38]** The introduction of mandatory disqualification gave effect to a recommendation of the Insolvency Law Review Committee under the chairmanship of Sir Kenneth Cork (the Cork Committee) (see Insolvency Law and Practice, Report of the Review Committee, Cmnd 8558 (1982)). It recommended that application for a mandatory order should be made by the liquidator or, with the leave of the court, by a creditor. This was not acceptable to Parliament, which understandably considered that greater safeguards are necessary in the case of a mandatory order than are required where the court retains a discretion to decline to make an order.

**[39]** Section 7(1) of the Disqualification Act provides that an application for a mandatory order under s 6 can be made only if it appears to the Secretary of State that it is expedient in the public interest that such an order should be made. The Secretary of State is under a continuing duty to keep the position under review. Proceedings can be brought and continued only if it appears, and continues to appear, to the Secretary of State that it is expedient in the public interest that an order be made.

**[40]** Application for a mandatory order must be made by the Secretary of State or, if the Secretary of State so directs in a case where the person against whom the order is sought is or has been a director of a company which is being wound up by the court in England and Wales, by the Official Receiver. As originally enacted, this meant that, if the winding up had been completed and the company

dissolved, the application could be made only by the Secretary of State. Accordingly the words 'is being wound up' have been amended by the Insolvency Act 2000 to read 'is being or has been wound up'.

[41] The Secretary of State can form an opinion whether it is expedient in the public interest that an order should be made under s 6 only if it is based upon adequate information. Section 7(3) and (4) contain provisions which enable him to obtain such information. Section 7(3) provides that, if it appears to the responsible office-holder that the conditions for making a mandatory order under s 6 are satisfied, he must forthwith report the matter to the Secretary of State. In the case of a company which is being wound up by the court in England and Wales, the Official Receiver is the responsible office-holder. In other cases, the liquidator, administrator or administrative receiver as the case may be is the responsible office-holder.

[42] Section 7(4) lies at the heart of this appeal. It provides:

> 'The Secretary of State or the official receiver may require the liquidator, administrator or administrative receiver of a company, or the former liquidator, administrator or administrative receiver of a company—(a) to furnish him with such information with respect to any person's conduct as a director of the company, and (b) to produce and permit inspection of such books, papers and other records relevant to that person's conduct as such a director, as the Secretary of State or the official receiver may reasonably require for the purpose of determining whether to exercise, or of exercising, any function of his under this section.'

THE OFFICIAL RECEIVER

[43] The office of Official Receiver was established by the Bankruptcy Act 1883. His role was originally confined to personal bankruptcy, but it was extended to companies in compulsory liquidation by the Companies (Winding Up) Act 1890. It is a statutory office held by persons appointed by the Secretary of State from among the civil servants employed within the Department of Trade and Industry. They are members of the Insolvency Service, which is an executive agency of the department with overall responsibility for the administration of insolvency in England and Wales, and acts under the ultimate direction and control of the Secretary of State. The Insolvency Service is headed by the Secretary of State but her involvement in day-to-day matters is normally exercised on her behalf by officials. She must make arrangements to ensure that there is at least one Official Receiver attached to each court having bankruptcy jurisdiction. The Official Receiver is an officer of the court to which he is attached and is answerable to the court for the carrying out of its orders and for the discharge of his statutory functions. As the holder of a statutory office, he has standing to bring proceedings and has a right of audience before the court to which he is attached. He sues and is sued not in his personal name but as 'the Official Receiver'. The definite article is appropriate because in the case of each company there is only one Official Receiver.

[44] Upon the making of a compulsory winding up order of a company in England and Wales, the Official Receiver attached to the court in which the winding up is proceeding becomes the liquidator of the company by virtue of his office and continues in office until another person is appointed liquidator in his place (see s 136(2) of the Insolvency Act 1986). He is also by virtue of his office the liquidator during any vacancy (see s 136(3)). At any time when he is

liquidator he may take steps to have a liquidator appointed in his place (see s 136(4)). In Scotland these functions are performed by the insolvency practitioner (known as 'the interim liquidator') appointed by the court when making the winding up order.

*Investigation and report*

[45] Where a winding up order is made by the court in England and Wales, it is the duty of the Official Receiver to investigate the causes of the company's failure and to inquire generally into the promotion, formation, business, dealings and affairs of the company, and to make such report (if any) to the court as he thinks fit (see s 132 of the Insolvency Act 1986, which can be traced back to s 8 of the 1890 Act). He was formerly but is no longer obliged as a matter of course to submit a report to the court and in practice he seldom does so. But it remains his duty to investigate the causes of the company's failure and take appropriate action. This may include making a report to the Secretary of State pursuant to s 7(3) of the Disqualification Act. He is under the same duty whether or not he is also the liquidator.

*Public examination*

[46] Where a company is being compulsorily wound up the Official Receiver (or in Scotland the liquidator) can apply to the court under s 133 of the Insolvency Act 1986 to direct the public examination of any person who is or has been an officer of the company, or has acted as an office-holder of the company, or has been concerned or taken part in the promotion, formation or management of the company.

[47] Before the Insolvency Act 1986 a public examination could be ordered only against a person who was suspected of fraud in relation to the company. By 1982 the procedure had fallen into disuse. The Cork Committee recommended that it should be revived. It expressed the hope that by exposing serious misconduct it would help to promote higher standards of commercial and business morality and serve as a sanction against former officers of a failed company who had not adequately assisted the Official Receiver and the liquidator in their investigations into the company's affairs.

[48] In *Re Paget, ex p Official Receiver* [1927] 2 Ch 85 at 87–88, [1927] All ER Rep 465 at 466 Lord Hanworth MR explained that the object of the public examination of the debtor was not merely to obtain a full and complete disclosure of his assets and the facts relating to the bankruptcy in the interests of the creditors, but was also for the protection of the public. He said:

> 'To concentrate attention upon the mere debt collecting and distribution of assets is to fail to appreciate one very important side of bankruptcy proceedings and law.'

The judge had disallowed a question on the ground that the answers would not assist in the collection of the debtor's assets. Lord Hanworth rejected this as a sufficient ground for disallowing the question ([1927] 2 Ch 85 at 92, [1927] All ER Rep 465 at 468) on the ground that it excluded—

> 'a side of the bankruptcy law which we are constantly affirming in this Court, where it has been necessary over and over again to point out that in matters of bankruptcy it is not merely the creditors who have their rights, but it is also the public themselves whose interests have to be safeguarded.'

[49] The Cork Committee recommended that the court conducting the public examination should have power, during the course of or at the conclusion of the public examination, to make a disqualification order. This proposal was not accepted; but there can be no doubt that the Official Receiver could apply for a public examination if he suspected that there had been serious misconduct on the part of a former director which rendered him unfit to be concerned in the management of a company. The court could decline to direct a public examination if it considered that it would be oppressive; but there can equally be no doubt that evidence obtained by a public examination could form the basis of an application for a disqualification order. It would be odd if the same were not true of a private examination under s 236.

*Disqualification proceedings*

[50] It is also the duty of the Official Receiver, as I have explained, to bring proceedings under s 6 of the Disqualification Act for a mandatory disqualification order if directed by the Secretary of State to do so; and to furnish the Secretary of State with information not only for the purpose of enabling her to determine whether such proceedings should be brought or continued but also for the purpose of bringing or continuing them.

*The functions of the liquidator*

[51] The principal function of the liquidator of a company is to carry out the winding up of its affairs by collecting the assets and distributing them among the creditors with a view to the ultimate dissolution of the company. But his functions are not confined to this. Under the heading 'The liquidator's functions' s 143 of the Insolvency Act 1986 describes the general functions of the liquidator in a winding up by the court as follows:

> '*General functions in winding up by the court.*—(1) The functions of the liquidator of a company which is being wound up by the court are to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it.
>
> (2) It is the duty of the liquidator of a company which is being wound up by the court in England and Wales, if he is not the official receiver—
>
> (a) to furnish the official receiver with such information, (b) to produce to the official receiver, and permit inspection by the official receiver of, such books, papers and other records, and (c) to give the official receiver such other assistance, as the official receiver may reasonably require for the purposes of carrying out his functions in relation to the winding up.'

The words 'in relation to the winding up' are wider than 'in the winding up'. Since the Official Receiver is ex hypothesi not the liquidator in the case envisaged, 'his functions in relation to the winding up' cannot extend, still less be limited, to the collection, realisation and distribution of the company's assets. They must encompass the functions which are conferred on him in the public interest in relation to the company which is being wound up, including the investigation into the reasons for the company's failure and the conduct of those concerned in its management. It does not stretch the language of the section to read it as including the Official Receiver's functions under s 7 of the Disqualification Act.

[52] From the earliest days of the joint stock company the liquidator has exercised functions which serve the public interest and not merely the financial interests of the creditors and contributories. The Cork Committee observed

(p 53 (para 192) of its Report): 'The law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society.' In consequence insolvency proceedings (p 390 (para 1734))—

> 'have never been treated in English law as an exclusively private matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them.'

*Criminal proceedings*

**[53]** Under s 167 of the Companies Act 1862 one of the functions of a liquidator was to bring criminal proceedings against directors and others who were alleged to have committed offences in relation to the company. The proceedings were brought at the expense of the estate, and this served as a powerful disincentive. But the court could direct the liquidator to bring such proceedings, and would do so if appropriate. In *Re London and Globe Finance Corp Ltd* [1903] 1 Ch 728 at 734–735, [1900–3] All ER Rep 891 at 894 the prosecuting authorities declined to bring criminal proceedings. The court authorised the liquidator (who happened to be the Official Receiver) to do so at the expense of the company. Buckley J observed that s 167 was concerned with enforcing commercial morality and was 'not measured or limited or even concerned with pecuniary benefit to be obtained for the shareholders or creditors'.

**[54]** The legislation remained in the same form until the Companies Act 1928, when s 77(1) authorised the court in a compulsory winding up to direct the liquidator either to prosecute the offender himself or to refer the matter to the Director of Public Prosecutions. If it appeared to the liquidator in a voluntary winding up that any past or present director, manager or other officer of the company had been guilty of an offence in relation to the company for which he was criminally liable, s 77(2) required him to report the matter to the Director of Public Prosecutions. It also required the liquidator to give the Director of Public Prosecutions information and access to documents in his possession or under his control. If the Director of Public Prosecutions decided not to bring proceedings against the offender, the liquidator could do so himself though only with the leave of the court. This was a safeguard against the company's assets being wasted on frivolous or vexatious proceedings.

**[55]** The present law is contained in s 218 of the Insolvency Act 1986. In the case of a compulsory winding up, s 218(3) provides that if it appears to the liquidator, not being the Official Receiver, that any past or present officer of the company or any member of it has been guilty of an offence in relation to the company for which he may be criminally liable he must report the matter to the Official Receiver. In the case of a voluntary winding up s 218(4) provides that the liquidator must report the matter, in the case of a winding up in England and Wales, to the Secretary of State and, in the case of a winding up in Scotland, to the Lord Advocate. The liquidator is subject to a duty as before to give the Secretary of State or the Lord Advocate as the case may be information and access to documents which are in his possession or under his control.

*Public examination*

**[56]** Although the Companies Acts have expressly required an application for a public examination to be made by the Official Receiver, and it was generally assumed before 1953 that a public examination could not be directed unless the

company was in compulsory winding up and the application was made by the Official Receiver, this was not the case. Section 307 of the Companies Act 1948 provided that in a voluntary winding up the liquidator or any creditor or contributory could apply to the court inter alia 'to exercise ... all or any of the powers which the court might exercise if the company were being wound up by the court'. It was held that the effect of this section was that the court could direct a public examination on the application of the liquidator in a voluntary winding up (see *Re Campbell Coverings Ltd* [1953] 2 All ER 74, [1953] Ch 488 and *Re Campbell Coverings Ltd (No 2)* [1954] 1 All ER 222, [1954] Ch 225). Section 307 has been re-enacted as s 112 of the Insolvency Act 1986 and has the same effect (see *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1992] 2 All ER 856 at 870, 889, [1993] Ch 1 at 24, 46).

*Investigation and report*

**[57]** I have already referred to s 7(3) of the Disqualification Act, which imposes a duty on the liquidator to report to the Secretary of State if it appears to him that the conditions for a mandatory disqualification order are satisfied; and to s 143 of the Insolvency Act 1986 and s 7(4) of the Disqualification Act, which impose a duty on the liquidator to assist the Official Receiver in carrying out his functions in relation to the winding up and to furnish the Secretary of State or the Official Receiver with information. I shall have to return to s 7(4) later.

SECTION 236

**[58]** So far as material s 236 of the Insolvency Act 1986 reads as follows:

> '(2) The court may, on the application of the office-holder, summon to appear before it—(a) any officer of the company, (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.
>
> (3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit an affidavit to the court containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.'

The expression 'office-holder' is defined in s 234(1) to mean the administrator, administrative receiver, liquidator or provisional liquidator of the company as the case may be. Where the company is being wound up by the court in England and Wales s 236(1) extends the expression to include the Official Receiver whether or not he is the liquidator.

THE JUDGMENT OF THE COURT OF APPEAL

**[59]** The judgment of the Court of Appeal ([2001] EWCA Civ 1227, [2001] 4 All ER 588, [2002] Ch 239) was given by Chadwick LJ. He gave two reasons (at [37]–[38]) for his conclusion that the court has no power to make an order on the application of the Official Receiver under s 236 for the production of documents in circumstances where the sole purpose of the application is to obtain information or documents for use as evidence in pending proceedings under the Disqualification Act. They are closely reasoned and merit being set out in full.

'[37] ... The reason, as it seems to me, is that the powers conferred by ss 235 and 236 are conferred on the liquidator for the better discharge of his functions in the winding up; and are not conferred to enable the Secretary of State to obtain, indirectly, information and documents which Parliament has not thought it necessary or appropriate to enable him to obtain directly. There is no reason to think that Parliament intended that the powers to obtain information and documents for use in disqualification proceedings should be any greater in a case where the company was being wound up by the court in England and Wales than in a case where the company was in voluntary winding up. As I have sought to explain, the role of the Official Receiver in relation to disqualification proceedings in a case where the company is being wound up by the court is attributable to considerations of convenience and cost; there is no reason to explain that role on the basis that it reflects an intention to provide enhanced powers in relation to the obtaining of information and documents.

[38] Second, in a case where the company is being wound up by the court in England and Wales, the function of the Official Receiver, under the Insolvency Act, is to investigate the causes of failure and to make a report *to the court* (see s 132 of that Act). It was plainly intended that the Official Receiver should be able to invoke the powers conferred by ss 235 and 236 for the purpose of discharging that function. Equally, as it seems to me, information which he obtains in the course of discharging his function under s 132 of the Insolvency Act is information to which he is intended to have regard, and to take into account, in making the report to the Secretary of State which s 7(3)(a) of the Disqualification Act requires. And, information which he obtains in the course of discharging his function under s 132 of the Insolvency Act is information which he is intended to use in pursuing disqualification proceedings, if that role is entrusted to him under s 7(1)(b) of the Disqualification Act. But the Official Receiver cannot have been intended to invoke the powers conferred by ss 235 and 236 of the Act either (i) for the purpose of carrying out his role under s 7(3) of the Disqualification Act—save in so far as that is incidental to the discharge of his function under s 132 of the Insolvency Act—or (ii) for the purpose of obtaining evidence for use in disqualification proceedings of which he has conduct under s 7(1)(b) of the Disqualification Act—again, save in so far as that is incidental to the discharge of his function under s 132 of the Insolvency Act. The reason is to be found in s 7(4) of the Disqualification Act. Unlike the Secretary of State—who may require information or documents under that section for the purpose of determining whether it is expedient in the public interest that a disqualification order should be made—the only purpose for which the Official Receiver could require an office-holder to provide information or documents under s 7(4) of the Disqualification Act would be that he reasonably required that information in connection with his functions under s 7(3)(a) or s 7(1)(b) of that Act. But, if those were functions in connection with which the powers conferred by ss 235 and 236 of the Insolvency Act could be invoked, s 7(4)—in so far as it applies to the Official Receiver—would be otiose. There would be ample power to obtain, under s 235(3)(c), any information which the Official Receiver required from a liquidator, administrator or administrative receiver. The inference, as it seems to me, is that Parliament included a reference to the Official Receiver in s 7(4) of the Disqualification Act because it was necessary to do so. It was

thought necessary to do so, because Parliament did not contemplate that the Official Receiver would be able to invoke ss 235 and 236 of the Insolvency Act for that purpose. It is pertinent to keep in mind that the Insolvency Act and the Disqualification Act were enacted on the same day (25 July 1986) and form part of the same corpus of legislation.'

**[60]** The last observation is well made. The provisions of the Disqualification Act and the Insolvency Act 1986 form part of the same statutory scheme formerly contained in the Insolvency Act 1985 and must be read together (see *Re Jeffrey S Levitt Ltd* [1992] 2 All ER 509 at 522–523, [1992] Ch 457 at 473–474 per Vinelott J, approved by the Court of Appeal in *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1992] 2 All ER 856 at 876, [1993] Ch 1 at 31).

**[61]** I shall examine these two reasons in turn.

THE FIRST REASON

**[62]** There are two strands to this part of Chadwick LJ's reasoning. (i) The liquidator of a company in voluntary liquidation cannot invoke the section for the purpose of disqualification proceedings and the Official Receiver's power to invoke the section can be no greater than that of the liquidator. (ii) The Secretary of State cannot invoke the section directly, and Parliament cannot have intended that the Official Receiver should be able to do so in order to enable the Secretary of State to obtain indirectly information and documents which it considered that he should have no power to obtain directly.

**[63]** The first of these strands proceeds from the premise that the powers conferred by s 236 are conferred on a liquidator 'for the better discharge of his functions in the winding up' ([2001] 4 All ER 588 at [37]). These words are not derived from the express terms of the section but are evidently considered to be implicit in it. The unspoken assumption is that a liquidator's 'functions in the winding up' are limited to the collection and distribution of the company's assets. I agree that the bringing of disqualification proceedings is not a function which is conferred on the Official Receiver 'in the winding up'; if it were, the costs of the proceedings would be payable out of the assets of the estate. It is not necessary to consider whether the gathering of evidence for the purpose of such proceedings is part of 'his functions in the winding up', for this formulation is unduly narrow. The liquidator's functions in relation to the company which is being wound up are not and never have been limited to the recovery and distribution of the company's assets. It would be very odd if the liquidator of a company in voluntary liquidation could apply to the court to direct a public examination in the wider public interest but could not invoke s 236 to order a private examination in the same interest. In practice the liquidator would usually prefer to invite the Official Receiver to make the application; and even where the application was made by the liquidator the court would be disposed to invite the views of the Official Receiver. But it is impossible to say that the liquidator would be acting outside his proper role in the one case and not in the other.

**[64]** Section 236 contains no express limitation on the purpose for which it may be invoked. Of course it may be invoked only for a legitimate purpose in relation to the company which is being wound up, and the court, which has discretion to make or refuse an order, should be astute to see that the powers conferred by the section are not abused. It would plainly be an abuse to use those powers for a purpose which is foreign to the functions of the applicant in relation to the company which is being wound up. But I reject the unspoken assumption that the functions of a liquidator are limited to the administration of the insolvent

estate. This is only one aspect of an insolvency proceeding; the investigation of the causes of the company's failure and the conduct of those concerned in its management are another. Furthermore such an investigation is not undertaken as an end in itself, but in the wider public interest with a view to enabling the authorities to take appropriate action against those who are found to be guilty of misconduct in relation to the company. If the investigation yields information material to the Secretary of State's decision to bring or continue disqualification proceedings, it must be reported.

**[65]** I would endorse the observations of Vinelott J in *Re Polly Peck International plc, ex p joint administrators* [1994] BCC 15 at 16:

> '... it is quite clear that the purposes of the administration must include the gathering of information as to the conduct of the affairs of the company and those responsible for it by an administrator in order that he can report to the Secretary of State as he is required to do. He must do so in order that the Secretary of State can perform his duty, which is the important one of taking proceedings if it appears that a disqualification order should be made.'

**[66]** Moreover, there is no justification for the assumption that the Official Receiver's powers are circumscribed by the reference to the functions of a liquidator in a voluntary winding up. Significantly in this context s 236(1) authorises the Official Receiver to make the application *whether or not he is the liquidator*. If he is not the liquidator, he is not responsible for the collection and distribution of the assets. Yet he is expressly authorised to invoke the section. This makes it impossible to say that the section can be invoked only for this limited purpose. It must be available to the Official Receiver to enable him to carry out his investigative and reporting functions.

**[67]** In my opinion, the only limitation which is implicit in s 236 is that it may be invoked only for the purpose of enabling the applicant to exercise his statutory functions in relation to the company which is being wound up. Whether the applicant is the Official Receiver or the liquidator or other office-holder these include the provision of information to the Secretary of State or the Official Receiver which is relevant to the bringing or continuing of disqualification proceedings.

**[68]** The second strand to the reasoning depends upon the unspoken assumption that by not permitting the Secretary of State to invoke s 236 directly Parliament evinced an intention that he should not have recourse to the section at all whether directly or indirectly. But there is another and more plausible explanation, viz that Parliament considered that it was neither necessary nor desirable that the application should be made by the Secretary of State and that it was better made by the Official Receiver. The liquidator is closest to the company whose affairs are under investigation; the Official Receiver, when not the liquidator, is at one step removed. The Secretary of State is still further removed, and there are only limited functions which he is obliged to exercise personally. He cannot, for example, delegate the decision whether it is expedient in the public interest to bring disqualification proceedings; but once he decides that it is he is not obliged to bring them himself. He can and usually does direct the Official Receiver to bring them. Historically he has usually been authorised to take action only where there is no Official Receiver to do so. It has never been the function of the Secretary of State to conduct an investigation or to gather information. He relies on information obtained by others; hence the

investigative and reporting duties imposed on the Official Receiver and the responsible office-holder.

[69] This brings me to s 7(4) of the Disqualification Act. This authorises the Secretary of State or the Official Receiver to require the liquidator or other office-holder to furnish the Secretary of State with such information and documents as the Secretary of State may reasonably require for the purpose of determining whether to exercise, or for the purpose of exercising, his function in relation to disqualification proceedings. Section 7(4) is not expressly limited to information and documents in the office-holder's possession; and I see no ground for implying such a limitation. I do not think that s 7(4) obliges the office-holder to invoke s 236 in order to obtain the information for which the Secretary of State has asked: it may not be reasonable for him to do so at the expense of the estate. But s 7(4) certainly does not forbid it; on the contrary, it brings the provision of such information to the Secretary of State for the purpose of disqualification proceedings squarely within the functions of the liquidator.

THE SECOND REASON

[70] The second reason is based on the fact that s 7(4) authorises the Official Receiver to require the office-holder to provide information in relation to disqualification proceedings. This, Chadwick LJ reasoned, would be otiose if the Official Receiver could invoke s 236 for this purpose.

[71] There are, I think, two reasons why s 7(4) is not otiose. In the first place, it may not be unreasonable in a particular case for the office-holder to refuse to invoke s 236 at the expense of the estate where the sole purpose of the application is to enable the Secretary of State or the Official Receiver to bring or continue disqualification proceedings. In the second place, and perhaps more cogently, disqualification proceedings often concern the conduct of a director in relation to more than one company. Section 6(1) of the Disqualification Act obliges the court to make a disqualification order against a person where it is satisfied that he has been a director of a company which has at any time become insolvent and that—

> 'his conduct as a director of that company (either taken alone *or taken together with his conduct as a director of any other company or companies*) makes him unfit to be concerned in the management of a company.' (My emphasis.)

[72] The other company or companies need not have become insolvent, but they usually will have done, since otherwise the person's misconduct as a director of those other companies is unlikely to have come to the attention of the Secretary of State or the Official Receiver. But unless the other companies are also in compulsory liquidation and the Official Receiver of the lead company obtains authority to act as Official Receiver of those companies, s 236 will not enable him to obtain information in respect of them.

[73] Section 7(4) replaces s 9(6) of the Insolvency Act 1976, under which similar powers were conferred on the Secretary of State alone. As the amicus curiae observed, disqualification proceedings under that Act required two insolvent liquidations. There must have been many cases where one company was in voluntary liquidation and the other in compulsory liquidation. If the Official Receiver of the company in compulsory liquidation were to bring disqualification proceedings, he could not invoke s 236 to obtain information in relation to the other company, because the section is not available to obtain

information in relation to matters which are unconnected with the company in respect of which the application is made. The inclusion of the Official Receiver in s 7(4) closes this lacuna.

CONCLUSION

[74] The consequences of the Court of Appeal's decision would be most unfortunate and cannot have been intended by Parliament. Where the company had no assets worth recovering, neither the Official Receiver nor the office-holder would be able to invoke s 236 for the purpose of investigating the conduct of former directors, since this would not be incidental to 'his functions in the winding up' as the Court of Appeal conceived them to be ([2001] 4 All ER 588 at [37]). Serious misconduct would go undetected and the public unprotected. Moreover applications under s 236 would be complicated by the need for detailed consideration of the reasons for the application, and in particular whether the information was sought for the benefit of creditors and contributories (and only incidentally for the purpose of disqualification proceedings) or solely for the purpose of disqualification proceedings. Not only would this inevitably delay the disqualification proceedings, which ought to proceed with expedition, but it would make the collection of the necessary evidence serendipitous and the protection of the public adventitious.

[75] I reject the assumption that the powers conferred by s 236 are conferred only for better discharge of the applicant's functions 'in the winding up', if these are confined to the recovery of the company's assets and their distribution among the creditors and contributories. In my opinion they are conferred for the better discharge of the applicant's wider statutory functions, both powers and duties, in relation to the company being wound up; and these include the provision of information to the Secretary of State for the purpose of disqualification proceedings. I would allow the appeal and make a declaration to this effect.

**LORD WALKER OF GESTINGTHORPE.**

[76] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Millett. I agree with his speech and for the reasons which he gives I would allow this appeal and make the order which he proposes. I add some observations of my own because of the interest and importance of the issue.

[77] The decision of the Court of Appeal ([2001] EWCA Civ 1227, [2001] 4 All ER 588, [2002] Ch 239) appears to have been based on an assumption, not fully spelled out in the judgment of Chadwick LJ, as to the relatively limited nature of the Official Receiver's functions in a winding up. It seems to have been assumed that those functions do not include the conduct of disqualification proceedings under s 6 of the Company Directors Disqualification Act 1986 (the Disqualification Act). Any such assumption would in my view be incorrect. It would overlook the fact that winding up has, and has had almost throughout the history of company law, a dual purpose. One purpose is the orderly settlement of a company's liabilities and the distribution of any surplus funds, prior to the company being dissolved. The other is the investigation and the imposition of criminal or civil sanctions in respect of misconduct on the part of persons (especially directors of an insolvent company in compulsory liquidation) who may be shown to have abused the privilege of incorporation with limited liability. The first function is primarily a concern of a company's creditors and shareholders; the second function serves a wider public interest.

[78] Mr Philip Jones, appearing to assist the House in the absence of any respondent, has indeed provided valuable assistance with a clear, detailed and scholarly survey of the development of corporate insolvency, including the office of Official Receiver, first instituted (initially for purposes connected with individual bankruptcy) by the Bankruptcy Act 1883. His survey shows that what I might call the public element in winding up has changed a good deal in the course of a century and a half. That is not surprising. The development of the law has responded to major social changes, including the establishment of prosecuting authorities, the emergence of a body of skilled and responsible professionals undertaking work as insolvency practitioners, and the recognition that the protection of the public against reckless or dishonest businessmen may be better attained by civil procedures (in particular disqualification of persons unfit to act as company directors) rather than by criminal proceedings. But although the practice and procedure have varied over the years the need to protect the public against the abuse of limited liability is a clear and constant theme.

[79] There have been three principal procedures available on winding up for the protection of the public: the initiation of criminal proceedings, originating in s 167 of the Companies Act 1862; summary proceedings for misfeasance or some other breach of duty in the course of the winding up, originating in s 10 of the Companies (Winding up) Act 1890; and proceedings for disqualification, originating in s 75(4) of the Companies Act 1928 (but only in respect of a director found guilty of fraudulent trading). The modern forms into which these three procedures have evolved are now found respectively in ss 218 and 212–214 of the Insolvency Act 1986 and the Disqualification Act. It is unnecessary to set out the intermediate history. Ever since the 1862 Act the court has made clear that these procedures exist for the protection of the general public, not in the interests of the creditors or shareholders of the particular company which is in liquidation. Indeed it may be contrary to the financial interests of the creditors and shareholders for these procedures to be invoked.

[80] That can be illustrated by the observation of Buckley J in *Re London and Globe Finance Corp Ltd* [1903] 1 Ch 728, [1900–3] All ER Rep 891. That was the case of a company which had gone from voluntary winding up, first to winding up under supervision and then to compulsory winding up, with the Official Receiver as liquidator. The company's former managing director was suspected of fraud, but the law officers declined to prosecute. Some of the shareholders wished to prosecute him, mainly at the expense of the company's assets (although they offered to pay into court at least £1,250 of their own money) while others opposed the prosecution as a waste of money. Buckley J authorised a prosecution at the expense of the company (so far as the subscribed fund was insufficient). He said ([1903] 1 Ch 728 at 734, [1900–3] All ER Rep 891 at 894):

> '... the general scheme of the Acts with reference to the liquidation of a company no doubt is that the assets are to be realized to the best advantage for the benefit of those who are entitled to share in their distribution. But indications are not wanting that the assets may under the Acts be applied for some purposes other than these. Sect. 167 of the [1862 Act] is, having regard to the reasons which I have just given, one example of this, and in the [1890 Act] the same intent may be traced in ss. 7 and 8 of that Act. These are sections which require the preparation of a statement of the company's affairs at the expense of the assets leading to a preliminary report, which is to

shew whether further inquiry is desirable as to matters relating to the promotion and the like, and, if necessary, to a public examination of parties incriminated, with the purpose, of course, of enforcing commercial morality. It is, therefore, in my judgment plain that the principle upon which I am to apply, or refuse to apply, s. 167 is not measured or limited or even concerned with pecuniary benefit to be obtained for the shareholders or creditors.' a b

**[81]** Similarly Farwell LJ said in *Re John Tweddle & Co Ltd* [1910] 2 KB 697 at 707, in relation to the Official Receiver's inquiries and report leading up to the public examination of former directors:

'Now those are functions of a judicial character which are cast upon him, not in the liquidation of the company for the benefit of the assets, but primarily at any rate for the protection of the public. One has to bear in mind that in 1890 there had been various company failures, and it was thought that more drastic legislation was required against directors and promoters and people standing in that position, and I have no doubt that this section was passed for that purpose. It is said, and with some truth, perhaps, that it is a little hard on the company if the view that we take is correct that the costs of all this should come out of the company's assets; but a company only exists by favour of and on the conditions imposed by the Legislature, and it is not immaterial to observe that as long ago as 1862, under the 167th section of the Act of 1862, if directors were prosecuted (as mentioned in that section) the expense of the prosecution came out of the assets of the company.' c d e

**[82]** Much more recently the same considerations carried weight with the Court of Appeal in *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1992] 2 All ER 856 at 876, [1993] Ch 1 at 31 in deciding that a person required to answer questions under s 236 of the Insolvency Act 1986 may not refuse to answer on the ground of self-incrimination. Dillon LJ said: f

'It is plain to my mind—and not least from the Cork Report—that part of the mischief in the old law before the Insolvency Act 1985 was the apparent inability of the law to deal adequately with dishonesty or malpractice on the part of bankrupts or company directors ... That was a matter of public concern, and there is a public interest in putting it right. As steps to that end, Parliament has, by [the Insolvency Act 1986], greatly extended the investigative powers available to office-holders, with the assistance of the court, and has expressly placed the officers of the company and others listed in s 235(3), under a duty to assist the office-holder.' g h

**[83]** Having identified the three main public elements in winding up as prosecution, remedies for misfeasance and disqualification, I must go back to identify the investigatory duties and powers which Parliament has conferred at different times, and the persons by whom they have been exercisable. The starting point is s 115 (together with s 117) of the 1862 Act, in a part of that Act headed 'Extraordinary Powers of Court'. In those days there was no insolvency service ('official liquidator' simply meant a liquidator appointed in a compulsory liquidation) and no body of licensed insolvency practitioners. The court seems to have been ready to take a hands-on approach. But it was (in an age which may have set a higher value on privacy) conscious that its powers under ss 115 and 117 j

ought not to be used oppressively (see for instance *Re North Australian Territory Co* (1890) 45 Ch D 87).

**[84]** The office of Official Receiver was introduced by the 1883 Act. Official Receivers were organised so that each was attached to a particular court exercising jurisdiction in bankruptcy. The 1890 Act extended this arrangement to courts exercising winding up jurisdiction, and when a court ordered a company to be wound up the Official Receiver attached to that court became provisional liquidator, although another liquidator might subsequently be appointed.

**[85]** Section 8 of the 1890 Act required the Official Receiver to submit a preliminary report to the court as soon as possible, including (s 8(1)):

> '(b) if the company has failed, as to the causes of the failure; and (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.'

A further report might lead to the public examination of a company promoter, director or officer, but only if the Official Receiver stated that in his opinion fraud had been committed. The provisions of s 8 of the 1890 Act can be traced through to ss 132 and 133 of the Insolvency Act 1986, although the making of a report by the Official Receiver is now optional, and is fairly rare in practice. The procedure for public examination was little used in the middle of the twentieth century but the Cork Committee perceived possible advantages in reinvigorating it (see *Re Seagull Manufacturing Co Ltd (in liq)* [1993] 2 All ER 980, [1993] Ch 345 (especially the submissions of counsel for the Official Receiver at [1993] Ch 345 at 349)).

**[86]** Although the court has always been concerned to see that its extraordinary powers should not be exercised oppressively, the nineteenth century and early twentieth century cases do not show any inclination to limit investigation to matters of direct concern to creditors and shareholders. Nor do they reveal any 'Rubicon' test being applied (for the history of that supposed test, see the judgment of Chadwick LJ ([2001] 4 All ER 588 at [26]) in the Court of Appeal in this case). On the contrary, the process of public examination (which was regarded as the most stringent and intrusive weapon in the court's armoury) was available only when the Official Receiver had already formed the opinion that fraud had taken place. That requirement has not been preserved in s 133 of the Insolvency Act 1986, but public examination remains a measure of last resort.

**[87]** Under the Disqualification Act the Official Receiver is very often the applicant for an order under s 6. That course has obvious convenience because the Official Receiver's report is prima facie evidence of its contents (see r 3(2) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023). The Official Receiver can apply to the court only if directed to do so by the Secretary of State, but when a direction is made the application is the Official Receiver's, not the Secretary of State's. Conducting disqualification proceedings is certainly a mainstream function of the Official Receiver. Parliament's decision to set out the code relating to the disqualification of company directors in a separate statute might be thought to give some superficial support to the view that the Official Receiver's functions under the Disqualification Act are not functions in a winding up. But in my opinion that view is mistaken. The provisions of the Disqualification Act are part of the same body of law as the Insolvency Act 1986 (see the observations of Vinelott J in *Re Jeffrey S Levitt Ltd* [1992] 2 All ER 509 at 522–523, [1992] Ch 457 at 473–474,

approved by the Court of Appeal in *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1992] 2 All ER 856 at 876, [1993] Ch 1 at 31). a

**[88]** For these reasons and for the further reasons set out in the speech of Lord Millett, I would allow this appeal. I would emphasise that the appeal was argued on the question of jurisdiction only, without reference to the very important element of discretion, considered by your Lordships' House in *British and Commonwealth Holdings plc (Joint administrators) v Spicer & Oppenheim (a firm)* [1992] 4 All ER 876, [1993] AC 426. It will be rare for any application under s 236 of the Insolvency Act 1986 to be made for the sole purpose of proceedings under the Disqualification Act, and in such a case the court will be well aware of the need to avoid any oppressive exercise of its powers. In this case the Official Receiver's concession, before Judge Weeks, that the application was made solely for the purposes of the disqualification proceedings, appears in retrospect rather surprising, as Mr Crow acknowledged in the course of his reply. The liquidator who was mistakenly appointed (after the company had been struck off the register) had intended to issue misfeasance proceedings claiming £387,000. But it is unnecessary to go further into that aspect of the matter, since your Lordships are concerned only with the issue of jurisdiction. b c d

*Appeal allowed.*

Dilys Tausz Barrister.

# Lloyds TSB General Insurance Holdings Ltd and others v Lloyds Bank Group Insurance Co Ltd

[2003] UKHL 48

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOBHOUSE OF WOODBOROUGH, LORD MILLETT AND LORD WALKER OF GESTINGTHORPE

7, 8 APRIL, 31 JULY 2003

*Insurance – Liability insurance – Determination of proximate cause – Claimants providing personal pension plans – Defendants insuring claimants against negligent advice – Claimants failing properly to train representatives selling pension plans – Representatives providing negligent advice – Claimants liable to investors – Whether individual policyholders' claims falling within aggregation clause – Whether series of claims constituting 'related series of acts or omissions'.*

The claimant companies marketed personal pension schemes. The marketing of such schemes was investment business within the Financial Services Act 1986 and could be undertaken only by authorised persons. To be authorised a person had to belong to the appropriate self-regulating organisation, which in the case of the majority of the claimants was the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), and comply with the organisation's rules as if they had been made under the 1986 Act. Rule 3.4(4)(a) of LAUTRO's rules provided that members should ensure that their company representatives complied with the LAUTRO code of conduct. The LAUTRO rules also required members to establish training schemes for their employees and to arrange to monitor their performance to ensure that they complied with the code of conduct. Under the 1986 Act a breach of the LAUTRO rules affecting an investor was actionable as a breach of statutory duty. It became apparent that the claimants' representatives selling the pensions had frequently failed to comply with the code of conduct in that they failed to give what the code defined as 'best advice' to investors. Nor had the claimants established the required training and monitoring schemes. Some 22,000 claims for mis-selling were made by investors against the claimants. No single claim was for more than £35,000 but the total paid out by the claimants exceeded £125m. The claimants held an insurance policy with the defendant insurers which included an indemnity in respect of their legal liabilities to third parties for third party claims. The mis-selling claims fell within the terms of the policy but the policy covered only the part of each and every third party claim which exceeded the deductible amount of £1m. However, an aggregation clause provided that if a series of third party claims resulted from 'any single act or omission (or related series of acts or omissions)' then all such claims were to be considered to be a single third party claim for the purposes of the application of the deductible. The effect of the definition of 'act or omission' in the policy was that it meant a breach of the LAUTRO rules in respect of which civil liability arose on the part of the claimants. The claimants sought an indemnity under the policy. In order to decide the effect of the aggregation clause, the trial as a preliminary issue was ordered of the questions of whether the mis-selling claims resulted from: (i) a single act or omission by the claimants, their officers or

employees; and or (ii) a related series of acts or omissions by the same persons; and were therefore to be considered to be a single claim subject to a single deductible. The claimants succeeded in the Commercial Court where the judge held that their breaches of their duties under the LAUTRO rules to establish training and monitoring schemes were an act or omission or series of acts or omissions that had been the cause of all 22,000 claims, which could therefore be aggregated and treated as a single claim. The insurers appealed to the Court of Appeal which held that while the lack of training and monitoring systems had not been a single act or omission from which liability had resulted, the words 'related series of acts or omissions' meant acts or omissions which had a single underlying cause or common origin, such as the failure to have proper systems, and dismissed the appeal. The insurers appealed to the House of Lords, and the claimants cross-appealed. The appeal was argued on the basis of three LAUTRO members, without distinguishing between them and the other two companies.

**Held** – The language of the aggregation clause, read with the definition of 'act or omission' showed that the insurers had not been willing to accept as a unifying factor a common cause more remote than the act or omission which had actually constituted the cause of action. An act or omission could qualify as a unifying factor in respect of more than one loss only if it gave rise to civil liability in respect of both losses. In the instant case, the act or omission which gave rise to the civil liability in respect of each claim, which was failure to give best advice to that investor, was different from the acts or omissions giving rise to the other claims. The only unifying factor which the clause provided for describing acts or omissions as 'related' and a 'series' was that they resulted in a series of third party claims. The unifying element was a common causal relationship. That meant that acts or events formed a related series if they together resulted in each of the claims. In the instant case the acts or omissions of the individual consultants which gave rise to the financial loss suffered by the third parties were not a related series of acts or omissions. Each arose from a separate contravention of r 3.4(4)(a) of the LAUTRO rules. Accordingly the appeal would be allowed, the cross-appeal would be dismissed and the questions in the preliminary issue answered in the negative (see [1], [23], [27], [29], [51], [53]–[55], below).

Decision of Court of Appeal [2002] 1 All ER (Comm) 42 reversed.

**Notes**

For the nature of liability insurance, see 25 *Halsbury's Laws* (4th edn reissue) paras 660, 661.

**Cases referred to in opinions**

*AXA Reinsurance (UK) Ltd v Field* [1996] 3 All ER 517, [1996] 1 WLR 1026, HL.
*Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437, QBD and CA.
*Caudle v Sharp* [1995] LRLR 433, CA.
*Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1998] Lloyd's Rep IR 421, CA.

**Cases referred to in list of authorities**

*American Centennial Insurance Co v INSCO Ltd* [1996] LRLR 407.
*Athel Line Ltd v The Liverpool and London War Risks Insurance Association Ltd* [1945] 2 All ER 694, [1946] 1 KB 117, CA.
*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769, [1995] QB 375, [1995] 2 WLR 87, CA; *rvsd* sub nom *South Australia Asset Management*

*Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group plc* [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.

*BHP Petroleum (Timor Sea) Pty Ltd v Minister for Resources* (1994) 49 FCR 155, Aust FC.

*Caudle v Sharp, Grove v Sharp* [1995] LRLR 80.

*Chandris v Isbrandtsen-Moller Co Inc* [1950] 2 All ER 618, [1950] 1 KB 240, CA.

*Clover, Clayton & Co Ltd v Hughes* [1910] AC 242, [1908–10] All ER Rep 220, HL.

*Cox v Bankside Members Agency Ltd* [1995] 2 Lloyds Rep 437, CA.

*Deeny v Gooda Walker Ltd (in liq)* [1996] LRLR 183.

*Dunham v Clare* [1902] 2 KB 292, CA.

*Fenton v J Thorley & Co Ltd* [1903] AC 443, HL.

*Galoo Ltd (in liq) v Bright Grahame Murray (a firm)* [1995] 1 All ER 16, [1994] 1 WLR 1360, CA.

*Goddard & Smith v Frew* [1939] 4 All ER 358, CA.

*Gray v Barr* [1971] 2 All ER 949, [1971] 2 QB 554, [1971] 2 WLR 1334, CA.

*Haydon v Lo & Lo (a firm)* [1997] 1 WLR 198, PC.

*Heskell v Continental Express Ltd* [1950] 1 All ER 1033.

*Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL.

*Lawrence v The Accidental Insurance Co Ltd* (1881) 7 QBD 216, DC.

*Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, [1918–19] All ER Rep 443, HL.

*Lloyd (JJ) Instruments Ltd v Northern Star Insurance Co Ltd, The Miss Jay Jay* [1987] 1 Lloyd's Rep 32, CA.

*Lord v Pacific Steam Navigation Co Ltd, The Oropesa* [1943] 1 All ER 211, [1943] P 32, CA.

*Ocean Steamship Co Ltd v Liverpool and London War Risks Insurance Association Ltd, The Priam* [1946] 2 All ER 355, [1946] 1 KB 561, CA.

*Reischer v Borwick* [1894] 2 QB 548, [1891–4] All ER Rep 531, CA.

*Rothschild (J) Assurance plc v Collyear* [1999] Lloyd's Rep IR 6.

*Rothwell v Caverswall Stone Co Ltd* [1944] 2 All ER 350, CA.

*Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 796, [1997] AC 254, [1996] 2 WLR 1051, HL.

*Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1973] 3 All ER 825, [1974] QB 57, [1973] 3 WLR 483, CA.

*West Wake Price & Co v Ching* [1956] 3 All ER 821, [1957] 1 WLR 45.

*Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL

*Yorkshire Dale Steamship Co Ltd v Minister of War Transport, The Coxwold* [1942] 2 All ER 6, [1942] AC 691, HL.

**Appeal**

Lloyds Bank Group Insurance Co Ltd (the insurers), appealed in part, with leave to appeal given by the Appeal Committee of the House of Lords on 16 May 2002, and Lloyds TSB General Insurance Holdings Ltd, TSB Life Ltd, TSB Pensions Ltd, TSB Bank plc and Lloyds TSB Life Assurance Co Ltd (the TSB companies) cross-appealed in part, from the order of the Court of Appeal (Potter, Hale and Longmore LJJ) on 8 November 2001 ([2001] EWCA Civ 1643, [2002] 1 All ER (Comm) 42) dismissing the insurers' appeal from the order of Moore-Bick J on 5 October 2000 ([2001] 1 All ER (Comm) 13) determining preliminary issues

arising in proceedings brought by the TSB companies against the insurers. The facts are set out in the opinion of Lord Hoffmann.

*Mark Hapgood QC* and *Timothy Howe* (instructed by *Simmons & Simmons*) for the TSB companies.

*Jonathan Sumption QC* and *Guy Philipps QC* (instructed by *Barlow Lyde & Gilbert*) for the insurers.

Their Lordships took time for consideration.

31 July 2003. The following opinions were delivered.

**LORD NICHOLLS OF BIRKENHEAD.**

[1] My Lords, I have not found this question of interpretation as easy as others. The conclusion reached in the Commercial Court ([2001] 1 All ER (Comm) 13) and the Court of Appeal ([2001] EWCA Civ 1643, [2002] 1 All ER (Comm) 42) has considerable attraction. In the end, and not without a degree of doubt, I agree that for the reasons given by my learned friends Lord Hoffmann and Lord Hobhouse of Woodborough this appeal should be allowed and the cross-appeal dismissed.

**LORD HOFFMANN.**

[2] My Lords, in 1994 the Securities and Investment Board (SIB) carried out an investigation into what it found to have been widespread breaches of the Financial Services Act 1986 (the FSA) by companies selling personal pension schemes. The marketing of such schemes was 'investment business' within the meaning of the FSA and could be undertaken only by authorised persons. To be authorised, the company had to belong to the appropriate self-regulating organisation. It had to comply with the rules of that organisation as if they had been made under the FSA.

[3] The relevant self-regulating organisation was at the time the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). Its rules provided, by r 3.4(4)(a), that 'the member shall ... ensure that its company representatives comply with the Code of Conduct (insofar as it applies to them)'. The code of conduct, scheduled to the rules, contained detailed provisions about the duties of salesmen selling personal pension schemes. These had been widely marketed after the Social Security Act 1986 gave employees or ex-employees the right to transfer the value of accrued benefits in their employer's occupational scheme to a personal scheme in which the investments were managed by a company of their own choice.

[4] Whether it was in the interests of an employee to leave his employer's occupational scheme and commit his future to a personal scheme was often a difficult question. A fully informed decision required the employee to be aware of the respective risks, costs and benefits of the choices open to him. Much depended upon his personal and family circumstances. The LAUTRO code of conduct required a sales representative to make a detailed analysis in order to give the investor what was compendiously called 'best advice' on all relevant aspects of the decision. It imposed a positive duty upon the salesman (who was usually paid commission on the schemes which he sold) to advise the employee against giving up his rights under the occupational scheme unless he honestly thought it was in the employee's best interests to do so.

[5] The 1994 investigation suggested that, in breach of the code of conduct, many employees had been persuaded to transfer to personal schemes without adequate advice about the risks, advantages and disadvantages. These breaches of the code by salesmen were commonly called 'mis-selling'. The underlying reasons for mis-selling were partly the method by which salesmen were paid but largely the inadequacy of the training and monitoring of their performance provided by the companies employing them. These failures were also breaches of the LAUTRO rules, which required members to establish training schemes for their employees (r 3.4A) and to make arrangements for monitoring their performance to ensure that they complied with the Code of Conduct (r 3.4(3)).

[6] A breach of the LAUTRO rules affecting an investor is actionable as a breach of statutory duty (see s 62 of the FSA) and the companies' breaches of r 3.4(4)(a) by failure to 'ensure' that their representatives complied with the code of conduct therefore gave rise to claims for compensation by investors who had suffered financial loss in consequence of mis-selling. After its investigation, the SIB required members of LAUTRO to inform persons to whom pensions had been sold that they might be entitled to a remedy in damages. The result was a flood of claims.

[7] The respondents to this appeal, then members of the TSB group (the TSB companies) received about 22,000 claims. (The TSB group has since become part of the Lloyds group.) Most of the claims were for relatively small amounts; so far, no single one has exceeded £35,000. But the total sum of money involved was large. The TSB companies have paid out more than £125m in compensation.

[8] The question in this appeal is whether the TSB companies can recover any part of this money under a bankers composite insurance policy under which they and other members of the TSB group were then insured. This policy, as its name suggests, covered the group companies against a variety of risks. It was divided into four sections, each covering a different type of risk. Broadly speaking, section 1 dealt with loss caused to the insured by the dishonest or fraudulent acts of employees, section 2 with electronic and computer crime, section 3 with liability to third parties arising from breaches of common law or statutory duties by employees and section 4 with the personal liabilities of directors and officers.

[9] The insured companies carried on widely different financial activities: they included Hill Samuel Bank Ltd, a well-known merchant bank; United Dominions Trust, equally well-known in hire purchase finance; TSB Bank plc, an old-established retail bank; as well as the other TSB companies. The appellant insurer, then called TSB Group Insurance Co Ltd and now Lloyds Bank Group Insurance Co Ltd, was a captive within the group. The group risks under the policy were reinsured and the reinsurers are the real parties in interest in this appeal.

[10] The risk of liability for mis-selling under the FSA fell within the insuring clause of section 3 of the policy:

> 'This Policy ... provides an indemnity to the Assured in respect of the Assured's legal liability to third parties for any third party claim ... which meets the following requirements:—
>
> Any third party claim must:
>
> (i) be for compensatory and/or restitutionary damages; and
>
> (ii) be first made against the Assured during the policy period; and
>
> (iii) ... (g) be for financial loss caused by a breach on the part of the Assured or an Officer or Employee of the Assured of the provisions of the Financial

Services Act 1986 (including without limitation any rules or regulations made by any Regulatory Authority or any Self Regulatory Organisation pursuant to the provisions of the Act) ... in respect of which civil liability arises on the part of the Assured ...' a

[11] There is no dispute that each of the claims for mis-selling satisfied these requirements. But the policy included a 'Schedule of Underlying Deductibles' which was said to form part of sections 1, 2 and 3. For section 3, there was to be a deductible of £1m 'each and every claim'. The same was repeated in item 7 of the schedule to section 3. The effect of the deductible in section 3 was stated in para 2 of the conditions: b

'... the Underwriters shall be liable only for that part of each and every third party claim during the Policy Period ... which exceeds the Deductible stated in Item 7 of the Schedule ... The Deductible shall apply to each and every third party claim and shall be subject to no aggregate limitation.' c

[12] So far, so bad—from the TSB companies' point of view. No single claim came anywhere near exceeding the £1m deductible. But the TSB companies rely, and have so far succeeded, on the 'aggregation clause' which follows the clauses I have already quoted: d

'If a series of third party claims shall result from any single act or omission (or related series of acts or omissions) then, irrespective of the total number of claims, all such third party claims shall be considered to be a single third party claim for the purposes of the application of the Deductible.' e

[13] In order to decide the effect of the aggregation clause, the following preliminary issue was ordered to be tried:

'Whether ... the Mis-Selling Claims constitute a series of third party claims which resulted from: (1) A single act or omission by the TSB Companies their officers or employees ... (2) A related series of acts or omissions by the TSB Companies their officers or employees ... and are therefore to be considered a single third party claim subject to a single Deductible for the purposes of Condition 2 of the ... Policy.' f

[14] Moore-Bick J said ([2001] 1 All ER (Comm) 13 at 24 (para 24)) that the purpose of an aggregation clause was: g

'... to enable two or more separate losses covered by the policy to be treated as a single loss for deductible or other purposes when they are linked by a unifying factor of some kind.' h

[15] That seems to me a fair description. The unifying factor is often a common origin in some act or event specified by the clause. But much will turn upon the precise nature of the act or event which, for the purposes of aggregation, the clause treats as a unifying factor. The more general the description of that act or event, the wider the scope of the clause. For example, j in *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1998] Lloyd's Rep IR 421 the unifying cause was expressed in very general terms: '... all occurrences of a series consequent on or attributable to one source or original cause ...'

[16] This meant that as long as one could find any act, event or state of affairs which could properly be described as a cause of more than one loss, they formed part of a series for the purposes of the aggregation clause. Hobhouse LJ held that

a series of losses caused by theft and vandalism from the port of Sunderland over a period of time were attributable to one original cause, namely the inadequacy of the port's system for protecting the goods of which it was bailee. On the other hand, in *AXA Reinsurance (UK) Ltd v Field* [1996] 3 All ER 517 at 526–527, [1996] 1 WLR 1026 at 1035 Lord Mustill contrasted the words 'arising from one originating cause' which had been used in *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437 with the words 'arising out of one event' which was the unifying factor designated by the clause then before the House. An 'event', he said, was 'something which happens at a particular time, at a particular place, in a particular way'. A 'cause' on the other hand, was less constricted: it could be a continuing state of affairs or the absence of something happening. The word 'originating' was also in his opinion chosen to 'open up the widest possible search for a unifying factor'. This meant that in the *AXA* case the incompetence of a Lloyds underwriter was not an 'event' giving rise to the losses under a number of separate policies which he had written on behalf of various syndicates, whereas in *Cox*'s case it had been held to be the 'originating cause' of such losses.

**[17]** The choice of language by which the parties designate the unifying factor in an aggregation clause is thus of critical importance and can be expected to be the subject of careful negotiation; as Lord Mustill observed in the *AXA* case [1996] 3 All ER 517 at 526, [1996] 1 WLR 1026 at 1035, among players in the reinsurance market 'keen interest [is] shown ... in the techniques of limits, layers and aggregations'.

**[18]** In the present case the unifying factor is, as in the examples so far given, a common cause, but that cause must be a 'single act or omission' or, by an extension in the parenthesis, a 'related series of acts and omissions'. So the question turns upon the meaning of an 'act or omission' or 'related series of acts or omissions'.

**[19]** Moore-Bick J said ([2001] 1 All ER (Comm) 13 at 24 (para 24)) that an 'act or omission' included any acts or omissions 'of the kinds described in the insuring clause'. In his view, this included the TSB companies' breach of their duty under the LAUTRO rules to establish training schemes for their employees and to make arrangements for monitoring their performance. For the purposes of the preliminary issue the TSB companies admitted, indeed, asserted, that they had been in breach of these duties. Moore-Bick J held that these breaches were an act or omission or series of acts and omissions within the meaning of the aggregation clause and that they had been the cause of all the 22,000 claims. So they could all be aggregated and treated as a single claim for the purposes of the deductible.

**[20]** The Court of Appeal (Potter, Hale and Longmore LJJ) ([2001] EWCA Civ 1643, [2002] 1 All ER (Comm) 42) did not agree. They drew attention to cl 2(g) of the endorsement to section 3 of the policy, which defines the term 'act or omission'. For present purposes, the relevant part of the definition is that the words are deemed to mean a breach of the provisions of the LAUTRO rules 'as described in the insuring clause'. The relevant part of the insuring clause is para (iii)(g), which insures against a breach 'in respect of which civil liability arises on the part of the assured'. The Court of Appeal said that an 'act or omission' must therefore be something which constitutes the investor's cause of action. It cannot mean an act or omission which is causally more remote.

**[21]** It is therefore necessary to examine the nature of the cause of action asserted by the 22,000 claimants. It is a contravention of r 3.4(4)(a); to 'ensure that' company representatives comply with the code of conduct. A duty to 'ensure that' something does or does not happen is the standard form of words

used to impose a contingent liability which will arise if the specified act or omission occurs. Even if the act or omission is that of a third party, such as a company representative, the liability is not vicarious. The company is not liable for the representative's act or omission: that is simply the contingency giving rise to the company's own liability. Nor should one be misled by the word 'ensure' into thinking that the effect is to impose upon the company a duty to do something. No doubt the company will be well advised to take whatever steps it can to prevent the contingency from happening, but the question of whether it took such steps or not is legally irrelevant to its liability. It is liable simply upon proof that the contingency has occurred.

**[22]** It follows that the absence of a training or monitoring system, even though an independent breach of the rules, was legally irrelevant to the civil liability of the TSB companies. Even without any such system, they would not have been liable unless their representatives actually contravened the code. Likewise, any such contravention would have given rise to liability whether they had a training and monitoring system or not. It cannot therefore have been an act or omission from which liability resulted.

**[23]** Thus far I respectfully agree with the Court of Appeal. The language of the aggregation clause, read with the definition of 'act or omission', shows that the insurers were not willing to accept as a unifying factor a common cause more remote than the act or omission which actually constituted the cause of action. An act or omission could qualify as a unifying factor in respect of more than one loss only if it gave rise to civil liability in respect of both losses. In the present case, the act or omission which gave rise to the civil liability in respect of each claim (failure to give best advice to that investor) was different from the acts or omissions giving rise to the other claims.

**[24]** But the Court of Appeal then turned to the words in parenthesis '(or related series of acts or omissions)'. And in construing these words, they produced exactly the result which they had rejected in their construction of the primary words 'single act or omission'. They said that acts or omissions could be 'related' and form a 'series' if they had a 'single underlying cause' or common origin (Potter LJ at [50], Hale LJ at [55]) or if they were 'the same omission' which had occurred on more than one occasion (Longmore LJ at [58]). The appeal was therefore dismissed.

**[25]** This result seems to me paradoxical. It means that the parties started by choosing a very narrow unifying factor: not 'any underlying cause', not 'any event' or even 'any act or omission', but only and specifically an act or omission which gives rise to the civil liability in question. Having chosen this as the opening and, one must assume, primary concept to act as unifying factor, they have then, by a parenthesis, produced a clause in which the unifying factor is as broad as one could possibly wish. It is sufficient that all the claims have a common underlying cause or (on the view of Longmore LJ) the breaches of duty are the same, which I take to mean sufficiently similar. In my opinion this construction is allowing the tail to wag the dog. I do not think that it is reasonable to understand the parties as having intended the parenthesis to stand the rest of the clause on its head.

**[26]** When one speaks of events being 'related' or forming a 'series', the nature of the unifying factor or factors which makes them related or a series must be expressed or implied by the sentence in which the words are used. It may sometimes be necessary to imply a unifying factor from the general context. But the express language may make such an implication unnecessary or impermissible.

[27] In the present case, the only unifying factor which the clause itself provides for describing the acts or omissions in the parenthesis as 'related' and a 'series' is that they 'result' in a series of third party claims. In other words, the unifying element is a common causal relationship. But that common causal relationship is, so to speak, downstream of the acts and omissions within the parenthesis. They must have resulted in each of the claims. This obviously does not mean that it is enough that one act should have resulted in one claim and another act in another claim. That provides no common causal relationship. It can only mean that the acts or events form a related series if they together resulted in each of the claims. In this way, the parenthesis plays a proper subordinate role of covering the case in which liability under each of the aggregated claims cannot be attributed to a single act or omission but can be attributed to the same acts or omissions acting in combination.

[28] The Court of Appeal was unwilling to accept that the clause itself provided the unifying factor to justify the use of the words 'related' and 'series'. They appear to have thought that it was in practice unlikely that acts or omissions having a common causal relationship with a series of claims would occur. So the Court of Appeal sought the unifying factor outside the clause, by implying a reference to a common underlying cause upstream of the acts or omissions in the parenthesis, or some similarity between them. The clause itself says nothing about such unifying factors. Not only that; the narrow formulation of the primary concept, 'single act or omission', suggests that it was anxious to avoid them. In my view, such an implication of an unstated unifying factor is impermissible. I would reserve my opinion on the example given by my noble and learned friend Lord Hobhouse of Woodborough of the salesman who presents the identical document to a number of customers in succession. I would not be inclined to accept that these acts are a series just because they are very similar, although I can see it might be said that the relevant single act or series of acts can be described as the distribution of the document and the method of distribution (sending it simultaneously to a number of people, showing it to them in succession or reading it to them at a meeting) is causally irrelevant.

[29] It is in my opinion quite possible that one could have separate losses caused to a number of people by the combination of more than one act or omission, none of which would have been caused by the one without the other. For example, to adapt an example of my noble and learned friend Lord Hobhouse, they may have been caused by the distribution of a misleading document in identical terms by someone who was not himself negligent but ought to have been corrected by someone else who was. The two acts or omissions would be a series which together caused each of the losses. But in any case, I think that it is wrong to allow doubts about the possibly practical application of the parenthesis (particularly when the clause may have to be applied to the wide variety of circumstances covered by the insuring clause of section 3 of the policy) to produce a construction which undermines the balance of the clause. Each of the claims did not arise from a 'single act or omission'. Nor did each of them arise from a 'related series of acts or omissions'. Each arose from a separate contravention of r 3.4(4)(a). I would therefore allow the appeal, dismiss the cross-appeal, and answer each of the preliminary issues, No.

**LORD HOBHOUSE OF WOODBOROUGH.**

[30] My Lords, this appeal has raised a question of the construction of an aggregation clause in a policy of insurance covering inter alia third party liability

risks. The context is the policy deductible, i e the provision which states the level up to which the assured must self-insure (or insure elsewhere) before he has a right of recovery under the relevant policy. This provision may be qualified by an aggregation clause which enables the assured to aggregate self-insured losses together so as to exceed in aggregate the deductible and give a right of recovery. Policies also normally contain clauses which limit the liability of the insurer under the policy and such clauses may provide a limit by reference to individual losses or claims but give the insurer the right to aggregate losses or claims so as to enable him to apply the limit to that aggregate. It will, therefore, be appreciated that aggregation clauses may favour the assured or the insurer and in some policies the same aggregation clause, because it qualifies both a deductible clause and a limit clause, may at times work in favour of the assured and at other times in favour of the insurer. Aggregation clauses thus require a construction which is not influenced by any need to protect the one party or the other. They must be construed in a balanced fashion giving effect to the words used.

**[31]** Another preliminary observation which needs to be made, which is true of very many professionally drafted commercial and financial contracts, and is particularly true in the present case, is that there are often well established alternatives open to the parties in the drafting of their agreement. The choice made from among these alternatives represents part of the bargain struck by the parties and must be respected by anyone (judge or arbitrator) adjudicating upon a dispute arising under the document. As noted by Lord Mustill in *AXA Reinsurance (UK) Ltd v Field* [1996] 3 All ER 517 at 522–527, [1996] 1 WLR 1026 at 1031–1035, and, as I will explain below, aggregation clauses come in different well established forms. The clause in the present case is no exception. The form it takes is plain and apparent from the language which the parties have used. It is an impressive feature of this litigation that both the Commercial judge (Moore-Bick J) ([2001] 1 All ER (Comm) 13) and the three members of the Court of Appeal (Potter, Hale and Longmore LJJ) ([2001] EWCA Civ 1643, [2002] 1 All ER (Comm) 42) have all arrived at the same conclusion. But it can be questioned whether that conclusion does not fail to give effect to the clause which the parties have chosen to include in this policy.

THE POLICY

**[32]** The policy was a 'Bankers Composite Insurance' covering what was then 'The TSB Group' for 12 months from 1 November 1993. It was in four effectively self-contained sections covering a variety of classes of risk and loss relevant to the business of the group. The section with which this appeal is concerned is section 3—'Professional Indemnity'. The relevant assured were members of the group to whom a deductible of £1m 'each and every' claim applied in respect of this section. The insurer was also a TSB company and the financial significance of liability under this policy would appear to be to its reinsurers rather than to the TSB Group insurer as such.

**[33]** The section 3 policy was a 'claims made' policy providing an indemnity in respect of the assured's legal liability to third parties for any third party claim which is for compensatory or restitutionary damages and first made against the relevant assured during the policy period and is for financial loss falling within any of ten listed categories, (a) to (j). These include financial loss caused by a negligent act, negligent error or negligent omission on the part of an officer or employee of the assured, or the breach of a fiduciary or professional duty, or

misrepresentation on the part of the assured or an officer or employee of the assured. But the risk primarily relied on in the present case was:

> '(g) ... financial loss caused by a breach on the part of the Assured or an Officer or Employee of the Assured of the provisions of the Financial Services Act 1986 (including without limitation any rules or regulations made by any Regulatory Authority or any Self-Regulatory Organisation pursuant to the provisions of the Act) or of any other statute enacted in the United Kingdom, or the Channel Islands including breach of a statutory duty in respect of which civil liability arises on the part of the Assured ...'

There was a very high limit on the insurer's overall liability under the policy which is therefore irrelevant for present purposes. The deductible is dealt with in cl 2 which provides that the policy only covers 'that part of each and every third party claim' which exceeds the deductible and continues:

> 'The Deductible shall apply to each and every third party claim and shall be subject to no aggregate limitation.
>
> If a series of third party claims shall result from any single act or omission (or related series of acts or omissions) then, irrespective of the total number of claims, all such third party claims shall be considered to be a single third party claim for the purposes of the application of the Deductible.'

This provision uses the phrase 'act or omission' which is later defined to mean exactly the same as the categories (a) to (j) in the insuring clause which it again quotes in full. So, if the third party claim qualifies under (g) it is the wording of (g) which defines 'act or omission' as used in the aggregation clause.

THE FACTS

**[34]** For the purpose of this appeal there is no dispute about the relevant facts. The facts are those pleaded by the assureds which must be assumed for the purposes of the preliminary issue to be true.

**[35]** The Social Security Act 1986 enabled employees who would otherwise be entitled to benefits under their employers' occupational pension schemes to transfer benefits from, opt out of, or not to join, those occupational pension schemes and instead to invest for their retirement in personal pension plans. Each of the claimants (save for the fifth claimant, Lloyds TSB Life Assurance Co Ltd) was engaged in the marketing and sale of personal pension plans to such employees ('pension transfer business'). The conduct of such business was subject to regulation as 'investment business' under the Financial Services Act 1986 (the FSA), in accordance with a regime of self-regulation administered by the responsible self-regulating organisation which until 18 July 1994 was the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO) and thereafter was the Personal Investment Authority. Three of the claimants (the second, third and fifth) were at the material times members of LAUTRO; the other two were not. The appeal has however been argued on the basis of the three LAUTRO members, without distinguishing between them and the other two. The actual marketing and sale of personal pension plans was at all material times done by 'consultants' employed by one of the claimants as the case might be.

**[36]** Rule 3.4(4)(a) of the rules of LAUTRO provided that a member shall 'ensure that its company representatives comply with the Code of Conduct (insofar as it applies to them)'. Rule 3.4(3) of the rules of LAUTRO provided that a member 'shall make arrangements ... for the monitoring of the performance of

its company representatives to ensure that they comply with the Code of Conduct (insofar as it applies to them)'. The LAUTRO code of conduct (Sch 2 to the LAUTRO rules) was expressly made for the purpose of ensuring that members and their representatives maintained high standards of integrity and fair dealing, in particular in relation to investors, exercised due skill care and diligence in providing services, and generally took proper account of the interests of investors in the course of carrying out investment business. The relevant duties of 'consultants' engaged in pensions transfer business were set out in the code. Thus, the code required the 'consultants' to give investors 'best advice' and prohibited them from advising investors on any matter unless competent to do so. The requirements of 'best advice' included giving advice in relation to sales of personal pension plans to members of occupational pension schemes with the obligation in particular to carry out a full and detailed analysis of and comparison between the costs and risks of and the benefits under the investor's occupational pension scheme and the proposed personal pension plan and to advise the investors upon them and included a positive duty not to advise an investor to give up his rights under the occupational pension scheme unless it was bona fide believed to be in his best interest to do so. Section 62 of the FSA provides that a contravention of (inter alia) the LAUTRO rules by a member of LAUTRO should be actionable against the member at the suit of any person who suffers loss as the result of the contravention, subject to any available defences.

[37] Following public expressions of concern which led to a review carried out by the Securities and Investment Board in 1994, more than 22,000 mis-selling claims were made by investors against one or other of the claimants, claiming compensation for the losses they had individually suffered by reason of the alleged mis-selling. Each of the mis-selling claims was based on or included allegations that best advice had not been given to the investor. The failure on the part of the 'consultant' concerned to give best advice to the investor constituted a breach of the code on the part of the 'consultant'. The failure on the part of the relevant claimant to ensure that the 'consultant' concerned gave best advice to the investor was also a breach on the part of the relevant claimant of the rules of LAUTRO. The mis-selling claims were claims against the claimants for damages for financial loss caused by (inter alia) breach of statutory duty giving rise to civil liability on their part under s 62 of the FSA.

[38] It is alleged, and must for present purposes be assumed to be true, that at all material times the claimant concerned, its officers or employees failed to consider, identify and satisfy the requirements of best advice in relation to pension transfer business and, specifically, that the relevant claimant—(a) initially failed to give any specific consideration to the requirements of best advice and failed to provide any specific internal compliance guidance or training to its 'consultants'; (b) subsequently misinterpreted the requirements of best advice in relation to pension transfer business, and mistakenly believed that it was unnecessary for its 'consultants' to evaluate the comparative risks and benefits for the investor to invest in a personal pension plan as opposed to membership of an occupational pension scheme, or to give advice to the investor accordingly; and (c) failed at all material times to establish and maintain adequate resources, policies, practices and procedures to ensure that the conduct of pension transfer business by the claimant and its 'consultants' as a whole complied with the requirements of the rules of LAUTRO and the code, and in particular failed to instruct train, equip, monitor and supervise its 'consultants' as a whole for the purpose of conducting pension transfer business in compliance with the

requirements of best advice. It is alleged, and must for present purposes be assumed to be true, that (i) the failures to give best advice on the part of the 'consultants' concerned and (ii) the acceptance of, or failure to reject, proposed pension transfer business on the part of the claimant concerned, its officers or employees, arose from the same underlying origin or were of an identical or very similar nature.

**[39]** The various claimants have paid compensation to investors exceeding £125m in total. However, no single claim has exceeded the deductible of £1m. Indeed, no single claim has exceeded about £35,000 in amount. It follows that the entitlement of the various claimants to be indemnified by the insurer in respect of the compensation paid by them to investors depends in the first instance upon whether the aggregation clause in section 3 of the policy entitles them to aggregate the mis-selling claims for the purposes of the deductible. The issues for determination are thus whether the mis-selling claims against the various claimants were 'a series of third party claims' which resulted from 'a single act or omission' on the part of the various claimants, their officers or employees and, if not, whether they were 'a series of third party claims' which resulted from 'a related series of acts or omissions' on the part of the various claimants, their officers or employees.

THE COURT OF APPEAL

**[40]** The judgments in the Court of Appeal did not wholly adopt the same reasoning as that of the judge. None treated their decision as concluded by binding authority. They rejected the argument that there had been a single act or omission but accepted the argument that there had been a related series of acts or omissions. Potter LJ ([2002] 1 All ER (Comm) 42 at [47]) rejected the 'single act or omission' argument on the ground that the failure to ensure that the 'consultants' gave best advice was not the cause of the liability to the third party as they 'were no more than regulatory duties not giving rise to duties directly enforceable by action by a member of the public'. But he accepted (at [50]) the argument that 'a series of acts or omissions may be related by reason of having a single underlying cause or common origin' which need not be within the list of insured items. So he considered that the failure to have a proper system, as alleged in this case, was such an underlying cause or origin. He considered the word 'related' was 'wholly apt' to apply to a series of acts or omissions which were of the same or a 'very similar nature and which share a common causal origin'.

**[41]** Hale LJ (at [54]) stressed that the conduct which gave rise to the individual third party claims for which the assureds were respectively liable was 'not the systemic management failure which is said to be the explanation for all those individual misdeeds'. But referring to the phrase 'related series' she found assistance in the variety of family relationships familiar to family lawyers, including 'kindred and affinity'. She treated the 'single underlying cause' as decisive to give rise to a sufficient relationship.

**[42]** Longmore LJ (at [56]) stressed that the liability of the assured was personal not vicarious. 'Once it is established that "Best Advice" has not been given, liability is automatic.' He summarised his view (at [57]), saying:

> '... if a number of different people are responsible for [the] omissions [to give best advice] and such omissions give rise to different losses for different customers, the omissions are nevertheless, in my view, related and constitute a related series of omissions because they are an omission to do

the same thing, although the consequences of each omission are, of course, different.' a

DISCUSSION

[43] The scheme of the relevant parts of section 3 of this policy is firstly that it has a carefully drafted insurance clause which defines the cover given. It is of no avail to the assureds to present arguments which involve saying that the b proximate cause or causes of the relevant third party losses is something other than the insured cover there defined. This scheme is reinforced by the inclusion of the definition clause in effectively identical terms inserted for the purpose of defining the phrase 'act or omission' as used in the aggregation clause. The result is that, for present purposes, the *third party claim* has to be one which is 'for c financial loss caused by a breach on the part of the assured or an officer or employee of the assured' of the FSA or the LAUTRO rules and the acts or omissions relied upon to trigger the aggregation clause have also to fit that description. This was recognised by Potter LJ (at [50]). It has to be what proximately caused the loss suffered by the third party and that was the act or omission of the 'consultant'. It may be that one should assume that all the d 'consultants' were untrained and incompetent. But the fact remains that on occasions they may happen to have given what was in fact the best advice or that the advice which they gave did not in fact cause the third party any financial loss. The essential factor in every case has to be that the breach—act or omission—caused the third party financial loss. There is thus no 'single act or e omission': there were as many acts and omissions as there were third party claims. Similarly, if there is to be a related series of acts and omissions, that description has to be true of the 22,000 claims notwithstanding that each claimant will have been different, each financial loss will have been different and the actual failure to give the best advice will have been on the part of many different employees of the relevant different assureds. It is of no assistance to the assureds f to say that they were themselves each in breach of their obligation to *ensure* that best advice was given. That statutory requirement merely creates for the relevant assured an absolute liability for the breach of its relevant employee.

[44] The second part of the structure of section 3 to which I wish to draw attention is the deductible clause. It applies across the board, to all ten heads of g cover; it is not specific to these individual assureds or to the FSA cover. So, it is not necessary or right to construe it specifically by reference to the FSA cover. The deductible applies to 'each and every third party claim'. This is the starting point for the consideration of the aggregation clause. The further fact that for these assureds the deductible is set at £1m shows that the primary intention is to confine the cover to large third party claims. h

[45] The aggregation clause is applicable if there is a series of third party claims which either have resulted from a 'single act or omission' or have resulted from a 'related series of acts or omissions'. The phrase 'series of third party claims' clearly carries with it the possibility that the claims may have been made by a number of third parties and each relate to the financial loss suffered by an j individual third party but do not, as such, import anything more. The following phrase 'result from any single act or omission' reinforces this. The single act or omission must be the proximate cause of the financial loss caused to the third parties. This in the present context has to be an identifiable single failure by an identifiable 'consultant' to give the third parties 'Best Advice'. One can visualise how this might happen when a 'consultant' makes a single presentation to a

room-full of people to persuade them to sign up to a pension scheme sold by his employer, one of the assureds. But this is not the scenario which the assureds invoke, no doubt because such aggregation would be insufficient to assist them in their claims against the insurer. What they seek to rely upon is the liability of the assureds by reason of the obligation to 'ensure'. But this does not provide them with an answer: there are as many failures to ensure as there have been failures by the various 'consultants' to give best advice. Further, a failure to ensure is not itself an 'act or omission' in any physical sense, as is implied by the use of the adjective 'single'; it is rather a word describing a personal responsibility for the failure of some other individual. The assureds' argument on the cross-appeal does not survive scrutiny and the Court of Appeal were right to reject it.

[46] The second basis of aggregation provided for in the clause is third party claims resulting from a 'related series' of acts or omissions. It is upon this phrase that the argument before your Lordships has mainly turned. As I have stated, this argument succeeded before the Court of Appeal. But, on examination, it can be seen to raise the same fundamental difficulties as the argument on the primary phrase, 'single act or omission'. The claims still have to result from something done or omitted as between the relevant 'consultant' and the relevant third party. The obligation of the relevant assured to 'ensure' does not suffice to bridge the gap nor could it unless one gave a different meaning to the words 'act(s) or omission(s)' in the two adjoining phrases. Here again one can visualise a situation which might be capable of leading to aggregation under this part of the wording. Suppose a 'consultant' prepares a document which misrepresents the merits of the pension scheme he is endeavouring to sell and gives that document to a succession of people; the people who buy into the scheme as a result of having been given the misleading document by the 'consultant' could each have a claim against the assured employing that 'consultant'. Each act of giving the misleading document to a person would be a distinct act. But they could together form a 'related series of acts' from which a 'series of third party claims' had resulted. But here again, this was not the way the assureds put their case, no doubt for the same reasons as before and because it was not in fact what happened. They however rely upon the use of the word 'ensure' and the assumed fact that all the acts of mis-selling arose from the same underlying origin or were of an identical or a very similar nature.

[47] The assureds' argument therefore runs as follows. Each of the assureds was under a statutory obligation to take the steps indicated in the code of conduct to guard against mis-selling. They did not do so. As a result, 'consultants' did not give best advice and mis-selling occurred. It follows that the various assureds did not ensure that it did not occur. The underlying cause of all the cases of mis-selling was the same—the failure to take the steps required by the code to guard against mis-selling. The requisite steps and the failure to take them were either the same in every case or very similar. This argument therefore takes the inquiry back to an earlier stage. It looks at not what caused the financial loss to the third party, the subject of the third party claim, but at the underlying situation which gave rise to the conduct of the 'consultant' vis-à-vis the third party. It can be commented that the underlying situation could equally well have been the failure of the assured to pay its 'consultants' a viable salary so that they became over-dependent upon commissions and were thus unduly influenced not to perform their duty to give best advice, a temptation to which a proportion of the 'consultants' would predictably succumb. The way in which the argument seeks to get round the basic difficulties is to say that the failure of each relevant assured

to take the requisite steps, whilst not being the act or omission itself or the proximate cause of the third party's loss, provides the relationship between the various acts and omissions so as to justify the description of them as a 'related series', or, as Hale LJ might have put it, they all had the same parent, ie the failures of the assureds (or, perhaps, the same parent or uncles and aunts). Is this the correct construction to place on this clause?

**[48]** It is possible to have an aggregation clause which may have this effect. In *AXA Reinsurance (UK) Ltd v Field* [1996] 3 All ER 517 at 521, [1996] 1 WLR 1026 at 1029, the policies discussed included two different sets of wording, one referring to 'each and every loss and/or occurrence ... and/or series of losses and/or occurrences ... arising out of one event' and the other referring to 'any claim or claims arising from one originating cause or series of events or occurrences attributable to one originating cause (or related causes)'. Lord Mustill said:

> 'In my opinion these expressions are not all the same, for two reasons. In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way ... A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate. To my mind the one expression has a much wider connotation than the other.' (See [1996] 3 All ER 517 at 526–527, [1996] 1 WLR 1026 at 1035.)

Accordingly where the words falling into the second category were used, losses caused by a mistake shared in common by three different underwriters as to the nature of the LMX spiral could be the single underlying cause of their having entered into a series of fatally defective reinsurance treaties and could therefore be the unifying factor justifying the aggregation of the losses suffered under those treaties, whereas the use of words falling into the first category would not suffice.

**[49]** Similar reasoning had earlier been adopted by Evans LJ, giving the leading judgment of the Court of Appeal in *Caudle v Sharp* [1995] LRLR 433 at 439–440. That case involved the former type of wording—'each and every loss and/or occurrence ... and/or series of losses and/or occurrences ... arising out of one event'. He did not in the context of that policy consider that the 'one event' need be an insured peril but rejected the idea that anything that happened could properly be described as 'an event'. He distinguished between a historical event such as the hundred years war and a single event such as a particular hurricane. The case was about a series of 32 asbestosis reinsurance contracts which Mr Outhwaite had underwritten without doing any proper assessment of the risk. Mr Outhwaite's repeated negligence, his sustained state of ignorance of the truth, could not be described as a single event.

**[50]** Similarly, in a later case *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1998] Lloyd's Rep IR 421, the Court of Appeal made the same distinction between a simple 'any one event' clause and a clause, which was the clause in the policy with which the Court of Appeal were concerned, which included the words 'or arising out of all occurrences of a series consequent on or attributable to one source or original cause'. Accordingly they held (at 433–434) that, where a large piece of machinery had been left unguarded and unprotected on the dockside for some 18 months and progressively stripped during that period by petty thieves, the losses fell to be aggregated under the clause because 'on an

ordinary use of language, the acts of pilferage and vandalism were a series of occurrences attributable to a single source or original cause'.

[51] Returning to the aggregation clause in the present policy, there are no words of equivalent strength to those found in the *AXA* and *Municipal* cases—'attributable to'—'a single source'—'originating cause'. The argument of the assureds has to be built upon the inclusion of the phrase 'related series'. But this does not have the same force or create such a strong and wide connecting factor. One is still left with the necessity to look at the acts and omissions of the individual 'consultants' which gave rise to the financial loss suffered by the third party and ask whether they were a related series of acts or omissions. In my opinion they were not. The parties could, if they had so chosen, have used a clause such as that found in the *AXA* and *Municipal* cases. They chose not to and, no doubt, the cost of obtaining insurance cover was reduced as a result. Their choice should be respected.

[52] The assumed facts expressly postulate two facts: that the losses 'arose from the same underlying origin' and that the 'consultants' failures to give best advice and the various assureds' failure to reject the pension transfer business sold by the 'consultants' 'were of an identical or very similar nature'. The first of these facts if it is to justify aggregation requires exactly the type of reclassification and redrafting of the clause which the authorities demonstrate is not permissible. The second without the first proves too much. It would lead to the aggregation of individual acts of negligence by individual employees which were independent of each other but merely could be described as having a very similar character, eg bad advice by bank managers. The essential component of the assureds' case remains that they must say that this aggregation clause is an 'original cause' clause. That is not a permissible construction to place upon it.

[53] Accordingly, the appeal should be allowed and the cross-appeal dismissed and the questions should be answered as contended for by the insurers.

**LORD MILLETT.**

[54] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hoffmann and Lord Hobhouse of Woodborough. I agree with them, and for the reasons they give I too would allow the appeal and dismiss the cross-appeal.

**LORD WALKER OF GESTINGTHORPE.**

[55] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hoffmann and Lord Hobhouse of Woodborough. For the reasons which they give I would allow the appeal, dismiss the cross-appeal and answer the preliminary issues in the way they propose.

*Appeal allowed. Cross-appeal dismissed.*

Celia Fox Barrister.

# Fawdry & Co (a firm) v Murfitt (Lord Chancellor intervening)

[2002] EWCA Civ 643

COURT OF APPEAL, CIVIL DIVISION

WARD, SEDLEY AND HALE LJJ

16, 17 APRIL, 14 MAY 2002

*Practice – Transfer of proceedings from or to the Technology and Construction Court – Case listed in Queen's Bench Division transferred to circuit judge authorised to hear cases in Technology and Construction Court but not general Queen's Bench cases – No order transferring case to Technology and Construction Court drawn up – Parties having no opportunity to be heard on transfer or consent to transfer – Whether lack of opportunity vitiating transfer – Whether fatal procedural error – CPR 3.10, PD 49C, para 2.2.*

The claimant firm brought proceedings in the High Court to recover fees allegedly due for consultancy work done for the defendant. The claim was for an amount such that it would in normal circumstances have been transferred to the county court but had remained in the High Court in order that the judgment would be enforceable in Jersey. The case was listed for trial in the Southampton District Registry in January 2001 but the day before the hearing the judge to whom it had been allocated informed the court group diary manager that he would not have sufficient time to hear it. The diary manager discovered that a circuit judge, who was authorised or 'ticketed' to sit as a judge of the Family Division of the High Court and in the Technology and Construction Court (TCC), but not to hear Queen's Bench cases, would be available to hear the case in Portsmouth. She faxed a memo to the presiding judge of the circuit asking for his approval for the case to be 'released' to that judge 'who is ticketed to hear TCC matters'. The presiding judge telephoned the diary manager and told her to do so. He considered that his instruction amounted to an order to transfer the case to the TCC, so that the judge could try it, although no order was ever drawn up to that effect. CPR PD 49C, para 2.2[a] provided that no order for a transfer of proceedings from or to the TCC should be made unless the parties had either been heard on the issue or consented. The parties were informed of the transfer to Portsmouth but not of any transfer to the TCC. At trial the judge dismissed the claim. The claimant thereafter discovered that the judge did not have a general Queen's Bench 'ticket', and was not told until July 2001 that the case had been transferred to the TCC. He appealed against the judge's decision on the ground that she had had no jurisdiction to hear the case. He argued: (i) that the presiding judge had not in fact transferred the case to the TCC; (ii) that even if he had transferred it the requirement in PD 49C para 2.2 had not been complied with; (iii) that that failure in compliance was so fundamental that (a) the transfer was thereby vitiated and (b) it was not covered by CPR 3.10(a)[b], which conferred on the court a general power of dispensation where there had been a procedural

a Paragraph 2, so far as material, is set out at [11], below

b Rule 3.10, so far as material, is set out at [13], below

error and provided 'the error does not invalidate any steps taken in the proceedings unless the court so orders'.

**Held** – The presiding judge had had the power to transfer the case to the TCC, and the evidence was that that was what he had thought he was doing. The court would usually have a discretion whether or not to disapply r 3.10(a) in which a number of factors would have to be balanced. Prominent among those factors would be the prejudice to the parties. There might be good reasons to object to a transfer to the TCC list but in the instant case the purpose of the transfer was purely to secure the trial of the action on the date which had already been fixed and for which the parties were prepared. That in itself fulfilled the criteria for a transfer to that list. Moreover, the case was the sort of case which the judge was eminently well qualified to hear; it was a straightforward claim for services rendered of the sort that was usually dealt with in the county court. The judge had been nominated to deal with the much more complex cases, often involving difficult points of law as well as fact, which were tried in the TCC. There was no reason why a transfer should not have been ordered and no reason to think that either party had been prejudiced either by the transfer or by not having been given an opportunity to be heard on the matter. For the court to order otherwise under r 3.10 would substantially prejudice the successful party. Accordingly the transfer of the instant case to the TCC list to be heard by the judge was a valid order of the court and effective to give her power to hear it. The appeal would, accordingly, be dismissed (see [12], [16], [17], [38], [39], [52], [62], below).

**Notes**

For transfer of proceedings within the High Court and for the Technology and Construction Court, see 37 *Halsbury's Laws* (4th edn reissue) para 124, and 10 *Halsbury's Laws* (4th edn reissue) para 616 respectively.

**Cases referred to in judgments**

*Adams v Adams (A-G intervening)* [1970] 3 All ER 572, [1971] P 188, [1970] 3 WLR 934.

*Aldridge, Re* (1897) 15 NZLR 361, NZ CA.

*Bagot's Case* (1469) YB 9 Edw 4.

*Buckley v Edwards* [1892] AC 387, PC.

*Curtin v Barton* (1893) 139 NY 505, NY CA.

*Daisystar Ltd v Town and Country Building Society, Townroots Ltd v Raja* [1992] 2 All ER 321, [1992] 1 WLR 390, CA.

*EE v Federal Republic of Germany* App No 18889/91 (14 October 1992, unreported), E Com HR.

*James (an insolvent) (A-G intervening), Re* [1977] 1 All ER 364, [1977] Ch 41, [1977] 2 WLR 1, CA.

*Millar v Dickson (Procurator Fiscal, Elgin)* [2001] UKPC D4, [2002] 3 All ER 1041, [2002] 1 WLR 1615; *rvsg* 2000 JC 648, HC of Just.

*Norton v Shelby County* (1886) 118 US 425.

*Pfeifer v Austria* (1992) 14 EHRR 692, [1990] ECHR 11855/95, ECt HR.

*R v Bedford Level Corp* (1805) 6 East 356, 102 ER 1323.

*R v Cronin* [1940] 1 All ER 618, CA.

*Starrs v Ruxton, Ruxton v Starrs* 2000 JC 208, HC of Just.

*State v Carroll* (1871) 38 Conn 449, Connecticut SC.

*Stubbings v UK* (1996) 1 BHRC 316, ECt HR.

*SW v UK, CR v UK* (1995) 21 EHRR 363, ECt HR.
*Tameside Metropolitan BC v Grant* [2002] 3 FCR 238, [2002] Fam 194, [2002] 2 WLR 376.
*Zand v Austria* (1978) 15 DR 70, E Com HR.

**Cases also cited or referred to in skeleton arguments**
*Abbot of Fountaine's case* (1431) 9 H VI 33.
*Metroinvest Anstalt v Commercial Union Assurance Co Ltd* [1985] 2 All ER 318, [1985] 1 WLR 513, CA.
*Stieringer v Germany* (App No 28899/95) (25 November 1996, unreported), E Com HR.
*Storer v British Gas plc* [2000] 2 All ER 440, [2000] ICR 603, [2000] 1 WLR 1237, CA.
*Walker v UK* (2000) 29 EHRR CD 276, E Com HR.

**Appeal**
By notice of appeal dated 9 February 2001, the claimant firm, Fawdry & Co, appealed from the decision of Judge Linda Davies sitting as a judge in the Technology and Construction Court, on 26 January 2001, dismissing its claim against the defendant, Colin Douglas Murfitt, for payment of £19,340. The Lord Chancellor intervened in the appeal. The facts are set out in the judgment of Hale LJ.

*Nicholas Isaac* (instructed by *Fawdry & Co*) for the appellant.
*Philip Sales* (instructed by the *Treasury Solicitor*) for the Lord Chancellor.
The defendant did not appear.

*Cur adv vult*

14 May 2002. The following judgments were delivered.

**HALE LJ.**

[1] This is the claimant's appeal against the dismissal of his claim by Judge Linda Davies, sitting in Portsmouth, on 26 January 2001. The claim was brought in the Queen's Bench Division of the High Court. Judge Davies is authorised to sit as a judge of the Family Division of the High Court and in the Technology and Construction Court (TCC) but she is not authorised (colloquially 'ticketed') to sit as a judge of the Queen's Bench Division. The sole issue in this appeal is whether she had jurisdiction to hear this case. The successful defendant has played no part in the appeal, but with the court's permission, the Lord Chancellor's Department has intervened and filed evidence of the circumstances in which Judge Davies came to hear it.

FACTS

[2] The appellant is a firm owned by Mr Colin Slinn who acted in person until the matter reached this court. The firm brought proceedings in the High Court to recover fees allegedly due for consultancy work done for the defendant. The total claimed was £19,340. Such a claim would normally be transferred to the county court but had apparently remained in the High Court because the claimant wished to be able to enforce the judgment in Jersey.

[3] It was listed for trial on Friday 26 January 2001 in the Southampton District Registry before Judge Thompson QC. Judge Thompson does have authority to try Queen's Bench Division cases (and the presiding judge of the Western Circuit,

Toulson J, had earlier decided that it be allocated to him). However, two urgent matters were also listed before him that Friday and therefore on Thursday 25 January, the day before the hearing, he informed Mrs O'Callaghan, the Winchester group diary manager, that he would not have sufficient time to hear this case.

[4] Mrs O'Callaghan discovered that Judge Davies would be available to hear it in Portsmouth. She was aware that Judge Davies was not authorised to hear Queen's Bench cases but was authorised to sit in the TCC. She faxed a memo to Toulson J asking for his approval for the case to be 'released' to Judge Davies 'who is ticketed to hear TCC matters'. He telephoned Mrs O'Callaghan about 4 pm and told her to do so. Toulson J was also aware that Judge Davies did not have a Queen's Bench 'ticket'. He has since said that he considered that his instruction amounted to an order to transfer the case to the TCC list so that Judge Davies could try it. No order was ever drawn up to that effect. The order made by Judge Davies is stated to have been made in the High Court of Justice, Queen's Bench Division, Portsmouth District Registry.

[5] The parties were immediately informed of the transfer to Portsmouth but not of any transfer to the TCC. Mr Slinn says that he inquired on arrival at court next morning whether Judge Davies was authorised to hear the case. Soon after the hearing began, Judge Davies observed:

> 'The matter is in the High Court, as I understand it, because that is the only basis upon which any judgment could be enforced in Jersey, and otherwise it would not be in the High Court. It comes before me, sitting as a High Court judge today, it being released—having been released to me for the purpose of this hearing.'

Ultimately, Judge Davies decided that although the claimant had undoubtedly done a considerable amount of work for the defendant, it had not been proved that this was done under an agreement that it be paid for rather than as a favour to a friend. She therefore dismissed the claim with costs summarily assessed at £1,976·90. The following Monday, 29 January, Mr Slinn set about investigating her authority to hear the case and discovered that she did not have a general Queen's Bench 'ticket'. He also gained the impression in conversation with Mrs O'Callaghan that it was Judge Thompson who had released the case to her. Although that impression was corrected in her letter of 6 February, no mention was made of any transfer to the TCC. The first he heard of this was in a letter dated 25 July 2001 from an official in the Lord Chancellor's Department in response to inquiries made by the Civil Appeals Office. In those circumstances it is scarcely surprising that Mr Slinn is puzzled as to what actually took place and questions its validity.

ISSUES IN THIS APPEAL

[6] I have found the researches and arguments of counsel, Mr Philip Sales for the Lord Chancellor's Department and Mr Nicholas Isaac for the appellant, both interesting and instructive. They have identified three issues. (1) What in fact happened on 25 January and was it effective to give Judge Davies authority to hear the case? This depends upon whether there was an effective transfer to the TCC and whether the undoubted breaches of the rules which took place were fatal to her jurisdiction. (2) If she did not have jurisdiction, was her sitting rescued by the common law doctrine of de facto authority? (3) If it was so rescued, is this sufficient to comply with the requirement that the court be

'established by law' for the purpose of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)?

DID THE JUDGE HAVE AUTHORITY TO HEAR THE CASE?

[7] In recent years, especially following the Woolf reforms and the Civil Procedure Rules 1998, there has been increasing integration between the different courts in the civil justice system. Nevertheless, the High Court and the county courts are still separate courts, constituted under different statutes, with different judges appointed in different ways and under different terms of appointment. While High Court judges automatically have jurisdiction in the county courts (by virtue of s 5(3) of the County Courts Act 1984), the same is not true in reverse. There are two provisions in the Supreme Court Act 1981 under which circuit judges may be given power to exercise the jurisdiction of the High Court: s 9 of the 1981 Act is headed 'Assistance for transaction of judicial business of Supreme Court' and s 68 of the 1981 Act is headed 'Exercise of High Court jurisdiction otherwise than by judges of that court'.

[8] Section 9(1) provides:

> 'A person within any entry in column 1 of the following Table may ... at any time, at the request of the appropriate authority, act—(a) as a judge of a relevant court specified in the request; or (b) if the request relates to a particular division of a relevant court so specified, as a judge of that court in that division.'

Column 1 is headed 'Judge or ex-judge' and includes 'A Circuit judge' at item 5. Column 2 is headed 'Where competent to act on request' and against item 5 says 'The High Court and the Court of Appeal'. By s 9(2)(b) the 'appropriate authority' to make the request for a circuit judge to sit in the High Court is the Lord Chancellor. By s 9(3)(b) it is the duty of a circuit judge to comply with such a request. There is nothing to suggest that such a request cannot be made ad hoc or orally. In practice, however, the Lord Chancellor, after consultation with the senior judiciary, appoints individual circuit judges as 'section 9 judges' to sit in one or more divisions of the High Court. He has not delegated this function to the presiding judges. Hence there is no suggestion that Toulson J could have requested Judge Davies to sit under s 9. What might have happened had Mrs O'Callaghan instead contacted the judicial appointments branch of the Lord Chancellor's Department one can only speculate, but it seems unlikely that they would have been able to respond favourably in such a short space of time. It follows that the only way in which Toulson J could have given Judge Davies authority to hear this case was by transferring it to the TCC list.

[9] The TCC is not a separate court constituted by statute. It is the modern name, adopted in 1998, for that part of the business of the High Court which was done by official referees. The Supreme Court of Judicature Acts 1873 and 1875 created 'Official Referees of the Supreme Court of Justice' to whom any question could be referred for trial if it involved prolonged investigation of documents or accounts or any scientific or local investigation. Initially they could not give judgment or make orders as to costs, but in the Supreme Court of Judicature Act 1884 they were given power to give a judgment, make orders for costs and exercise all the powers of the High Court in a case referred to them. When the office of circuit judge was created in the Courts Act 1971 it was provided that in

future official referees' business would be dealt with by such circuit judges as the Lord Chancellor should determine.

**[10]** The present legislative provision is contained in s 68(1) of the 1981 Act:

> 'Provision may be made by rules of court as to the cases in which jurisdiction of the High Court may be exercised by—(a) such Circuit judges, deputy Circuit judges or Recorders as the Lord Chancellor may from time to time nominate to deal with official referees' business ...'

That provision was formerly made under RSC Ord 36. Official referees' business included any cause or matter begun in the Chancery or Queen's Bench Division which met the criteria laid down in the 1873 Act or for which trial by an official referee was 'desirable in the interests of one or more of the parties on grounds of expedition, economy or convenience or otherwise'. Cases which were begun in the Chancery or Queen's Bench Division in the usual way could be treated as official referees' business from the outset or transferred to be so dealt with.

**[11]** The relevant rules are now the CPR. CPR Pt 49 deals with 'Specialist Proceedings'. Rule 49(1) provides that the CPR shall apply to the listed proceedings subject to the provision of the relevant practice direction which applies to those proceedings. The list, in r 49(2)(e), contains 'Technology and Construction Court Business (as defined by the relevant practice direction)'. The relevant practice direction is CPR PD 49C. Paragraph 1.2 defines a 'TCC claim' as one 'which involves issues or questions which are technically complex or for which a trial by a judge of the TCC is for any other reason desirable'. Such claims may now be begun and dealt with either in the High Court or in a county court but unless a judge of the TCC otherwise directs must be dealt with by a judge of the TCC. As before they may be allocated to the TCC at the outset or transferred there later. Paragraph 2.2 provides:

> 'The TCC is a specialist list for the purposes of the CPR Part 30 (Transfer) but no order for the transfer of proceedings from or to the TCC shall be made unless the parties have either: (1) had an opportunity of being heard on the issue, or (2) consented to the order.'

CPR Pt 30 deals with transfers between and within courts. Rule 30.5(2) provides that the court may order proceedings to be transferred to or from a specialist list (though any application for this has to be made to a judge dealing with claims in that list). Rule 30.4(1) provides that where the court orders proceedings to be transferred, the court from which they are transferred must give notice to all parties. The practice direction, CPR PD 30, para 4.1 also provides that the transferring court will immediately send notice of the transfer to the receiving court.

**[12]** Mr Isaac, on behalf of the appellant, first argued that Toulson J did not in fact transfer the case to the TCC list: that is not what he was asked to do, not therefore what he agreed to do, and not what Judge Davies thought he had done, nor was there any written order or other record made of such a transfer. Mr Isaac concedes, however, that Toulson J had power to order the transfer and the evidence is that this is indeed what Toulson J thought he was doing. This is scarcely surprising, given that he knew that this was the only way in which he could authorise Judge Davies to hear the case.

**[13]** It is obvious, however, that in making that order, several provisions of the CPR and practice direction were not complied with, principally the requirement in PD 49C, para 2.2 that the parties consent or be given an opportunity to be

heard upon such a transfer. The question, therefore, is whether such a failure is so fundamental as to vitiate the transfer or whether it is covered by CPR 3.10:

> 'Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.'

[14] The argument is that there are some failures to comply with the rules, or even the practice directions, which are so fundamental that they cannot be described simply as an 'error of procedure' and r 3.10 cannot apply to them. Some colour is given to that argument in this case by s 68(1) of the 1981 Act, because the jurisdiction of the High Court may only be exercised by the judges nominated to deal with official referees' business in those cases for which provision is made by rules of court. To that extent the rules are conferring a jurisdiction upon a person which he or she would not otherwise have. One problem with that argument is that, as Mr Isaac concedes, there are some breaches of the rules relating to transfer to which r 3.10 does apply. It is difficult therefore to conclude that it *cannot* cover PD 49C, para 2.2.

[15] The question is more whether in this case it would be wrong for it to do so, so that this court should 'order otherwise'. The failure to afford an opportunity to be heard will sometimes be such a denial of natural justice as to render the application of any such cure completely inappropriate, irrespective of whether the opportunity would have made any difference: refusing to listen to one of the parties during the trial of the action is an obvious example. The failure to afford an opportunity to be heard on a purely procedural matter is less likely to fall into that category but could do so, particularly if the matter cannot be cured by reconsidering the original decision.

[16] More commonly, however, the court will have a discretion whether or not to disapply r 3.10(a) in which a number of factors will have to be balanced. Prominent amongst these will be the prejudice to each party if that does, or does not, happen. There may of course be good reasons to object to a transfer to the TCC list, but in this case its purpose was purely to secure the trial of the action on the date which had already been fixed and for which parties were prepared. This in itself fulfilled the criteria for a transfer to that list. It would be different if such a transfer had been used as a device to enable a judge to try a case which he or she was not qualified to hear: an example might be a complex medical negligence case. But this was the sort of case which this judge was eminently well qualified to hear: it was a straightforward claim for services rendered of the sort that is usually dealt with in a county court. The judge has been nominated to deal with the much more complex cases, often involving difficult points of law as well as fact, which are tried in the TCC. There was no reason not to order a transfer in this case and there is no reason now to think that either party was prejudiced either by the transfer or by not being given an opportunity to be heard on the matter. For us to order otherwise under r 3.10 now would substantially prejudice the successful party. He would be deprived of the benefit of the judgment and put to the trouble and expense of defending himself all over again. It is only if, for example, the alternative was to fix the claimant with the judgment of an unqualified or inappropriate tribunal that a contrary interest should come into the reckoning.

[17] I therefore conclude that the transfer of this case to the TCC list to be heard by Judge Davies was a valid order of the court and effective to give her

power to hear it. I do however have considerable sympathy for the appellant. There is little point in having two different courts and an elaborate system for deciding which judge is qualified and suited to hear which sort of case if it can be circumvented in this fashion. It was a fortunate chance that Judge Davies was a nominated TCC judge. It might be thought preferable for the Lord Chancellor to ensure that there are sufficient judges authorised under s 9 of the 1981 Act to cater for emergencies of this sort or alternatively to have an appropriate rapid response system.

ACTS OF A DE FACTO OFFICER

**[18]** That is sufficient to determine this appeal. Nevertheless, we have heard argument on whether, even if the case had not been validly transferred to the TCC, the judge's order is valid as the act of a de facto officer. This long-standing doctrine of the common law is summarised thus in Wade and Forsyth *Administrative Law* (8th edn, 2000) pp 291–292:

> 'The acts of an officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so.'

**[19]** It was held by Sir Jocelyn Simon P in *Adams v Adams (A-G intervening)* [1970] 3 All ER 572, [1971] P 188 that despite the lack of modern English authority applying the doctrine, it was still part of the English common law (and had been overlooked in *R v Cronin* [1940] 1 All ER 618). He referred ([1970] 3 All ER 572 at 588, [1971] P 188 at 211) to 'two masterly judgments of great learning', *State v Carroll* (1871) 38 Conn 449, in the Supreme Court of Connecticut, and *Re Aldridge* (1897) 15 NZLR 361, in the Court of Appeal of New Zealand, and also to an even more learned article by Sir Owen Dixon, later Chief Justice of Australia, 'De Facto Officers' (first published in *Res Judicatae* (Melbourne, 1938) reproduced in Woinarski, ed *Jesting Pilate* (1965) pp 229–237).

**[20]** Sir Owen explains that the doctrine has its origin in the medieval conception of an office as property, an incorporeal thing, to which the usual principles of the law of property applied. Thus a person who dispossessed another of his office, a disseisor, was nevertheless entitled to exercise the authority of that office, unless and until the disseisee exercised his right of re-entry. Nowadays, the rule is based not on that technicality but on public policy. Sir Owen quotes (p 231) from *Curtin v Barton* (1893) 139 NY 505 at 511:

> 'When a court with competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge, who presides in the court, to his office.'

**[21]** Despite its technical rationale in the notion of disseisin, the authorities show that the de facto officer must have some basis for his assumption of office, variously expressed as 'colourable title' or 'colourable authority'. Quite what suffices for that purpose has been debated, a particularly broad view being taken in *State v Carroll* (1871) 38 Conn 449. In that case, the elected judge of the city court not being available, the clerk of the court invited a justice of the peace to act in his place. The report does not reveal whether or not that justice knew that he had no lawful authority to sit. After an extensive review of the authorities,

Butler CJ (at 471–472) summarised the circumstances in which the doctrine would apply:

> 'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised, First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth, [under an unconstitutional statute, not relevant here] ...'

The first was sufficient to validate the justice's acts.

**[22]** But the judge must not be a mere usurper who is known to have no such colourable authority. The doctrine depends upon his having been generally thought to be competent to act and treated as such by those coming before him. The contrast is well illustrated by *Re Aldridge* (1897) 15 NZLR 361 and *Adams v Adams (A-G intervening)* [1970] 3 All ER 572, [1971] P 188. Mr Sales also suggests that the doctrine does not apply where the person concerned knows himself to be a usurper even if the litigants appearing before him do not. That is consistent with the approach and dicta in those two cases. It is harder to reconcile with all the authorities, including the robust approach of Lord Denning MR in his dissenting judgment in *Re James (an insolvent) (A-G intervening)* [1977] 1 All ER 364, [1977] Ch 41, quoted by Ward LJ at [58], below: he would also have applied the doctrine to the facts of *Adams'* case.

**[23]** In *Re Aldridge* (1897) 15 NZLR 361, the New Zealand Court of Appeal applied the doctrine to the acts of Mr Edwards, a barrister who had been appointed as a Supreme Court judge in the proper fashion by the Governor but whose appointment had later been declared invalid by the Privy Council (see *Buckley v Edwards* [1892] AC 387) because Parliament had only provided for four such judges and he was the fifth. It was argued that the doctrine could not apply where the office to which he had purportedly been appointed did not exist, but the Court of Appeal held otherwise. Prendergast CJ (1897) 15 NZLR 361 at 366) put it this way:

> 'It may be assumed that on the occasion there was a duly-appointed session of the Court; that there was no *de jure* Judge there; that the officers of the Court and others then present received and treated Mr. Edwards as a Judge of the Supreme Court; that he had prior to the occasion of the then sitting performed judicial acts under the *bona fide* pretence or colour of being a Judge of the Court; and, in short, that in repute he was on the occasion of the sitting a Judge of the Court.'

**[24]** The authorities are extensively reviewed in the judgment of Richmond J, who also quotes from *State v Carroll*. Richmond J observed (at 372):

'It may well be that the principle which validates the acts of a Judge *de facto* cannot be invoked for their own protection by any who wilfully abuse the office, still less by mere usurpers.'

Similarly, Denniston J (at 379):

'He cannot be termed a usurper of his office, and the result of all the authorities seems to me to be that it is only in the case of a usurper—that is, a person without a colourable title—that judicial acts done in due form in a competent Court are other than valid and unimpeachable.'

Connolly J also referred (at 380) to the fact that Mr Edwards was not a usurper and continued:

'The error in appointing Mr. Edwards as a Judge when there was no judgeship vacant was that of the Governor and his Advisers, and cannot, in my opinion, prejudice the position *de facto* of his appointee ...'

**[25]** In *Adams v Adams (A-G intervening)* [1970] 3 All ER 572, [1971] P 188, however, Sir Jocelyn Simon P declined to recognise a divorce decree granted in Rhodesia by a judge who had been appointed under the constitution adopted in 1965 after the Unilateral Declaration of Independence. The case did not fall within the de facto doctrine 'even so widely stated' as in *State v Carroll* because the circumstances of his appointment which made it invalid in the eyes of English law were very well known, indeed notorious. Sir Jocelyn Simon P commented ([1970] 3 All ER 572 at 590, [1971] P 188 at 214): '... I can find no trace of its ever being applied during a rebellion to accord recognition to the judicial or official acts or under a usurping power ...'

**[26]** It is not unknown for statute to provide for this sort of problem expressly. Section 9(1) of the Courts and Legal Services Act 1990 gives power to the Lord Chancellor to direct that certain kinds of family proceedings in the county courts shall be allocated to specified judges or specified descriptions of judges: this is the basis for the system of 'ticketing' judges to hear cases concerning children. Section 9(3) of the 1990 Act provides:

'Where any directions have been given under this section allocating any proceedings to specified judges, the validity of anything done by a judge in, or in relation to, the proceedings shall not be called into question by reason only of the fact that he was not a specified judge.'

**[27]** This calls to mind the first statute passed after the accession of Edward IV, about which Sir Jocelyn Simon P in *Adams'* case and Richmond J in *Aldridge's* case disagreed. According to Richmond J ((1897) 15 NZLR 361 at 369):

'On the accession of Edward IV. the three preceding kings of the Lancastrian line were declared to have been usurpers; which might have occasioned uncertainty as to the validity of judicial acts done by those kings, and by Judges of their appointment. To avoid doubts on this and other cognate subjects, an Act was passed (1 Edward IV.) which declares valid judicial acts, recoveries, and processes in any Court held in the times of Henry IV., Henry V., and Henry VI. (described as "lately kings *de facto sed non de jure*"), and confirms the commissions of the Judges appointed by those kings, and all processes, determinations, executions, &c., thereto appendant. This Act is declaratory, and is expressed to be, to eschew (*eschuer*)—*i.e.* avoid—doubts which might arise; and, accordingly, in *Bagot's*

*case* ((1469) YB 9 Edw 4) it was treated by both parties and by the Court as merely affirming the common law.' a

**[28]** Sir Jocelyn Simon P, in *Adams'* case [1970] 3 All ER 572 at 589–590, [1971] P 188 at 213, did not agree that this statute was merely declaratory; nor was the Act for Confirmation of Judicial Proceedings passed in 1660. But he did not read these as calling in question the general de facto doctrine. He merely regarded them as no exception to the principle which he enunciated, that the doctrine had not been applied to the prejudice of any right of a sovereign. For what it is worth, therefore, I would not regard a provision such as s 9(3) of the 1990 Act as calling in question the continued applicability of the common law doctrine. b

**[29]** The circumstances of this case clearly do fall within the doctrine. Judge Davies is indeed a judge, validly appointed as such. All those involved in arranging for her to hear this case believed that the case had been properly assigned to her. She herself believed the same. She sat as such and was treated as such by everyone involved. The query raised by Mr Slinn at the outset, to which he received the answer given by the judge, was not such as to deprive her of the de facto authority which flowed from all those circumstances. It could not be said that her want of authority was notorious. c d

**[30]** It is not necessary to express a view upon whether the doctrine would apply had the circumstances been different. What, for example, would be the case if Mrs O'Callaghan, knowing perfectly well that Judge Davies did not have the requisite ticket, had persuaded her to sit? Would that be covered provided that Judge Davies thought that Mrs O'Callaghan had secured the necessary request from the Lord Chancellor's Department? Would it make any difference if Judge Davies had allowed herself to be persuaded to sit knowing that she should not? From the point of view of the litigants who went through the whole case thinking that she was authorised to hear it, none of this should make any difference at all. However desirable it might be to state the doctrine in such a way as to discourage officials and judges from behaving like this, the public policy considerations which lie behind it point in the other direction. But what if the court usher had been persuaded to sit and everyone in court had behaved as if he were entitled to do so? There must come a point at which, whatever the public perception, there is no basis for applying the de facto doctrine. The dividing line between what is and is not sufficient 'colour' in borderline cases may not be as clear as one would like, but fortunately the point does not arise for decision here. e f g

ARTICLE 6

**[31]** Under art 6(1) of the convention, everyone is entitled, in the determination of his civil rights and obligations, to a fair hearing before 'an independent and impartial tribunal established by law'. If Judge Davies had not been properly authorised to hear this case, could the court be 'established by law' for this purpose? Mr Sales argues that the de facto doctrine, being itself part of the common law, is sufficient to fulfil this requirement. It is for the national law to determine what is and is not a lawful tribunal. The convention does not impose any particular requirements, other than that it be independent and impartial. Judge Davies was both independent and impartial in this case. h j

**[32]** Mr Isaac argues that the doctrine is designed to validate the acts of someone who by definition was not legally entitled to perform them rather than to validate the appointment itself. The court cannot therefore be regarded as 'established by law' even if its acts are not susceptible to challenge.

[33] Mr Isaac relies upon the decision of the European Court of Human Rights in *Pfeifer v Austria* (1992) 14 EHRR 692. Two of the judges who had acted as investigating judges in Mr Pfeifer's case also presided at his trial, despite a clear provision of the Code of Criminal Procedure disqualifying them. Obviously they knew about this. The European Commission of Human Rights (the Commission) dealt with whether the court was 'established by law' separately from whether it was 'impartial' and held that it was not. The court held that the two complaints coincided: the court was not established by law because of the disqualification which national law had imposed so as to remove all reasonable doubt as to the impartiality of trial courts. Hence there was a breach of art 6(1) (and there had not been an effective waiver of the applicant's rights). Not surprisingly, although the object of the ticketing system has nothing to do with avoiding bias, Mr Isaac argues that the lack of proper qualification and authority to try this case should be equated with the disqualification in *Pfeifer*'s case.

[34] Mr Sales points out that there was no Austrian equivalent to the de facto doctrine. This, he argues, does something more than merely validate the acts of an invalid tribunal. It is properly understood as a rule of law which establishes the lawful composition of the court. It determines which tribunals will be recognised as acting legitimately as a court for the purpose of our legal system. This is consistent with the object of the legality requirement in art 6(1) as stated by the Commission in *Zand v Austria* (1978) 15 DR 70 at 80 (para 69)—

> 'that the judicial organization in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament.'

But this did not mean that Parliament had to regulate every detail: some things could be left to delegated powers of the minister. Holding valid Judge Davies' acts does not improperly expand the power of the executive. It is a judge-made rule designed to protect the interests of the litigants and public generally, and to promote certainty and finality in litigation, which are in themselves legitimate objectives: see *Stubbings v UK* (1996) 1 BHRC 316. In *EE v Federal Republic of Germany* App No 18889/91 (14 October 1992, unreported), the Commission had said that it was for the national courts to examine the question of their jurisdiction under national law: they were entitled to conclude that an adult criminal court had not acted arbitrarily (in assuming jurisdiction over someone who had only later claimed to be a juvenile). There is nothing arbitrary about the operation of the rule in this case.

[35] Mr Sales accepts, of course, that the rule must also comply with the usual requirements of accessibility and foreseeability (for which a better word might be predictability). A long-standing rule of the common law is sufficiently accessible even if it is often forgotten (there was no reference to it, for example, in the recent case of *Tameside Metropolitan BC v Grant* [2002] 3 FCR 238, [2002] Fam 194, where one of the three justices sitting in a family proceedings court was not a member of the family panel). All rules require interpretation to elucidate doubtful points and adapt to changing circumstances. This is acceptable as long as the result is consistent with principle and can reasonably be foreseen (see *SW v UK, CR v UK* (1995) 21 EHRR 363).

[36] I have no difficulty in concluding that the doctrine is sufficiently accessible and foreseeable. Despite the discussion earlier about the precise scope of the concept of 'colourable title' or 'colourable authority', its determination is no more unpredictable than many other questions in the common law. With

rather more hesitation, but assisted by the concept that there must be some basis for the authority assumed by the judge, I also conclude that the rule can be regarded as validating the establishment of the tribunal as well as the acts it performs. It is not there, in modern times, to protect usurpers. Rather it protects the individual citizen, who had good reason to think that he was appearing before a properly constituted court, acted accordingly and should not without more be deprived of the rights he has established as a result.

CONCLUSION

**[37]** As Mr Sales has been at pains to remind us throughout, the other party to this case has an interest in not being deprived of the benefit of his order and not being made to go through the whole process again unless there was something materially wrong with it. There was nothing materially wrong with this trial and it would be wrong to set it aside.

**[38]** I would dismiss this appeal.

**SEDLEY LJ.**

**[39]** I agree with Hale LJ that Judge Davies had authority de jure to hear the case as a judge of the Technology and Construction Court despite the want of notice of transfer. I agree too, however, that the alternative argument that the judge in any case possessed de facto authority deserves at least provisional attention, and I adopt with gratitude Hale LJ's scholarly account of the law.

**[40]** If the outcome depended on it I would be troubled nevertheless by Hale LJ's proposition (at [29], above) that the judge's response to Mr Slinn's query about her status—'The matter ... comes before me, sitting as a High Court judge today ...'—was not such as to deprive Judge Davies of the de facto authority flowing from the surrounding circumstances. I entirely agree that the judge's want of authority in that capacity was not notorious; but might it be said that it was or should have been known to her?

**[41]** None of the reported cases deals in terms with the situation of the judge who is believed by the public and the litigants to have due authority but who himself knows, or ought to know, that he does not. Mr Sales readily accepted in argument that de facto authority should not extend to such a case. In a subsequent written submission he has pointed to passages in *Re Aldridge* (1897) 15 NZLR 361 which at least lean towards this proposition. Thus Richmond J said (at 372):

> 'It may well be that the principle which validates the acts of a Judge *de facto* cannot be invoked for their own protection by any who wilfully abuse the office, still less by mere usurpers.'

Denniston J said (at 379):

> '... the result of all the authorities seems to me to be that it is only in the case of a usurper—that is, a person without a colourable title—that judicial acts done in due form in a competent Court are other than valid and unimpeachable.'

All the judges held that Mr Edwards was not a mere usurper. But it is apparent from the report that the claim was based on the non-existence in law of the office to which he had been purportedly appointed. The New Zealand Court of Appeal was not, it seems, invited to consider whether Mr Edwards must have known

that he was being appointed to a non-existent office and, if so, whether that made him a usurper.

[42] Mr Sales' further submission that Lord Ellenborough CJ had the same point in mind when he spoke in *R v Bedford Level Corp* (1805) 6 East 356 at 368–369, 102 ER 1323 at 1328, of a de facto officer as 'one *who has the reputation of being the officer he assumes to be*' is very doubtful. The primary meaning of 'assume' until relatively recent times was 'claim'.

[43] In the present state of authority the position of the usurper, in the sense of someone who discharges an office in the actual or constructive knowledge that he has no title to it, is in my view uncertain. If the purpose of the de facto doctrine is the maintenance of stability and confidence in the legal system and the prevention of technical disputes about the formalities of appointment, it might well be said that a sufficiently clearly reputed tenure of office should not be open to challenge even on the ground of the purported officer's knowledge of his own incapacity. Yet, as Mr Sales' response on behalf of the Lord Chancellor confirms, it goes entirely against the grain to validate the acts of someone who knows, even if the world does not, that he is not qualified to hold the office he is exercising.

[44] The expression 'colourable authority', upon which some of the decided cases turn, I find opaque. The adjective itself, which (so far as it is used at all) ordinarily connotes something specious and therefore false (see the *Oxford English Dictionary* entry), has acquired a legal meaning which is almost the opposite: 'Capable of being presented as true or right; having at least a *prima facie* aspect of justice or validity' (definition 2.b.). This too tends to collapse reality into appearance.

[45] In *Millar v Dickson* 2000 JC 648, the High Court of Justiciary had to consider the consequences for subsequent convictions and sentences passed by temporary sheriffs of its earlier decision in *Starrs v Ruxton, Ruxton v Starrs* 2000 JC 208 that a temporary sheriff was not an independent and impartial tribunal. Its decision that the objection had been impliedly waived was overset by the Privy Council in its judgment of 24 July 2001 (*Millar v Dickson* (*Procurator Fiscal, Elgin*) [2001] UKPC D4, [2002] 3 All ER 1041, [2002] 1 WLR 1615). But the Scottish court had also dealt with a second argument, namely that the temporary sheriffs were in any event de facto judges and their acts consequently beyond challenge. This argument the High Court of Justiciary rejected, and it was not revived on the appeal to the Privy Council.

[46] The leading opinion, that of Lord Prosser, contains a valuable consideration of the nature and effect of the de facto doctrine in a situation where the most it could achieve was to make unlawful acts unchallengeable by equiparating them with the de jure acts. His conclusion, in which the other judges concurred, was that this could have no bearing where the challenge was not directly to the tribunal but to the Lord Advocate's decision to pursue prosecutions before it. In particular, however, Lord Prosser said (2000 JC 648 at 663 (para 38)):

> 'The fact that the illegality of the prosecution flows from the tribunal not being independent and impartial does not mean that the tribunal itself is tainted with any illegality. The situation is quite different from that which obtains when there is a fundamental nullity, and a want of power which cannot be cured by waiver.'

[47] That Lord Prosser's second category exists seems clearly right in principle, but—and especially if the first proposition is also right—one wants to

know what factual situations it embraces. In such a highly problematical area, different objectives of legal and public policy can pull in different directions and legal doctrine begins to verge on the metaphysical. But a point must come at which the undesirability of undoing ostensibly valid judgments has to yield to the greater undesirability of letting unqualified people adjudicate on people's legal rights and obligations.

**[48]** It is clear that the last word has not been said about this; but the present case fortunately does not depend on the prickly issues which I have been inspecting from the safety of the unassailable proposition that Judge Davies had legal authority to adjudicate.

**WARD LJ.**

**[49]** I am extremely grateful to Mr Philip Sales for his very informative skeleton argument submitted on behalf of the Lord Chancellor's Department dealing with the history of official referees' business and its development to the present-day position of the Technology and Construction Court (TCC). Mr Sales, who appeared on the Department's behalf, added to the learning through his researches on the de facto doctrine. It led to a fascinating argument in which Mr Nicholas Isaac as counsel for the appellant played a full part. In the result, I entirely agree with Hale LJ that the appeal must be dismissed for the reasons she gives.

**[50]** Mr Slinn is understandably bewildered by what happened and by the explanations he has been given for what happened. This court owes him an explanation. The confusion arises because Judge Davies said at the outset of the case coming before her:

> 'The matter is in the High Court, as I understand it, because that is the only basis upon which any judgment could be enforced in Jersey, and otherwise it would not be in the High Court. It comes before me, sitting as a High Court judge today, it being released—having been released to me for the purpose of this hearing.'

**[51]** Having discovered after the trial that Judge Davies was only authorised to sit in the Family Division of the High Court and not in the Queen's Bench Division, Mr Slinn wrote to Mrs O'Callaghan, the diary manager for that part of the Western Circuit, and complained that the judge had acted without proper authority, that the mere fact that the case was 'released to her' did not in his view give her authority to act in a division of the High Court where she was not authorised. He contended accordingly that the trial was null and void. She replied:

> 'The presiding judge of the Western Circuit Toulson J released the case to Judge Davies in her capacity as a High Court judge. He has authority to nominate a judge for certain cases.'

In her witness statement filed for the purpose of this appeal she acknowledges:

> 'With hindsight I probably ought to have provided a fuller explanation of what had happened but at the time I did not see that Mr Slinn had any real grounds of complaint.'

**[52]** She has given us that fuller explanation and I have no reason whatever to disbelieve it. Indeed Mr Isaac quite properly did not challenge any of the evidence submitted to us by the Lord Chancellor's Department. Thus the undisputed

position is that she knew that Judge Davies was not 'ticketed' for Queen's Bench matters but was ticketed to hear TCC matters. She therefore sought Toulson J's approval for the case to be released to her. The mechanics of the release were by way of the transfer of the matter from the general business of the Queen's Bench Division to the specialist list for proceedings in the TCC (which, as it happens, is still a part of that Division). That is what Toulson J did. He was entitled to do so by virtue of CPR 30.5(2). He ought to have given Mr Slinn the opportunity of being heard as required by CPR PD 49C, para 2.2 but that breach did not invalidate the transfer because of the operation of CPR 3.10(a). For the reasons given by Hale LJ, I, too, would not now order that the error has invalidated the transfer. In the result I am satisfied that Judge Davies was properly authorised to try the action as an appointed judge of the TCC to which the matter had been validly transferred.

**[53]** I appreciate that such a technical explanation may not satisfy Mr Slinn's legitimate query about the judge's apparent perception, which on the analysis I have just conducted was a wrong perception, that she was 'sitting as a High Court judge', the case having been 'released to me for the purposes of this hearing'. The case may have been 'released' to her, but she was not sitting as a High Court judge, only as a TCC judge. When she was asked to explain that remark, she told a member of the Lord Chancellor's Department that what she had said was in accordance with her understanding of her authority to hear the case. I have no reason whatever to doubt her explanation. I am totally satisfied that she sat genuinely believing she was authorised to do so.

**[54]** It is easy to see how she could have come to think that. Mrs O'Callaghan did not speak to Judge Davies personally but left a message for her with the listing officer at the Portsmouth Combined Court. It is apparent that at least part of the message was that the case had been released to Judge Davies because approval of that release was what she had sought from and been granted by Toulson J. If told, as she must have been, that the case had been released to her, I can readily understand that she, like most judges, would simply accept what she had been told and would get on with the job she was paid to perform, trying the cases put in front of her. For most judges the 'ticketing' process is an arcane mystery known only to the Lord Chancellor and presiding and liaison judges. It is not within the ken of ordinary mortals. Judges may know they do not have a full s 9 ticket (see s 9 of the Supreme Court Act 1981) but may assume that ad hoc authority can be and has been conferred to cover the trial of a particular case if the presider says that case has been released to that judge. That seems to me to have been Judge Davies' perception.

**[55]** It is not clear from Mrs O'Callaghan's evidence whether the listing officer in Portsmouth was told that the mechanism of the release was by way of transfer of the case to the TCC. Even if it was explained, I am not at all surprised that the listing officer would not have grasped the technicalities or conveyed them to Judge Davies. I am quite sure that if the judge had been told or had appreciated what had actually happened she would have said so. There was no reason not to do so. She would have explained that the transfer solved both problems. It was an expedient device which not only kept the case in the Queen's Bench Division for enforcement purposes but also made available a judge qualified to try the matter and so saved the fixture.

**[56]** In my judgment none of this speculation really matters. The two points upon which I am utterly clear are: (i) this was not an invalid transfer to the TCC in which the judge was authorised to sit and for that reason the judgment is not

a nullity; (ii) the judge genuinely believed that, one way or another, she was authorised to hear this case.

**[57]** The former conclusion is the end of the appeal, but I am prepared to deal with Mr Slinn's anxiety that *if* she was sitting as a judge of the Queen's Bench Division and was not authorised to exercise that jurisdiction, then the invalidity in her appointment should nullify her judgment. There is some authority for that proposition that I have been able to trace. In *R v Cronin* [1940] 1 All ER 618 the appellant had been convicted at a borough quarter session presided over by a person appointed to act as a deputy recorder. This deputy was not, and never had been, a barrister as was required: he was a solicitor. The Court of Criminal Appeal held that the proceedings were void ab initio. I regard that decision to be of doubtful authority as no argument was addressed to the court on the application of the de facto doctrine. The deputy recorder, like Judge Davies in the circumstances postulated by Mr Slinn and assumed for the purpose of this argument was, in the words of Lord Ellenborough CJ in *R v Bedford Level Corp* (1805) 6 East 356 at 368–369, 102 ER 1323 at 1328: 'An officer ... *who has the reputation of being the officer he assumes to be*, and yet is not a good officer in point of law.'

**[58]** There is an interesting discussion on the application of the doctrine by Lord Denning MR in *Re James (an insolvent) (A-G intervening)* [1977] 1 All ER 364, [1977] Ch 41. Even if Geoffrey Lane LJ did not totally agree, Scarman LJ found it unnecessary to comment on *Adams v Adams (A-G intervening)* [1970] 3 All ER 572, [1971] P 188 which met with Lord Denning MR's criticism. Lord Denning MR said ([1977] 1 All ER 364 at 373, [1977] Ch 41 at 65–66):

> 'I cannot think it right that the validity of a divorce should depend on which particular judge hears the case. The decision [in *Adams'* case], if correct, applies to any case coming before the High Court of Rhodesia during the interregnum. It makes the validity depend on which particular judge makes any particular order. That seems to me absurd. Not only absurd, but quite unjust. When a person applies *after* UDI to the court in Rhodesia seeking justice, he cannot choose his judge. He cannot say whether his case will come in front of a judge of that court who was appointed before UDI or a judge who was appointed afterwards. He may not even be able to find out. At any rate, he cannot say, "I will not have Mr Justice Beck—I want Mr Justice Goldin". Simple justice demands that it should make no difference. No matter by whom the man was appointed a judge, no matter at what date he was appointed, he is sitting as a judge of the court and the order made by him is an order of the High Court of Rhodesia. He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. *Maybe he was not validly appointed.* [I add the emphasis for Mr Slinn's benefit.] But, still, he holds the office. It is the office that matters, not the incumbent. I remember when I was first appointed a judge, a senior but disappointed member of the Bar raised his hat to me, saying: "I raise my hat, if not to you, at any rate to the office." So long as the man holds the office, and exercises it duly and in accordance with law, his orders are not a nullity. If they are erroneous, they may be upset on appeal. But if not erroneous, they should be upheld. Such is the theme which runs through the important case in the Supreme Court of Connecticut: [*State v Carroll* (1871) 38 Conn 449]; and the Court of Appeal in New Zealand in *Re Aldridge* ((1897) 15 NZLR 361). The point is well put in the United States Court, *Norton v*

*Shelby County* ((1886) 118 US 425 at 444–445): "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions ... The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact." In the light of these cases, I think the decision of the Court of Criminal Appeal in *R v Cronin* ([1940] 1 All ER 618) was wrongly decided. So was *Adams'* case ([1970] 3 All ER 572, [1971] P 188).'

**[59]** I am quite satisfied that even if there were some defect in the appointment of Judge Davies, the de facto doctrine operates so as to protect her judgment from the charge that it was invalid.

**[60]** It is, therefore, quite unnecessary to speculate about the position of the impostor or the judge who acts in bad faith but very interesting questions would arise in either of the fanciful scenarios where: (i) the usher with delusions of grandeur locks the new recorder in his room and takes his place on the Bench; or (ii) the new recorder, on his first outing and being ever anxious to please the county court where he is to sit for the first time, is prevailed upon to do everybody a favour and hear the Queen's Bench action next door knowing full well it is beyond his jurisdiction. We all have experience (in courts other than our own, of course!) of fire-breathing listing officers who must be obeyed and we know how hard it is to refuse them.

**[61]** We have not had full argument on these questions which do not arise in this appeal and what follows is my tentative first impression. In the former case the 'judge' is not a judge at all, has no colour of office and cannot assume it. For what it is worth, I would treat the judgment as a nullity. In the latter case a 'proper' judge knew he was exceeding his jurisdiction. There would be a clash of two principles of public policy—the need for certainty which underpins the de facto doctrine, and the need for justice to be administered by judges who are honest and impartial. The judgment of a judge infected with actual bias would probably be a nullity. I noted in *Millar v Dickson (Procurator Fiscal, Elgin)* [2001] UKPC D4, [2002] 3 All ER 1041, [2002] 1 WLR 1615, to which Sedley LJ has referred, an observation of Lord Prosser in *Starrs v Ruxton, Ruxton v Starrs* 2000 JC 208 at 232: 'I would regard the concept of a partial judge as a contradiction in terms.' So too a judge who knows he is not a judge authorised to exercise the judicial function in the trial or matter before him. His judgment would be 'a decision that never was' of the kind contemplated by Lord Donaldson of Lymington MR in *Daisystar Ltd v Town and Country Building Society, Townroots Ltd v Raja* [1992] 2 All ER 321 at 324, [1992] 1 WLR 390 at 394.

**[62]** Having warned myself that it is idle to speculate, I should heed my own warning and say no more than that I agree that the appeal should be dismissed.

*Appeal dismissed.*

Kate O'Hanlon Barrister.

# Batchelor v Marlow and another

[2001] EWCA Civ 1051

COURT OF APPEAL, CIVIL DIVISION

HENRY, TUCKEY AND KAY LJJ

28 JUNE 2001

*Easement – Right to park cars – Claimant owning land which could accommodate parking for no more than six cars – Judge holding that defendants had right to park six cars on land during working hours – Whether right capable of existing as easement.*

The defendants, who ran a garage business, parked cars on land belonging to the claimant. No more than six cars could be parked on the land. In proceedings between the parties, the defendants asserted that they had an easement to park and store cars on the land. The judge held that they had acquired an exclusive prescriptive right to park six cars on the land between 8.30 am and 6.00 pm Monday to Friday in connection with their business. In so holding, the judge concluded that such a right was capable of subsisting as an easement since, being limited in time, it did not, as a matter of degree, amount to such exclusion of the claimant as to preclude the right from subsisting. The claimant appealed.

**Held** – The right found to exist by the judge was not capable of being an easement. The claimant had no use of the land for parking during the whole of the time that parking space was likely to be needed. Moreover, his right to use his land for any other purpose was curtailed altogether for intermittent periods throughout the week. Such a restriction would have made his ownership of the land illusory. The appeal would, accordingly, be allowed (see [18]–[21], below).

**Notes**

For ownership and exclusive use, see 14 *Halsbury's Laws* (4th edn) para 34.

**Cases referred to in judgments**

*Bilkus v London Borough of Redbridge* (1968) 207 EG 803.

*Copeland v Greenhalf* [1952] 1 All ER 809, [1952] Ch 488.

*Dyce v Lady James Hay* (1852) 1 Macq 305, HL.

*London and Blenheim Estates v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307, [1992] 1 WLR 1278; *affd* [1993] 4 All ER 157, [1994] 1 WLR 31, CA.

**Cases also cited or referred to in skeleton arguments**

*A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, [1914–15] All ER Rep 444, PC.

*Barings plc (No 2), Re, Secretary of State for Trade and Industry v Baker* [1999] 1 All ER 311, [1999] 1 WLR 1985, CA.

*Crawley BC v Hickmet Ltd* (1997) 75 P&CR 500, CA.

*Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481, [2002] 2 AC 1, [2001] 2 WLR 72, HL.

*Leon Asper Amusements Ltd v Northmain Carwash & Enterprises Ltd* (1996) 56 DLR (2d) 173, Manitoba QB.

*Marlow v Secretary of State for the Environment, Transport and the Regions* [2000] CA Transcript 686.

*Miller v Emcer Products Ltd* [1956] 1 All ER 237, [1956] Ch 304, [1956] 2 WLR 267, CA.

*Newman v Jones* (22 March 1982, unreported), ChD.

**Appeal**

William Batchelor appealed with permission of Mummery LJ granted on 8 August 2000 from the decision of Nicholas Warren QC sitting as a deputy judge of the Chancery Division on 11 May 2000 declaring that his entitlement to be registered as proprietor of freehold land known as Albert Road, Sutton, Surrey was subject to the right of the respondents, Peter Robert Marlow and Patricia June Marlow, to park up to six cars on a specified part of the property between the hours of 8.30 am and 6 pm on working days. The facts are set out in the judgment of Tuckey LJ.

*Bridget Williamson* (instructed by *Penningtons*, Newbury) for the appellant.

*Mark West* (instructed by *WH Matthews & Co*, Kingston-upon-Thames) for the respondents.

**TUCKEY LJ** (giving the first judgment at the invitation of Henry LJ).

[1] Albert Road in Sutton is an unadopted dirt road which now belongs to the appellant, Mr Batchelor. The public right of way over this road does not however extend to its whole width. The appeal concerns an L-shaped strip of land to the south and west of the public highway, effectively its verge. This land is shown marked pink on the large scale plan which we have been given.

[2] Mr Nicholas Warren QC, sitting as a deputy judge of the Chancery Division ([2001] RTR 175), held that the respondents, who run a nearby garage business, had acquired an exclusive prescriptive right to park up to six cars on the pink land between 8.30 am and 6 pm Monday to Friday. The appellant contends, firstly, that such a right is not capable of being a valid easement and in any event that the judge's findings of fact did not justify the conclusion that such a right had been acquired. We have only heard argument on the first point.

[3] It is common ground that only six cars can be parked on the pink land. If the respondents' right to park in this way is upheld, the adjoining land, which does not belong to the appellant, will probably not be able to be developed since the present planning permission for its development requires the pink land to be used as a small roundabout or turning circle in connection with the development.

[4] In the proceedings the respondents asserted rights to park and store cars on the pink land and other parts of the appellant's land along Albert Road. It was common ground that a right to park could exist as an easement but there was some argument before the judge as to whether such a right could be acquired by prescription. The judge stated his conclusion about this as follows (at 186):

> '35 ... obviously the evidence has to establish the right claimed: there may be difficulties in establishing a prescriptive easement of a detailed nature which could be created by express grant ...
>
> 36 However ... if the evidence does establish use which is consistent and only consistent with a right which, if it had been expressly granted, would

have been capable of subsisting as an easement, the court should recognise that right as capable of being established by prescription.' a

[5] This conclusion is not challenged, although Miss Williamson, for the appellant, argues that when one comes to consider whether the right asserted was capable of being an easement it was relevant to take account of the fact that it had been acquired by prescription. Thus she submitted a clear distinction should be drawn between cases where there was an express grant over land designated and/or laid out for parking and cases where the right had been acquired by prescription and therefore without the actual consent of the owner of the servient tenant and over land which had not been so designated or laid out. b

[6] For the purpose of this case I do not think it is necessary to decide whether Miss Williamson is right about this. I shall proceed on the assumption that there is no difference between the two situations for the simple reason that once the right is established the route by which that has been done does not matter. c

[7] In dealing with the point at issue on this appeal the judge simply said (at 190 (para 44)):

'... I consider that the exclusive right to park six cars during normal business hours on Mondays to Fridays in connection with the business carried on [by the respondents] is capable of subsisting as an easement ... In my judgment, such a right, being limited as it is in time, does not, as a matter of degree, amount to such exclusion of the claimant and his predecessors in title as to preclude it subsisting as an easement.' d e

[8] Earlier in his judgment he referred to the authorities and accepted that the question he had to answer was one of degree. This followed the approach adopted by Judge Paul Baker QC in *London and Blenheim Estates v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307 at 317, [1992] 1 WLR 1278 at 1288 who, after reviewing the earlier authorities on car parking, said: f

'The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land whether for parking or anything else, it could not be an easement, though it might be some larger or different grant.' g

[9] It was common ground before us that that was the essential question in this case and that there was no authority which provided the answer to it.

[10] The underlying principle is set out in *Gale on Easements* (17th edn, 2002) p 30 (para 1-52) which says: h

'... an easement ... involves a diminution of natural rights of ownership, and a grant under which the proprietary rights of the so-called servient owner are either shared or usurped cannot create an easement. For instance, "no man can be considered to have a right of property, worth holding, in a soil over which *the whole world* has the privilege to walk and disport itself at pleasure". The line is difficult to draw, and each new case would probably be decided on its own facts in the light of common sense.' j

[11] The authority for this proposition is cited as *Dyce v Lady James Hay* (1852) 1 Macq 305 at 309 where the House of Lords said:

'There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected.'

[12] That case was referred to by Upjohn J in the well-known case of *Copeland v Greenhalf* [1952] 1 All ER 809, [1952] Ch 488 about which considerable argument was addressed to us. Miss Williamson relied on it because she said the facts were similar to those in our case and the judge had held that the rights asserted were not capable of being easements because they would deprive the servient owner of any reasonable use of his land. Mr West, for the respondents, said that the facts were not similar and the judge only decided that the rights asserted were too uncertain to amount to an easement.

[13] In view of the fact that the parties are agreed what the right question is and that the answer to it depends upon the facts of each case, I see no need to grapple with these arguments, other than to say that I think it is clear from his judgment that Upjohn J rejected the claim because the rights asserted were both uncertain and too extravagant.

[14] Mr West referred us to the facts in *London and Blenheim Estates v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307, [1992] 1 WLR 1278 and in *Bilkus v London Borough of Redbridge* (1968) 207 EG 803, in an attempt to demonstrate that the courts were prepared to uphold extravagant easements to park. I do not think however that these cases help. The nature of the right considered by the judge in the *Blenheim Estates* case is not at all clear. In *Bilkus'* case the court had to construe the terms of a covenant given by the council to the claimant. It was not a case about easements at all, although the judge did characterise the covenant as an easement. I suspect that the covenant in that case fell within Judge Paul Baker QC's category of 'some larger or different grant'.

[15] After that short diversion I return to the question which has to be answered in this case. Does an exclusive right to park six cars for nine-and-a-half hours every day of the working week leave the appellant without any reasonable use of his land, whether for parking or anything else?

[16] Miss Williamson emphasises the fact that the right asserted is exclusive of all others, including the appellant. Car parking over the whole of the land is highly intrusive because no other use can be made of it when cars are parked on it. In practice it prevents the appellant from making any use of his land and makes his ownership of it illusory. Not so, says Mr West. Mathematically the respondents only have use of the land for 47-and-a-half hours per week, whereas the appellant has 120-and-a-half hours. He suggests various uses which the appellant could make of the land. He could sell it to the respondents or charge them for using it outside business hours, if that is what they wanted. Outside those hours he could park on the land himself or charge others for doing so. He would be able to concrete over the surface of the land without interfering with the right.

[17] I think these suggestions demonstrate the difficulties which Mr West faces. Sale to the respondents would amount to a recognition that the rights they asserted had given them in practice a beneficial interest and no doubt the price would reflect this fact. The appellant could of course park himself at night or the weekends but the commercial scope for getting others to pay for doing so must be very limited indeed. I cannot see how the appellant would benefit from concreting over the land, although this would certainly enhance the respondents' right.

[18] If one asks the simple question: 'Would the appellant have any reasonable use of the land for parking?' the answer, I think, must be 'No'. He has no use at all during the whole of the time that parking space is likely to be needed. But if one asks the question whether the appellant has any reasonable use of the land for any other purpose, the answer is even clearer. His right to use his land is curtailed altogether for intermittent periods throughout the week. Such a restriction would, I think, make his ownership of the land illusory.

[19] I therefore accept Miss Williamson's submissions on this aspect of the case. It follows that I do not think the right found to exist by the judge was capable of being an easement. In reaching this conclusion I am of course differing from the judge to whom I should pay tribute for his detailed and clear judgment in which he resolved a number of issues which are not the subject of this appeal. On the issue with which we are concerned, however, it does not seem to me from the passage which I have cited from his judgment that the judge fully realised the implications of his finding upon the appellant's right to make use of his own land. For these reasons I would allow this appeal.

**KAY LJ.**

[20] I agree.

**HENRY LJ.**

[21] I also agree.

*Appeal allowed.*

Alexander Horne Barrister.

# Mulvaney v Gough and others

[2002] EWCA Civ 1078

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, MANCE AND LATHAM LJJ

8, 24 JULY 2002

*Easement – Communal garden – Right to enjoy communal garden – Whether right to enjoy communal garden totally excluding any use of land by owners*

The claimant owned one of a group of cottages. The defendants owned the land behind the cottages, which had long been used by all the cottage owners as their back yard and communal garden. The claimant cultivated a garden, consisting of a flower bed and a grassed area, on part of the land. The defendants, who intended to gravel the surface to create vehicular access to adjoining land, removed the flower bed and part of the grass. In response, the claimant commenced proceedings for a declaration that she was entitled to rights over the land for the purposes of cultivating, mowing and otherwise enjoying it. The defendants contended that the right claimed effectively excluded them from any use of the land, and was for that reason incapable of being an easement. The district judge, concluding that the use claimed was long established and capable of being an easement, granted a declaration that the claimant was entitled to reinstate and maintain the flower bed. That decision was affirmed by the circuit judge. The defendants appealed to the Court of Appeal.

**Held** – The claimant was entitled to a right to use the land as a communal garden for recreational and amenity purposes, along with the other cottage owners. That right did not exclude the defendants from any use that they might want to make of the land. It restricted that use only to the extent necessary to ensure that the land, as a whole, could still be used as a communal garden. However, the district judge's declaration had gone further than had been necessary to reflect the right which had been established on the evidence. In so far as it suggested that the claimant had the right to the restoration of the flower bed, in the sense that the existence of the flower bed in that position had been the consequence of the right which the district judge concluded had been established, it was wrong. Whether any particular proposal by the defendants to create a driveway would substantially interfere with the claimant's rights would be a matter for consideration of all the facts. If, however, the defendants wished to carry out any works on the land, they would have to do so in a way that would substantially maintain its character as a communal garden for recreational and amenity purposes. It followed that the appeal would be allowed only to the extent of amending the declaration to reflect the right that had been established (see [24]–[27], [29]–[31], below).

*Re Ellenborough Park, Re Davies (decd), Powell v Maddison* [1955] 3 All ER 667 considered.

**Notes**

For ownership and exclusive use, see 14 *Halsbury's Laws* (4th edn) para 34.

**Cases referred to in judgments**

*Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 4 All ER 78, [2003] 1 WLR 764, CA.

*Copeland v Greenhalf* [1952] 1 All ER 809, [1952] Ch 488.

*Dyce v Lady Hay* (1852) 1 Macq 305, HL.

*Ellenborough Park, Re, Re Davies (decd), Powell v Maddison* [1955] 3 All ER 667, [1956] Ch 131, [1955] 3 WLR 892, CA; *affg* [1955] 2 All ER 38, [1956] 1 Ch 131, [1955] 3 WLR 91.

*Grigsby v Melville* [1973] 1 All ER 385, [1972] 1 WLR 1355; *affd* [1973] 3 All ER 455, [1974] 1 WLR 80, CA.

*London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307, [1992] 1 WLR 1278; *affd* [1993] 4 All ER 157, [1994] 1 WLR 31, CA.

*Wright v Macadam* [1949] 2 All ER 565, [1949] 2 KB 744, CA.

**Appeal**

Colin Gough, Bryan Holmes, Thomas Holmes and Emily Jackson appealed with permission of Longmore LJ granted on 20 September 2001 from the decision of Judge Kershaw QC in the Preston County Court on 16 July 2001 dismissing their appeal from the order of District Judge Ashton on 9 November 2000 declaring that the respondent, Elizabeth Carole Rachel Mulvaney, was entitled to reinstate and maintain a flower bed on land owned by the appellants which was adjacent to her own property. The facts are set out in the judgment of Latham LJ.

*Sean Kelly* (instructed by *Jobling & Knape*, Carnforth) for the appellants.

*Jonathan Gaunt QC* and *Mark Harper* (instructed by *Oglethorpe Sturton & Gillibrand*, Lancaster) for the respondent.

*Cur adv vult*

24 July 2002. The following judgments were delivered.

**LATHAM LJ** (giving the first judgment at the invitation of Simon Brown LJ).

[1] This appeal is concerned with an easement to which the respondent claims that she is entitled over land adjacent to her cottage, 7 East View, Galgate, Lancashire. Her cottage is one of a group of cottages which forms a block shaped like a reversed 'L', with the west aspect of the 'L' facing Chapel Street, and the southern side being bordered by a lane running east to west at right angles from Chapel Street. The respondent's property is the easternmost cottage. It lies on the junction between the lane and a strip of land running along the east side of her property of at least carriageway width which emerges onto open land on the north. Behind the cottages, within the confines of the inverted 'L', and emerging onto that strip of land is an area which forms the back yard of the cottages. The dispute is over the extent of the respondent's rights to use the back yard and the strip of land which are owned by the appellants. I shall refer to the back yard and the strip of land together as the 'blue land'.

[2] The cottages and the blue land were at one time owned by the appellants' predecessor in title, Joseph Holmes, who died on 5 December 1950. The cottages were gradually sold off. When the respondent's cottage was sold in 1970, the conveyance included—

> 'a right of way at all time and for all purposes in common with the vendors and all persons having the like right over and above the open yard adjoining the said premises and coloured blue on the said plan ("the blue land").'

[3] The respondent, however, claims that the right appurtenant to her cottage is more extensive by reason of the use of the blue land that has been made over the years. She had tended a garden on the strip of land consisting of a grassed area and a flower bed abutting the wall along the east side of the strip. On 11 April 1996, she returned to her cottage to find that a JCB had been used to remove the flower bed and part of the grassed surface of that area. The appellants were clearly seeking to exercise what they believed were their rights over that strip of land in order to create vehicular access to land both to the north and to the east. They were intending to gravel its surface, and had deposited gravel for that purpose. From the relevant dimensions set out on a plan with which we have been provided they clearly considered that they would be unable to obtain sufficient width for vehicular access unless the flower bed was removed, particularly as the respondent's back door opens outwards onto the strip of land.

[4] The respondent commenced proceedings claiming a declaration that she was entitled to 'freehold rights' over the blue land 'for the purposes of cultivating, mowing and otherwise enjoying the same and hanging washing' being a right acquired by use and passing as part of the title under s 62 of the Law of Property Act 1925. The appellants contended that the right claimed could not exist as an easement as it was so extensive that it amounted to nothing less than the right to shared possession of the blue land, so that, accordingly, the respondent was only entitled to the express grant of the right of way recorded in the conveyance to which I have referred. This argument was later modified to assert that the right claimed effectively excluded the appellants from any use of the land, and was for that reason incapable of amounting to an easement.

[5] The action was heard as a fast-track case by District Judge Ashton in the first instance. He heard the evidence and concluded that the use claimed was a long-established use and was capable of amounting to an easement. On 9 November 2000, he granted a declaration that the respondent was entitled to reinstate and maintain the flower bed in question. The appellants appealed. The appeal was heard by Judge Kershaw QC as a review of the district judge's decision; and he dismissed the appeal on 16 July 2001. He held that the facts found by the district judge were sufficient to found an easement known to law. The question before us is whether he was right.

[6] The relevant findings of fact were set out in the judgment of District Judge Ashton; it is necessary to set these out in some detail. He said:

> 'This case concerns the environment of a cottage known as 7 East View, Galgate, Lancashire, owned and occupied by the claimant. It is one of a group of cottages situated in East View and Chapel Street with an enclosed back yard. Most if not all of these cottages have been provided with modern amenities but they were originally served by water closets in the yard and such buildings still exist, although now used for other purposes if at all. The cottages were acquired by Joseph Holmes in 1932 and occupied by tenants, but following his death in 1950 the trustees of the estate have progressively sold them and some have changed hands several times since. Although rights were not always expressed in the same way, the policy of the trustees was (when possible) to sell just the cottages with rights over the yard and to retain ownership of the water closets. Thus when 7 East View (the

[respondent's] cottage) was sold off to Mrs Plahatu in 1970 the conveyance merely included "a right of way at all times for all purposes in common with the vendors or persons having the like right over and upon the open yard adjoining the said premises coloured blue on the said plans". Yet in 1959 when 1 East View was sold the conveyance had included, in addition to express water supply and coal bunker rights: "... A right of way and of use for drying purposes, over and in the said yard ... upon payment of a proportionate part of the expense of repairing and maintaining the same." And there was the standard agreement and declaration that all easements and quasi-easements should remain as they existed under one ownership. In 1974 when 9 Chapel Street was sold such provisions were reduced to: "The joint use of the yard or ground to the rear of the said property coloured blue on the said plan." One may wonder whether any distinction was intended, but in practice none was adopted by the residents and development of the yard by the owners would be effectively prevented by the terms of the conveyance of 1950 (of which there were several). The many witness statements from existing and former residents testify not only to a "communal" yard on "the blue land" but also to happy relationships between all residents. I am satisfied that over the decades, and certainly predating these sales, the entirety of the yard was used by the residents as amenity and garden land on a shared basis. That would have been the intention when the cottages were built in the nineteenth century and the way it was occupied when in common ownership. Nothing appears to have been done when the cottages were sold off to prevent this long-established regime from continuing and no distinction appears to have been made as regards any part of the land invariably shown coloured blue on these deeds. The evidence shows certain "ground rules" or understandings grew out of the need to avoid anarchy and this included provision of washing lines, space for dustbins and allocation of small flower beds so that the yard would resemble a domestic garden and be more attractive as an amenity enjoyed by all. To the extent the late Joseph Holmes and subsequently the trustees continued to own some of these properties they must have known and indeed acquiesced in what was going on and benefited from the higher prices that would be obtained when they came to sell individual properties. Whilst the yard regime was not spelt out in conveyances it was recounted to prospective purchasers and I am satisfied that there was no systematic attempt by either the Holmes family to inform initial and successive owners that all this was done with their permission which could be revoked at any time on a whim. Purchasers were inclined to take the situation on trust and not to insist that it was spelt out in the deeds. In so far as pieces of land were allocated for cultivation adjacent to each cottage this was part of the overall scheme. Acceptance by all would be essential because these small flower beds inevitably obstructed the mutual rights of way over the yard. Whilst each registered resident could say: "That is my garden", this would not be a claim to legal ownership but allocation as part of the overall scheme of the communal garden. During some period one occupier may have less time or be uninterested in the chore of garden maintenance and I have no doubt that an informal arrangement would be made with someone else for the upkeep of the allocated land. But generally each flower bed was regarded as being attributed to a particular cottage. The unallocated part of the yard was grassed over and there is evidence that people took it in turns to cut this and

keep it tidy. There is an abundance of evidence, collected by the [respondent] in the form of both statements and photographs, of the enjoyment of the communal yard—now a garden—by the residents over many years. There is also evidence of steps being taken by certain residents to question anyone who "trespassed" there ... I am satisfied that these communal rights have been acquired by prescription over the "blue land" by the [respondent] and those property owners to whom express rights as joint user were not granted. This long-standing basis of user and occupation with the cottages does not depend upon the express consent of the Holmes family as they now seek to allege. It is the de facto situation based upon more than 50 years' history ... The evidence of an already established communal yard is uncontested, not contestable now by reason of consent and not negatived by any express provision in [the respondent's] conveyance. At the very least this claimant will enjoy rights over the blue land equivalent to those expressed in the 1974 conveyance, that is joint use of the entire yard shown coloured blue on the plan. The nature and extent of that joint use depends upon what has been going on in the previous year and has continued during the 30 years since her cottage was sold off. There is no question but that the flower border on the passage adjacent to the cottage was part of the established scheme of things so that the [appellants] were not entitled to summarily remove it in 1996. The [respondent] has status to assert and protect the communal rights.'

[7] The district judge's reasons for granting a more restricted declaration than that which the respondent claimed was set out in a later passage in his judgment in which he said:

'There is also the question of the removal of the grass surface of the passage, being that part of the blue land between the [respondent's] flower bed and her cottage. The passage is part of the right of way enjoyed by all the cottages as an essential means of gaining direct access to the communal yard and their back doors. This area is more of an access road than the enclosed yard and the surface does not have to be grass. Although I condemn the manner in which the [appellants] removed this surface I am not, in the exercise of any discretion I may have, prepared to grant any relief to the claimant provided that the [appellants] now resurface this land in an acceptable manner so it can again be used as a right of way in all weather.'

[8] The appellants appealed to the circuit judge on a number of grounds, only one of which was pursued. It was in the following terms:

'The district judge erred in law in finding that a right to cultivate the common garden, hang washing and generally enjoy land was capable of existing as an easement and/or was capable of being acquired by prescription or implied grant.'

[9] The circuit judge, on those facts, held that the respondent had established a right known to law over the blue land, which he described as a right to use the land as a communal garden. The grounds of appeal to this court are that—

'The judge erred in law in holding that the right claimed by the [respondent] that is to say the right in common with the owners of the freehold properties surrounding the freehold land shown edged in blue and hatched black on the plan annexed to the defence ("the blue land") to use the

blue land as their communal garden was capable of existing as an easement and/or could be acquired by prescription or implied grant.' a

[10] The appellants accept that the findings of fact made by District Judge Ashton were sufficient to justify his conclusion that, if the use made of the blue land was capable of amounting to an easement, it had continued for sufficiently long to entitle the respondent to that easement either by prescription or implied grant under s 62 of the 1925 Act. It was submitted, however, that the easement as defined by the district judge and Judge Kershaw was so extensive as to amount, in effect, to a claim to use the land to the exclusion of the appellants, and was an attempt to dress up a claim for adverse possession, which could not succeed because of the shared nature of the use, as a claim for an easement. It was submitted that such an extensive use could not be justified as an easement even if the subject of an express grant, but certainly could not be created by way of prescription. We were referred to the House of Lords decision in *Dyce v Lady Hay* (1852) 1 Macq 305, in which the side note reads as follows: b c

'There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected. *Semble*—That where a claim in the nature of a servitude or easement is incapable of judicial control and restriction, it cannot be sustained by prescription. It does not follow that rights sustainable by grant are necessarily sustainable by prescription.' d

[11] This principle was applied by Upjohn J in *Copeland v Greenhalf* [1952] 1 All ER 809, [1952] Ch 488. In that case the plaintiff was the owner of an orchard, access to which was over a strip of land owned by the plaintiff. The defendant was a wheelwright, whose premises were opposite to the strip of land across a road, also owned by the plaintiff. The plaintiff brought an action against the defendant claiming to restrain him from placing and leaving vehicles on the strip. The defendant's claim was, as proved at the trial, that for 50 years he and his father before him had with the knowledge of the plaintiff and of her predecessors in title, continuously stored along the strip, except for a space left for access to the orchard, customers' vehicles awaiting and undergoing repair, and awaiting collection after repair. The judge held that the right exercised and claimed was too extensive to constitute an easement in law as it amounted practically to a claim to the whole beneficial use of that part of the strip of land over which it had been exercised. Upjohn J said ([1952] 1 All ER 809 at 812–813, [1952] Ch 488 at 498): e f g

'... in my judgment the right claimed here goes wholly outside any normal idea of an easement, that is, a right of the occupier of a dominant tenement over a servient tenement. This claim really amounts to a claim to a joint user of the land by the defendant. Practically he is claiming the whole beneficial user of the strip of land on the south-east side of the track so that he can leave there as many or as few lorries as he likes for any time that he likes and enter on it by himself, his servants and agents, to do repair work. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession, if necessary to the exclusion of the owner, or, at any rate, to a joint user, and no authority has been cited to me which would justify me in coming to the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that for this claim to succeed it must really amount to a right of possession by long h j

adverse possession. I say nothing, of course, as to the creation of such rights by grant or by covenant. I am dealing solely with the question of a claim arising by prescription.'

**[12]** The appellants accept that this court has held in *Re Ellenborough Park, Re Davies (decd), Powell v Maddison* [1955] 3 All ER 667, [1956] Ch 131 that an express grant of the right to the enjoyment of a communal garden can constitute an easement. In that case the owners of Ellenborough Park sold off surrounding plots of land also owned by them by conveyances which granted each purchaser—

'the full enjoyment ... at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground [the park] ... but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground ...' (See [1955] 3 All ER 667 at 674, [1956] Ch 131 at 165.)

**[13]** The vendors covenanted to keep the park as an ornamental pleasure ground. Amongst the issues raised on the appeal from the decision of Danckwerts J ([1955] 2 All ER 38, [1956] 1 Ch 131) that this created an easement known to law, was the argument that the dominant owners' rights were too wide and vague and inconsistent with the rights of the servient owners.

**[14]** This court concluded that as a matter of construction, the park became a communal garden for the benefit and enjoyment of those whose houses adjoined it and were in its close proximity. It formed the collective garden of the neighbouring houses giving the owners the right to enjoy the amenities that it provided. The servient owners retained the right to the produce from the garden, and to design and maintain it as they wished subject only to the obligation that it should remain available as a communal garden to the dominant owners. In the court's judgment Lord Evershed MR said ([1955] 3 All ER 667 at 682, [1956] Ch 131 at 176):

'We see nothing repugnant to a man's proprietorship or possession of a piece of land that he should decide to make of it and maintain it as an ornamental garden, and should grant rights to a limited number of other persons to come into it for the enjoyment of its amenities.'

**[15]** The appellants submitted, however, that this decision is of no assistance in the present case. They pointed out that the right in question was the subject matter of an express grant with detailed provisions as to the nature of the respective rights and obligations of the dominant and servient owners. They pointed out that the garden was created, controlled and maintained by the servient owners. In contrast, they submitted that in the present case the use relied upon by the respondent as establishing her prescriptive right indicates that the respondent and the other cottage owners were asserting the right themselves to control and maintain the area as a communal garden and amenity space, with no evidence as to the correlative rights or obligations of the appellants themselves which could in any way circumscribe what is therefore a wide ranging entitlement akin to that asserted by the defendant in *Copeland v Greenhalf* [1952] 1 All ER 809, [1952] Ch 488, and effectively excluding the appellants from any beneficial use of the blue land.

**[16]** We were referred to a number of other authorities which, it is submitted, underline the general principle that the right claimed must not to be such as

would leave the servient owner without any reasonable use of his land if it is to exist as an easement. In *Grigsby v Melville* [1973] 1 All ER 385 at 392–393, [1972] 1 WLR 1355 at 1364 Brightman J said that the asserted right to use premises as a store gave, in effect, an exclusive right of user over the whole of the servient tenement and he would, if it had been necessary to do so, have followed *Copeland*'s case. In *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307, [1992] 1 WLR 1278, Judge Paul Baker QC sitting as a judge of the High Court applied that same test to a claimed right to park cars, and concluded on the facts of that case that the right claimed did not preclude use of the servient tenement in such a way as to fall foul of the principle. However, in *Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 4 All ER 78, [2003] 1 WLR 764, another case involving a claim to the right to park cars, this court concluded that the right there claimed was so extensive as to make the servient owner's rights of ownership of the land illusory, and accordingly held that the right claimed was not capable of amounting to an easement.

**[17]** The only case in which what apparently amounted to exclusive use of premises was claimed as an easement was *Wright v Macadam* [1949] 2 All ER 565, [1949] 2 KB 744. In that case the tenant of a flat in a property claimed the right to use a shed in the garden for the storage of coal. The main argument in the case concerned the question of whether or not the use was essentially by permission and licence, which the Court of Appeal concluded in the tenants' favour. Jenkins LJ, during the course of his judgment, said ([1949] 2 All ER 565 at 571–572, [1949] 2 KB 744 at 752):

> 'Next, the right was, as I understand it, a right to use the coal-shed in question for the purpose of storing such coal as might be required for the domestic purposes of the flat. In my judgment, that is a right or easement which the law will clearly recognise, and it is a right or easement of a kind which could readily be included in a lease or conveyance by the insertion of appropriate words in the parcels.'

**[18]** The appellants submitted that this case is of no assistance to the court. The point in *Copeland*'s case was never argued. It was a completely different factual situation. And in particular, in dealing with any apparent conflict between *Wright*'s case and *Copeland*'s case, Brightman J in *Grigsby*'s case considered that the difference in the facts was such that he was at liberty to follow *Copeland*'s case.

**[19]** The respondent submitted that the appellants' argument is based on a false premise. The facts found by District Judge Ashton did not preclude the appellants from using the land. That was recognised by his refusal to grant a declaration in relation to the grassed surface of the strip of land, restricting relief as he did to the flower bed. It was submitted that all that is claimed, and all that the evidence established, was that the blue land had been used as a communal garden for recreational and amenity purposes, and a right of way. The right to enjoy the land as a communal garden was clearly a right capable of subsisting as an easement provided that there was the necessary connection between the dominant and the servient tenement, as was established in *Re Ellenborough Park* [1955] 3 All ER 667, [1956] Ch 131. The fact that the owners of the dominant tenements had, as a matter of fact, maintained the garden did not as a matter of law mean that the appellants had been excluded from using it. On a proper analysis, the respondent submitted, the dominant owners had simply been carrying out that which they were entitled to do, namely such works as were necessary to enable them to enjoy the right to use the garden as a communal

garden for recreational and amenity purposes. On that analysis, the appellants retain the right themselves to enter the blue land and do whatever they wish to do on that land, provided that it maintains its character as a garden which can be enjoyed by the dominant owners.

[20] The respondent further submitted that there is no uncertainty about the respective rights and obligations, despite the absence of any deed. The appellants are entitled to exercise their undoubted rights over the blue land provided that they do not substantially interfere with the respondent's right to enjoy it as a garden. It follows that District Judge Ashton's order was justified in that the destruction of the flower bed had been carried out without notice and without any intent that the blue land would retain its character as a garden. It was submitted that the district judge was right to conclude:

> 'As stated in *Re Ellenborough Park* the categories of easement are not closed and in my experience many older properties enjoy rights over communal gardens and yards. It may be that reallocation of the layout of such areas may be required from time to time but the land owner cannot simply do this for his own convenience without prior consultation with all concerned. That is what happened in this case and it will not be supported by a court of equity.'

[21] It was submitted that this requires the appellants, if they wish to exercise their rights, to do so on reasonable notice, with reasonable proposals, and for good reason.

[22] In general terms, I consider the respondent's arguments are correct. In *Re Ellenborough Park* [1955] 3 All ER 667 at 673, [1956] Ch 131 at 163 Lord Evershed MR said:

> 'For the purposes of the argument before us counsel were content to adopt, as correct, the four characteristics formulated in DR CHESHIRE'S MODERN REAL PROPERTY (7th Edn.), p. 456 et seq. They are (i) There must be a dominant and a servient tenement: (ii) an easement must accommodate the dominant tenement: (iii) dominant and servient owners must be different persons: and (iv) a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.'

[23] Clearly in the present case the first three characteristics have been met. As to the fourth characteristic, the Court of Appeal in *Re Ellenborough Park* held that an easement to use land as a communal garden was capable of forming the subject matter of a grant. However there is no doubt that there is a real difference between a case in which the easement claimed is said to have been the subject matter of an express grant, and one which is said to arise by reason of prescription or under s 62 of the Law of Property Act 1925. In the former case, the issue is simply one of construction of the grant. And the court will undoubtedly lean in favour of the creation of an easement if the intention of the parties was clearly to that end. In the latter case, the court has the more difficult task of assessing the evidence as to alleged use in order to determine whether the claimed right has been established. But if it is clear from that evidence that use has been made of the land for the requisite period which is capable of amounting to an easement, it seems to me that a court should not be deflected from declaring the existence of an easement which can sensibly be formulated by the fact that, of necessity, its parameters may not be so clearly defined as they could be in a deed.

[24] In my judgment, the findings of fact by District Judge Ashton are conclusive of the matter in the respondent's favour. Even though the appellants had not themselves created or maintained the communal garden, the blue land had been used as such ever since the sale of the properties. The fact that the appellants had been content to allow the dominant owners over the years to determine the layout of the garden and to have maintained it themselves does not seem to me to derogate from the conclusion that they have been prepared to set aside this land for the use of the dominant owners as a communal garden. As the district judge himself recognised, this was a potential advantage to the appellants and their predecessors in title at the time that the properties were originally sold.

[25] I am therefore satisfied that the facts found by District Judge Ashton were sufficient to justify both his and the circuit judge's conclusions that the respondent was entitled to a right to use the blue land as a communal garden along with the other dominant owners. Those facts do not justify the conclusion that the right created by the established use excluded the appellants from any use which they might wish to make of the land. It restricted that use only to the extent necessary to ensure that the blue land as a whole could still be enjoyed by the dominant owners, and in particular the respondent, as a communal garden for recreational and amenity purposes. However, the declaration made by the district judge goes further than is necessary to reflect the right which he had concluded had been established on the evidence. In so far as it suggested that the respondent had a right to the restoration of the flower bed, in the sense that the existence of a flower bed in that position was the consequence of the right which he concluded had been established, it was wrong.

[26] But by removing the flower bed without notice, and without giving her any opportunity to recreate or relocate it or its contents elsewhere in the way they did, the appellants undoubtedly did interfere with that right. That does not mean that the appellants are not entitled to create a gravelled driveway over that strip of land. That would not itself necessarily interfere with the respondent's right to use the blue land, as a whole, as a communal garden together with the other dominant owners, bearing in mind that a right of way exists over that strip of land for the benefit of all the dominant owners. Whether any particular proposal by the appellants to create such a driveway would substantially interfere with the respondent's rights would be a matter for consideration of all the facts. The proper way to reflect the respective rights of the parties seems to me to require an amendment of the declaration granted by District Judge Ashton to a declaration that: 'The respondent is entitled to a right to use the blue land as a communal garden for recreational and amenity purposes.'

[27] This will inevitably require the appellants, if they wish to carry out any works on the blue land, to do so in a way which will substantially maintain its character as a communal garden for recreational and amenity purposes. And this will require them to demonstrate that any proposed work would maintain that character, and in practice the work is likely to require prior consultation, and preferably agreement, if it is not to amount to a significant interference with the respondent's rights.

[28] District Judge Ashton awarded the respondent £200 damages for the destruction of her flower bed. Although he considered that the respondent's rights over the flower bed were more extensive than I consider them to be, none the less, the destruction without notice of the flower bed was, as I have already said, a substantial interference with her right which is capable of sounding in damages. I see no reason to interfere with the district judge's figure of £200.

a [29] I would therefore allow the appeal but only to the limited extent to which I have indicated.

**MANCE LJ.**

[30] I agree.

b **SIMON BROWN LJ.**

[31] I also agree.

*Appeal allowed only to the extent indicated. Appellants to pay 75% of respondent's costs.*

Alexander Horne Barrister.

# Note

## Mullins v Laughton and others

[2002] EWHC 2761 (Ch)

CHANCERY DIVISION

NEUBERGER J

4–8 NOVEMBER, 19 DECEMBER 2002

*Partnership – Dissolution – Effect – Whether accepted repudiatory breach of partnership deed dissolving partnership.*

In the course of giving judgment in a partnership dispute **NEUBERGER J** said:

'[87] The question whether a partnership can be dissolved by one or more partners accepting a repudiatory breach on the part of other partners was discussed in some detail by Lord Millett in *Hurst v Bryk* [2000] 2 All ER 193 at 198–202, [2002] 1 AC 185 at 193–196. In that case, it had been common ground between the parties that a partnership could be dissolved by an accepted repudiation, but Lord Millett, in the passage to which I have referred, questioned whether this was correct, albeit that he expressly left the point undecided. The other members of the House of Lords ([2000] 2 All ER 193 at 195, [2002] 1 AC 185 at 189) agreed with the speech of Lord Millett; Lord Nicholls of Birkenhead expressly said that he also preferred to keep the point open.

[88] Before the decision in *Hurst*'s case, it would seem, according to Lord Millett ([2000] 2 All ER 193 at 200, [2002] 1 AC 185 at 194), that eighteenth and nineteenth century judges would have been likely to—

> 'have rejected the idea that the dissolution of a partnership at the instance of one partner, however wronged, and against the wishes of his fellow partners can be withdrawn from the discretion of the court and left to the unilateral decision of the innocent partner.'

Indeed, he described the idea as 'unhistorical'.

[89] As Lord Millett went on to point out, there is fairly recent, first instance, authority to support the proposition that a partnership can be dissolved by an accepted repudiation. In *Hitchman v Crouch Butler Savage Associates* (1983) 80 LS Gaz 550, Harman J held that the doctrine of accepted repudiation did apply to a partnership, although it is noteworthy that the then current, fourteenth edition of *Lindley on Partnership* (1979), doubted that view (p 611–612). The authority of that decision is not enhanced by the fact that it was reversed by the Court of Appeal on a different point: see (1983) 127 SJ 441.

[90] Lord Millett's analysis speaks for itself. While his observations were obiter and he expressly left the point open, it seems pretty clear that he would have held, at least on the basis of the arguments as they then appeared to him, that a partnership could not be dissolved by an accepted repudiation.

[91] The Law Commission Paper *Partnership Law* (Consultation Paper No 159) discusses the issue in paras 6.28–6.31. The Law Commission (para 6.29) 'respectfully question Lord Millett's view'. It seems to have been

assumed that he held that the partnership contract could be terminated by accepted repudiation, so that the un-terminable partnership would merely be 'a partnership at will which the accepting parties may then terminate immediately'. I am not at all convinced that that is the consequence of Lord Millett's analysis. Indeed, on the basis that a partnership could not be dissolved by an accepted repudiation, I think that this analysis is wrong. Lord Millett observed ([2000] 2 All ER 193 at 199, [2002] 1 AC 185 at 193), that the doctrine of accepted repudiation could 'apply to an agreement to enter into partnership or to the contractual obligations which the partners mutually undertake to observe after the partnership has come to an end'. This indicates to me that he was suggesting that accepted repudiation could not determine the contract (or the partnership) while the partnership was in existence. That certainly seems to have been the view of the editors of the current, eighteenth edition of *Lindley and Banks on Partnership* (2002) p 677–678 (para 24-06). Unlike a lease, where there is an interest in land which is effectively detached from the contract which created it, a partnership cannot be detached from the partnership agreement: the relationship is contractual, but is subject to equitable principles and the provisions of the Partnership Act 1890. Accordingly, I am unconvinced that the continuing contract can be determined without the relationship being determined.

[92] Interestingly, the Law Commission expressed (para 6.31) the 'provisional view' that 'acceptance of a repudiatory breach should not terminate the contract and dissolve the partnership', but that any partner who wished to dissolve the partnership on the basis of 'repudiatory breaches' should 'apply to the court for dissolution'. This conclusion contrasts with the view of the current edition of *Lindley and Banks*, where the editors suggest (p 678 (para 24-07)) as their strongest point against Lord Millett's provisional view, that it appears to have 'failed to take into account ... the position in which the innocent partner is thereby placed'. The editors go on to explain that, if accepted repudiation could not dissolve the partnership, then an innocent party would be left in a state of uncertainty while he made an application to the court for dissolution pursuant to s 35 of the 1890 Act, during which period he would be left in an unfair state of uncertainty, and indeed would be unable to put an end to the partnership in the meantime. I do not think that is a negligible point, but it does not seem to me to be very forceful, and the present case provides a good example of why that is so. Even if the doctrine of accepted repudiation applies to a partnership, an innocent partner, who purports to accept a repudiatory breach, would often not be certain as to whether or not the partnership has been brought to an end, until the court decides on the issue of whether the breach was in fact repudiatory, and, indeed, on any other issue, such as waiver, which might prevent the innocent partner relying on dissolution.

[93] While the point is plainly difficult, I have reached the conclusion that, on the basis of the written material, and the brief oral argument on the topic, Lord Millett's provisional view should prevail. First, although he expressly left the point open, his characteristically thorough and careful analysis plainly favours the view that dissolution of a partnership by accepted repudiation is not possible. Indeed, the fact that he devoted three pages of close argument and analysis to question whether a partnership could be dissolved by acceptance of a repudiatory breach, when it had been assumed

on all sides, is of significance in itself, as is the fact that none of the other four members of the House of Lords disagreed with him. Secondly, apart from the sole decision of Harman J (which, as I have mentioned, was reversed on another point by the Court of Appeal) the weight of previous authority, at least as considered and analysed by Lord Millett, is against the view that a partnership could be dissolved by an accepted repudiation. Thirdly, the reasons advanced in the Law Commission paper and in the current edition of *Lindley and Banks*, for questioning Lord Millett's provisional view, do not appear to me to be particularly convincing, and, indeed, the main reason each gives seems to me to be undermined by the other.'

Neneh Munu Barrister.

# Wilson v First County Trust Ltd

[2003] UKHL 40

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOPE OF CRAIGHEAD, LORD HOBHOUSE OF WOODBOROUGH, LORD SCOTT OF FOSCOTE AND LORD RODGER OF EARLSFERRY

10–13 MARCH, 10 JULY 2003

*Consumer credit – Agreement – Form and content of agreement – Restrictions on enforcement – Whether court having jurisdiction to make declaration of incompatibility concerning Consumer Credit Act 1974 where agreement made before implementation of Human Rights Act 1998 – Consumer Credit Act 1974, s 127(3) – Human Rights Act 1998, ss 3(1), 4.*

Under an agreement made in January 1999, the defendant pawnbroker lent the claimant borrower a sum of money for six months on the security of her car. The agreement was a regulated agreement for the purposes of the Consumer Credit Act 1974. Such an agreement was not properly executed unless the document signed contained all the prescribed terms. Those terms included the amount of the credit. By virtue of s 127(3)[a] of the 1974 Act, a failure to state all the prescribed terms precluded the court from enforcing the agreement. In the absence of enforcement by the court, the agreement was altogether unenforceable. When the borrower failed to repay the loan, the pawnbroker sought repayment, failing which the car would be sold. In response, the borrower commenced county court proceedings, claiming that the agreement was unenforceable because it did not show the correct amount of the credit. The judge rejected that contention, and the borrower appealed to the Court of Appeal. The appeal was heard shortly after the implementation, in October 2000, of the Human Rights Act 1998. Unlike the judge, the Court of Appeal held that the agreement did not contain the amount of the credit and was accordingly unenforceable. It therefore allowed the appeal, and as a result the borrower was entitled to keep the amount of her loan, pay no interest and recover her car. At a subsequent hearing, however, the Court of Appeal granted a declaration under s 4[b] of the 1998 Act that s 127(3) of the 1974 Act was incompatible with two of the rights guaranteed to the pawnbroker by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act)—the implied right of access to the court under art 6(1)[c] and the right to property under art 1[d] of the First Protocol. The Secretary of State, who had been joined as a party to the Court of Appeal proceedings, appealed to the House of Lords, contending that the court had no jurisdiction to make a declaration of incompatibility in relation to events occurring before the implementation of the 1998 Act. Since the court could only make such a declaration if it had concluded that it was not possible to read and give effect to legislation in a way that was compatible with convention rights, as

a Section 127(3) is set out at [100], below

b Section 4, so far as material, provides: '… (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.'

c Article 6, so far as material, provides: '1. In the determination of his civil rights and obligations … everyone is entitled to a fair … hearing …'

d Article 1, so far as material, is set out at [38], below

it was otherwise required to do by s 3(1)[e] of the 1998 Act, the issue arose as to whether s 3(1) applied. a

**Held** – Where an agreement governed by the 1974 Act had been entered into before the implementation of the 1998 Act, the court could not make a declaration of incompatibility in respect of the 1974 Act. Section 3(1) of the 1998 Act did not apply to such a case because Parliament could not have intended its b application to have the effect of altering parties' existing rights and obligations under the 1974 Act. It followed that, for the purposes of identifying the rights of the borrower and the pawnbroker under their agreement, the 1974 Act was to be interpreted without reference to s 3(1) of the 1998 Act. Accordingly, the Court of Appeal had lacked jurisdiction to make a declaration of incompatibility, and the appeal would therefore be allowed (see [22], [23], [26], [101], [102], [124], [145], c [161], [162], [178], [220], below).

Per curiam. (1) Article 6(1) of the convention is not engaged by the complaint that s 127(3) of the 1974 Act renders a regulated agreement unenforceable unless the debtor signs a document containing all the prescribed terms. That is a restriction on the scope of the rights a creditor acquires under a regulated d agreement, and does not bar access to court to decide whether a case is caught by the restriction (see [36], [165], [178], below).

(2) Section 127(3) of the 1974 Act is compatible with art 1 of the First Protocol to the convention. In suitable instances it is open to Parliament, when it considers the public interest so requires, to decide that compliance with certain formalities is an essential prerequisite to enforcement of certain types of e agreement. Considered overall, that may well be a proportionate response in practice to a perceived social problem even though it will sometimes yield a seemingly unreasonable result in a particular case. Money-lending transactions as a class give rise to significant social problems, and Parliament may properly make compliance with the formalities required by the 1974 Act regarding f prescribed terms an essential prerequisite to enforcement (see [74], [75], [78], [109], [138], [169], [170], [178], below).

(3) Where a regulated agreement has been rendered unenforceable by s 127(3) of the 1974 Act, there is no relevant restitutionary remedy available to the lender in respect of the money lent. Since the lender is intended by Parliament to be left g without recourse against the borrower, the lender cannot assert that the borrower has been unjustly enriched. A conclusion to the contrary is inconsistent with the parliamentary intention in rendering the entire agreement unenforceable (see [49], [121]–[123], [172], [178], below); *Orakpo v Manson Investments Ltd* [1977] 3 All ER 1 and *Dimond v Lovell* [2000] 2 All ER 897 applied.

(4) When the court is determining whether a statutory provision is h compatible with a convention right, there may be occasion for it to have regard to matters stated in Parliament if those matters constitute background information tending to show, for instance, the likely practical impact of the statutory measure and the nature and extent of the social problem at which the legislation is aimed. By having regard to such material, the court will not be j questioning proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court will merely be placing itself in a better position to understand the legislation. Beyond that use of Hansard as a source of background information,

e Section 3(1) is set out at [155], below

the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases, and hence those debates are not a proper matter for investigation or consideration by the courts. The proportionality of legislation is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members (see [63]–[65], [67], [116]–[118], [141]–[143], [173], [178], below).

(5) When the court is considering the issue of proportionality for the purposes of determining whether a statutory provision is compatible with convention rights, it is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force (see [62], [144], [173], [178], below).

Decision of the Court of Appeal [2001] 3 All ER 229 reversed.

**Notes**

For the requirement, so far as possible, to read and give effect to legislation in a way which is compatible with convention rights, see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 87, for the convention right of access to a court and the convention right to property, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 141, 165, and for prescribed terms of regulated agreements and the consequences of improper execution, see 9(1) *Halsbury's Laws* (4th edn reissue) paras 167–169.

For the Consumer Credit Act 1974, s 127, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 107.

For the Human Rights Act 1998, ss 3, 4, Sch 1, Pt I, art 6, Pt II, art 1, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 532, 533, 554, 556.

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**Appeal**

The Secretary of State for Trade and Industry appealed with permission of the Appeal Committee of the House of Lords given on 13 November 2001 from the declaration of the Court of Appeal (Sir Andrew Morritt V-C, Chadwick and Rix LJJ) on 2 May 2001 ([2001] EWCA Civ 633, [2001] 3 All ER 229, [2002] QB 74) that the provisions of s 127(3) of the Consumer Credit Act 1974, in so far as they prevented the court from making an enforcement order under s 65(1) of the 1974 Act unless a document containing all the prescribed terms of the agreement had been signed by the debtor, were incompatible with rights guaranteed to the creditor or the hirer by art 6(1) of, and art 1 of the First Protocol to, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The Secretary of State had been joined as a party to the proceedings in the Court of Appeal following the decision of that court on 23 November 2000 ([2001] QB 407, [2001] 2 WLR 302) allowing an appeal by the claimant, Penelope Wilson, from the decision of Judge Hull QC in the Kingston-upon-Thames County Court sitting at Epsom on 24 September 1999 dismissing her proceedings for a declaration that a credit agreement entered into between her and the defendant, First County Trust Ltd, on 22 January 1999 was void and unenforceable. Neither the claimant nor the defendant took part in the proceedings in the House of Lords, but the following parties intervened in the Secretary of State's appeal: (1) the Finance and Leasing Association, (2) Aviva plc, (3) Royal & Sun Alliance plc, (4) Axa Insurance UK plc, (5) Churchill Insurance Co Ltd and (6) the Attorney General on behalf of

the Speaker of the House of Commons and the Clerk of the Parliaments (the House Authorities). The facts are set out in the opinion of Lord Nicholls of Birkenhead.

*Lord Goldsmith QC* and *Jonathan Crow* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*William Hibbert* and *Robert Weir* (instructed by *Gregory Rowcliffe Milners*) for the Finance and Leasing Association.

*Richard Gordon QC* and *Jonathan Hough* (instructed by *Sharpe Pritchard*) for the second to fifth interveners.

*Jonathan Sumption QC* and *Mark Hoskins* (instructed by the *Treasury Solicitor*) for the Attorney General on behalf of the House Authorities.

*Monica Carss-Frisk QC* and *Jane Mulcahy* (instructed by the *Treasury Solicitor*) as amicus curiae.

Their Lordships took time for consideration.

10 July 2003. The following opinions were delivered.

**LORD NICHOLLS OF BIRKENHEAD.**

[1] My Lords, in January 1999 Penelope Wilson borrowed £5,000 from a pawnbroker for a period of six months. The pawned property was her car, a BMW 318 Convertible. She did not repay the loan. The pawnbroker sought repayment, failing which the car would be sold. Mrs Wilson's response was to commence proceedings in the Kingston-upon-Thames County Court. She claimed the agreement was unenforceable because it did not contain all the prescribed terms. She sought an order for the return of her car. Alternatively she sought to reopen the agreement as grossly exorbitant. At the trial Mrs Wilson appeared in person. The pawnbroker was a two-man company, First County Trust Ltd. The company was represented in court by its finance director.

[2] From these modest beginnings the county court proceedings burgeoned into a case with wide-ranging implications. Neither Mrs Wilson nor First County Trust appeared before the House. But the Attorney General appeared on behalf of the Secretary of State for Trade and Industry. The Speaker of the House of Commons and the Clerk of the Parliaments intervened. They were represented by leading and junior counsel. The Finance and Leasing Association also intervened, as did four insurance companies which are among the largest providers of motor insurance in this country. And leading and junior counsel also appeared as amicus curiæ.

THE £250 FEE: WAS IT 'CREDIT'?

[3] When Mrs Wilson signed her agreement and pawn receipt she was charged a 'document fee' of £250. This was added to the amount of her loan. In the agreement the amount of the loan was stated as £5,250. The amount payable on redemption was £7,327, made up of £5,250 and interest of £1,827. The annual percentage rate of interest was stated to be 94.78%.

[4] The agreement was a regulated agreement for the purposes of s 8 of the Consumer Credit Act 1974. A regulated agreement is not properly executed unless the document signed contains all the prescribed terms (s 61(1)(a)). One of the prescribed terms is the 'amount of the credit' (see reg 6 of and para 2 of Sch 6

to the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553). The consequence of failure to state all the prescribed terms of the agreement is that the court is precluded, by s 127(3), from enforcing the agreement. In the absence of enforcement by the court the agreement is altogether unenforceable (s 65(1)).

[5] On 24 September 1999 Judge Hull QC, in a carefully reasoned judgment, held that the fee of £250 was part of the amount of the credit. So the agreement was enforceable. He reopened the agreement as an extortionate credit bargain and reduced the amount of interest payable by one half. Mrs Wilson appealed to the Court of Appeal ([2001] QB 407, [2001] 2 WLR 302). Pending the hearing of her appeal she paid First County Trust £6,900 to redeem her car. That was in December 1999.

[6] The appeal was heard in November 2000, shortly after the Human Rights Act 1998 came into force. The Court of Appeal, comprising Sir Andrew Morritt V-C, and Chadwick and Rix LJJ, allowed Mrs Wilson's appeal. Sir Andrew Morritt V-C recognised there was considerable force in First County Trust's submissions in support of the judge's view. But having analysed the statutory provisions, the court held that the £250 added to the loan to enable Mrs Wilson to pay the document fee was not 'credit' for the purposes of the 1974 Act. So one of the prescribed terms was not correctly stated. In consequence the agreement was unenforceable. So also was the security. First County Trust was ordered to repay the amount of £6,900 Mrs Wilson had paid the company after Judge Hull's judgment together with interest amounting to £662. The overall result was that Mrs Wilson was entitled to keep the amount of her loan, pay no interest and recover her car.

THE ADJOURNED HEARING

[7] Sir Andrew Morritt V-C expressed concern at this outcome. He considered it might be arguable that s 127(3) of the 1974 Act infringes art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) art 1 of the First Protocol to the convention. The court adjourned the further hearing of the appeal for notice to be given to the Crown, pursuant to s 5 of the 1998 Act, that the court was considering whether to make a declaration of incompatibility. The Secretary of State for Trade and Industry was then added as a party to the proceedings.

[8] On 2 May 2001 the court gave judgment at the adjourned hearing (see [2001] EWCA Civ 633, [2001] 3 All ER 229, [2002] QB 74). The court held that the inflexible exclusion of a judicial remedy by s 127(3), preventing the court from doing what is just in the circumstances of the case, is disproportionate to the legitimate policy objective of ensuring that particular attention is paid to the inclusion of certain terms in the document signed by the borrower. It is not possible to read and give effect to s 113 or s 127(3) in a way compatible with First County Trust's convention rights. The court made a declaration, pursuant to s 4 of the 1998 Act, that s 127(3), in so far as it prevents the court from making an enforcement order under s 65 of the 1974 Act unless a document containing all the prescribed terms of the agreement has been signed by the debtor, is incompatible with the rights guaranteed to the creditor by art 6(1) of the convention and art 1 of the First Protocol to the convention.

[9] The Secretary of State appealed to your Lordships' House. First County Trust did not. The Secretary of State accepted that Mrs Wilson's agreement was not 'properly executed' within the meaning of s 61 of the 1974 Act. She accepted that, in consequence, no enforcement order could be made under s 65 and that

the security over the car was unenforceable. The Secretary of State also accepted it is not possible to 'read down' the relevant provisions of the 1974 Act and thereby save them from any convention rights incompatibility otherwise existing. But she challenged the decision of the Court of Appeal on several grounds. Her primary submission was that the court has no jurisdiction to make a declaration of incompatibility in relation to events occurring before the 1998 Act came fully into force on 2 October 2000. Here, the agreement was made in January 1999 for a period of six months. Additionally, the parties' rights were determined before the 1998 Act came into force. The county court decision was in September 1999.

RETROSPECTIVITY AND SECTION 4 OF THE 1998 ACT

**[10]** As everyone knows, the purpose of the 1998 Act was to make the human rights and fundamental freedoms set out in the convention directly enforceable in this country as part of its domestic law. The question raised by the Secretary of State's submission is how the Act was intended to operate regarding events occurring before the Act came into force, that is to say, events taking place at a time when these human rights were not as such part of the domestic law of this country.

**[11]** Section 1 of the Act defines 'Convention rights' and states how the relevant articles of the convention and its Protocols are to have effect for the purposes of the Act. Section 2 provides that when determining a question arising in connection with a convention right courts must take into account, among other matters, decisions of the European Court of Human Rights and the European Commission of Human Rights. I can put these two introductory sections on one side. Contrary to the submissions of the Secretary of State, I do not think they assist either way on the point now under consideration. They are neutral.

**[12]** The Act prescribes two principal means whereby it 'brings human rights home' from Strasbourg: first, by making provision for the interpretation and amendment of legislation and, secondly, by making it unlawful for a public authority to act in a way incompatible with a convention right. Sections 3–5 and 10 are concerned with the former of these objectives, ss 6–9 with the latter. I shall consider the latter group of sections first. Sections 6–9 are forward looking in their reach. Section 6(1) provides that it 'is unlawful for a public authority to act in a way which is incompatible with a Convention right'. On a natural reading this provision is directed at post-Act conduct. The context powerfully supports this interpretation. One would not expect a statute promoting human rights values to render unlawful acts which were lawful when done. That would be to impose liability where none existed at the time the act was done. Sections 7–9 are concerned with conduct outlawed by s 6(1). They prescribe remedial consequences which ensue when a public authority has acted, or proposes to act, in a way 'which is made unlawful by s 6(1)': s 7(1). It follows therefore that, like s 6(1), ss 7–9 are concerned with post-Act events.

**[13]** Section 22(4) is an exception to this scheme. It is a curious provision. Commentators and judges have spilled much ink in discussing it. Its effect is that in response to proceedings brought by a public authority a victim of an unlawful act may rely on a convention right 'whenever the act in question took place'. So this provision enables a victim to assert and rely on a convention right in respect of conduct which was not unlawful when it took place. In circumstances where s 22(4) applies the 1998 Act gives a remedy in respect of pre-Act conduct. What

is not apparent is why, in respect of pre-Act violations of human rights, victims are given a domestic remedy in this one respect but not more widely. What is special about this one particular situation is not clear. But there it is.

**[14]** With these provisions in mind I turn to ss 3 and 4. It can be noted at once that s 4 rides in harness with s 3. Section 4 contains two prerequisites to the court's jurisdiction to make a declaration of incompatibility. First, sub-s (2) and (4) of s 4 apply to proceedings in which the court 'determines' whether a legislative provision is compatible with a convention right. So s 4 does not apply unless the court, in the proceedings in question, actually decides whether the relevant legislation is convention-compliant. The second prerequisite is that the court must be satisfied the relevant legislative provision is incompatible with a convention right (s 4(2) and (4)). This presupposes that, despite application of the principle of interpretation stated in s 3, the legislation is non-compliant. In other words, interpretation of the legislation in accordance with s 3 is an essential preliminary step to making a declaration of incompatibility. It is an essential preliminary step because the court cannot be satisfied the legislation is incompatible until effect has been given to the interpretative obligation set out in s 3.

**[15]** This interpretation of s 4 accords with the consequence flowing from a declaration of incompatibility. A declaration of incompatibility triggers the 'fast track' legislative procedures set out in s 10. It would make no sense for these procedures to be set in motion if it remains uncertain whether it is possible to interpret the legislation in a convention-compliant way.

**[16]** In the ordinary course this sequential approach goes without saying. Courts will interpret legislation, as they are required to do, in accordance with s 3. Only when they have done this will any question of a declaration of incompatibility arise. But the present case is exceptional because of its transitional nature: the agreement was made pre-Act, and the Court of Appeal was interpreting the legislation post-Act. Hence the all-important question: is s 3 applicable in such a case?

**[17]** On its face s 3 is of general application. So far as possible legislation must be read and given effect in a way compatible with the convention rights. Section 3 is retrospective in the sense that, expressly, it applies to legislation whenever enacted. Thus s 3 may have the effect of changing the interpretation and effect of legislation already in force. An interpretation appropriate before the Act came into force may have to be reconsidered and revised in post-Act proceedings. This effect of s 3(1) is implicit in s 3(2)(a). So much is clear.

**[18]** Considerable difficulties, however, might arise if the new interpretation of legislation, consequent on an application of s 3, were always to apply to pre-Act events. It would mean that parties' rights under existing legislation in respect of a transaction completed before the Act came into force could be changed overnight, to the benefit of one party and the prejudice of the other. This change, moreover, would operate capriciously, with the outcome depending on whether the parties' rights were determined by a court before or after 2 October 2000. The outcome in one case involving pre-Act happenings could differ from the outcome in another comparable case depending solely on when the cases were heard by a court. Parliament cannot have intended s 3(1) should operate in this unfair and arbitrary fashion.

**[19]** The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions but they are vague and imprecise. As Lord Mustill

pointed out in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 All ER 20 at 29–30, [1994] 1 AC 486 at 524–525, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide. As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at 724:

> '... the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'

Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle.

**[20]** Applying this approach to the 1998 Act, I agree with Mummery LJ in *Wainwright v Home Office* [2001] EWCA Civ 2081 at [61], [2003] 3 All ER 943 at [61], [2002] QB 1334, that in general the principle of interpretation set out in s 3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it in such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other. The 1998 Act was not intended to have this effect.

**[21]** I emphasise that this conclusion does not mean that s 3 never applies to pre-Act events. Whether s 3 applies to pre-Act events depends upon the application of the principle identified by Staughton LJ in the context of the particular issue before the court. To give one important instance: different considerations apply to post-Act criminal trials in respect of pre-Act happenings. The prosecution does not have an accrued or vested right in any relevant sense.

**[22]** In the present case Parliament cannot have intended that application of s 3(1) should have the effect of altering parties' existing rights and obligations under the 1974 Act. For the purpose of identifying the rights of Mrs Wilson and First County Trust under their January 1999 agreement the 1974 Act is to be interpreted without reference to s 3(1).

**[23]** It follows that, in this transitional type of case concerning the 1974 Act, no question can arise of the court making a declaration of incompatibility. For the reasons already considered, it is only when a court is called upon to interpret legislation in accordance with s 3(1) that the court may proceed, where appropriate, to make a declaration of incompatibility. The court can make a declaration of incompatibility only where s 3 is available as an interpretative tool. That is not this case.

THE COURT AS A PUBLIC AUTHORITY

**[24]** The Court of Appeal reached a contrary conclusion on the applicability of convention rights by a different route. The court held that the relevant event is not the making of the January 1999 agreement. The relevant event is the Court of Appeal's order. The court is a public authority. The court, required by s 6(1) to act in a way compatible with convention rights, must have regard to the facts as they are at the time when it makes its order ([2001] 3 All ER 229 at [17], [18]

and [22]). The decision of the Court of Appeal, I should note, was given before the decisions of this House in *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, and *R v Kansal (No 2)* [2001] UKHL 62, [2002] 1 All ER 257, [2002] 2 AC 69.

**[25]** As is well known, the application of s 6(1) to judicial decisions on matters of substantive law is a highly controversial topic. It is not necessary to venture onto this quicksand in the present case. One insuperable difficulty with the Court of Appeal's analysis, as it respectfully seems to me, is that it fails to take into account the mandatory nature of the relevant provisions of the 1974 Act. Let it be assumed, but without deciding, that the court's order in these proceedings is an 'act' by a public authority within the meaning of s 6(1). Even so, there can be no question of the court acting unlawfully. The court's decision in these proceeding gives effect to the mandatory provisions of the 1974 Act. An order giving effect to these provisions of primary legislation is excluded from the scope of s 6(1) by s 6(2)(a). Thus, reference to s 6(1) takes the matter no further forward. The question which remains to be answered is whether, in interpreting and giving effect to the provisions of the 1974 Act in this case, s 3(1) of the 1998 Act applies. That is the crucial question. That is the question I have already considered.

**[26]** For these reasons the appeal by the Secretary of State must succeed. In this transitional type of case s 3(1) is inapplicable to the interpretation of the 1974 Act. Consequently, the court has no jurisdiction to make a declaration of incompatibility. The declaration made by the Court of Appeal should be set aside.

**[27]** This conclusion makes it strictly unnecessary for the House to consider the further issues arising out of the judgment of the Court of Appeal. But it would not be satisfactory to leave these other issues unresolved. They have been fully argued by experienced counsel, the House has the benefit of the views of the Court of Appeal, and the issues are of importance to innumerable transactions being entered into every day. I turn, therefore, to consider what the position would be in this case had the 1998 Act applied.

WHETHER ART 6 OF THE CONVENTION OR ART 1 OF THE FIRST PROTOCOL APPLIES

**[28]** The first of the further issues is whether art 6 of the convention or art 1 of the First Protocol applies in the present case. Before turning to these articles I should outline the salient provisions of the 1974 Act. Subject to exemptions, a regulated agreement is an agreement between an individual debtor and another person by which the latter provides the former with a cash loan or other financial accommodation not exceeding a specified amount. Currently the amount is £25,000. Section 61(1) sets out conditions which must be satisfied if a regulated agreement is to be treated as properly executed. One of these conditions, in para (a), is that the agreement must be in a prescribed form containing all the prescribed terms. The prescribed terms are the amount of the credit or the credit limit, rate of interest (in some cases), how the borrower is to discharge his obligations, and any power the creditor may have to vary what is payable (see Sch 6 to the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553). The consequence of improper execution is that the agreement is not enforceable against the debtor save by an order of the court (s 65(1)). Section 127(1) provides what is to happen on an application for an enforcement order under s 65. The court 'shall dismiss' the application if, but only if, the court considers it just to do

so having regard to the prejudice caused to any person by the contravention in question and the degree of culpability for it. The court may reduce the amount payable by the debtor so as to compensate him for prejudice suffered as a result of the contravention, or impose conditions, or suspend the operation of any term of the order or make consequential changes in the agreement or security.

**[29]** The court's powers under s 127(1) are subject to significant qualification in two types of cases. The first type is where s 61(1)(a), regarding signing of agreements, is not complied with. In such cases the court 'shall not make' an enforcement order unless a document, whether or not in the prescribed form, containing all the prescribed terms, was signed by the debtor (s 127(3)). Thus, signature of a document containing all the prescribed terms is an essential prerequisite to the court's power to make an enforcement order. The second type of case concerns failure to comply with the duty to supply a copy of an executed or unexecuted agreement pursuant to ss 62 and 63, or failure to comply with the duty to give notice of cancellation rights in accordance with s 64(1). Here again, subject to one exception regarding ss 62 and 63, s 127(4) precludes the court from making an enforcement order.

**[30]** These restrictions on enforcement of a regulated agreement cannot be side-stepped by recourse to a pledge or other form of security furnished in support of the debtor's obligations under the agreement. The security is not enforceable to a greater extent than the loan (s 113). Where an application for an enforcement order is dismissed, except on technical grounds only, or the court makes a declaration under s 142 that the agreement is not enforceable, any security provided in relation to a regulated agreement 'shall be treated as never having effect' (s 106(a)). Property lodged with the creditor by way of security has to be returned by him 'forthwith'.

**[31]** These restrictions on enforcement of a regulated agreement are for the protection of borrowers. They do not deprive a regulated agreement of all legal effect. They do not render a regulated agreement void. A regulated agreement is enforceable by the debtor against the creditor. It seems, for instance, that a borrower may insist on making further drawdowns under a regulated agreement even though the agreement is unenforceable against him. Further, s 173(3) expressly permits consensual enforcement against a borrower. A borrower may consent to the sale of a security or to judgment. Moreover, the creditor is entitled to retain any security lodged until either an application for an enforcement order is dismissed or the court makes a declaration under s 142 that the agreement is not enforceable. That is the effect of ss 113(3) and 106.

**[32]** Against this background I turn to the relevant convention rights. Article 6(1) of the convention guarantees everyone a fair, expeditious and public trial of disputes about his civil rights. This guarantee includes an implied right of access to a court (see *Golder v UK* (1975) 1 EHRR 524 at 536 (para 36)). The scope of this guarantee has been considered on many occasions by the European Court of Human Rights. The relevant principles were explored recently by your Lordships' House in *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 All ER 689, [2003] ICR 247 (see, for instance, the pithy introductory summary by Lord Bingham of Cornhill at [3]).

**[33]** For present purposes it is sufficient to note that the established case law of the European Court of Human Rights is to the effect that art 6(1) does not itself guarantee any particular content for civil rights and obligations in the substantive law of the contracting states. Section 6(1) applies only to disputes over what, at least arguably, are recognised under domestic law to be 'rights and obligations'

(see *Z v UK* [2001] 2 FCR 246 at 268 (para 87)). Article 6(1) may not be used as a means of creating a substantive civil right having no basis in national law. The content of substantive national law may call for scrutiny under other articles of the convention or its protocols, but that is not the target of art 6(1).

**[34]** The basic principle underlying art 6(1) is that 'civil claims must be capable of being submitted to a judge for adjudication' (see *Fayed v UK* (1994) 18 EHRR 393 at 429 (para 65)). Thus a typical case within art 6(1) is where a person enjoys under national law what is arguably a civil right but the only forum for deciding a dispute over the existence or enforcement of the right is a tribunal which is not independent and impartial. So procedural bars on bringing claims to court may fall within art 6(1). So also may procedural bars having the effect of preventing claims being decided on their merits. *Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393 at 415–418 (paras 72–79), is an example of the latter. The issue of a 'national security' certificate had the effect of preventing complaints of religious discrimination being considered on their merits by a Fair Employment Tribunal. That was a violation of art 6(1).

**[35]** The distinction between the substantive content of a right and an unacceptable procedural bar to its enforcement by a court can give rise to difficulty in distinguishing the one from the other in a particular case. As a matter of drafting, a restriction on the scope of a right may be framed in several different ways. But the drafting technique chosen by the draftsman cannot be determinative of this issue. Human rights conventions are concerned with substance, not form, with practicalities and realities, not linguistic niceties. The crucial question in the present context is whether, as a matter of substance, the relevant provision of national law has the effect of preventing an issue which ought to be decided by a court from being so decided. The touchstone in this regard is the proper role of courts in a democratic society. A right of access to a court is one of the checks on the danger of arbitrary power. In *Matthews v Ministry of Defence* [2003] 1 All ER 689 at [142], Lord Walker of Gestingthorpe noted that art 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system. Lord Hoffmann observed (at [29]), that it should not matter how the law is framed, provided one holds onto the underlying principle, which is to maintain the rule of law and the separation of powers.

**[36]** In the present case the essence of the complaint is that s 127(3) of the 1974 Act has the effect that a regulated agreement is not enforceable unless a document containing all the prescribed terms is signed by the debtor. In my view, thus framed, the complaint does not bring art 6(1) into play. In terms of labels, that is a restriction on the scope of the rights a creditor acquires under a regulated agreement. It does not bar access to court to decide whether the case is caught by the restriction. It does bar a court from exercising any discretion over whether to make an enforcement order. But in taking that power away from a court the legislature was not encroaching on territory which ought properly to be the province of the courts in a democratic society.

**[37]** In reaching the opposite conclusion the Court of Appeal focused on the exclusion of any meaningful consideration by the court of the creditor's rights under the agreement in a case where the document signed by the debtor does not include all the prescribed terms. The court held ([2001] 3 All ER 229 at [31], [32], [2002] QB 74 at [31], [32]) that the exclusion of any judicial remedy in such a case engages art 6(1). I am unable to agree. The inability of the court to make an enforcement order in such a case, whatever the circumstances, is a limitation on the substantive scope of a creditor's rights. It no more offends the rule of law and

the separation of powers than would be the case if Parliament had said that such an agreement is void.

**[38]** In contrast to art 6(1), art 1 of the First Protocol is concerned with the content of substantive national law. Art 1 provides:

> 'Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law ...
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...'

**[39]** On its face art 1 is engaged in this case, most obviously with regard to the BMW car delivered by Mrs Wilson to First County Trust as security. On delivery First County Trust as pawnee acquired a proprietary interest in the car. That was in January 1999. The company's proprietary interest ceased eight months later, in September 1999, when the court refused to make an enforcement order. In addition, both parties acquired contractual rights under the agreement. 'Possessions' in art 1 is apt to embrace contractual rights as much as personal rights. Contractual rights may be more valuable and enduring than proprietary rights. But, by virtue of the statute, the contractual rights acquired by First County Trust were enforceable only with the consent of the borrower pursuant to s 173(3).

**[40]** The response of the Secretary of State and others is that all the rights acquired by First County Trust under the agreement were from their inception subject to the limitations prescribed by the 1974 Act. A restriction on the scope of the rights acquired by a lender under a transaction is not within art 1 of the First Protocol. A person who acquires property subject to limitations under national law which subsequently bite according to their tenor cannot complain that his rights under art 1 of the First Protocol have been infringed.

**[41]** I do not agree. This proposition is stated too widely and too loosely to be acceptable. Clearly, the expiry of a limited interest such as a licence in accordance with its terms does not engage art 1. That is not this case. Here the transaction between the parties provided for repayment of the loan and for the car to be held as security. What is in issue is the 'lawfulness' of overriding legislation. The proposition advanced by the Secretary of State would mean that however arbitrary or discriminatory such legislation might be, if it was in existence when the transaction took place a court enforcing human rights values would be impotent. A convention right guaranteeing a right of property would have nothing to say. That is not an attractive conclusion.

**[42]** There are of course many circumstances where statutes empower the Executive or the courts to make orders depriving a person of some of his possessions. Compulsory acquisition, and property adjustment orders on divorce, are instances. The exercise of powers such as these prima facie engages art 1. This is so irrespective of whether the enabling statute was enacted before or after the property affected by the order was acquired. *Hakansson v Sweden* (1990) 13 EHRR 1 is an example where the law was in place before the property in question was acquired. The law providing for the compulsory resale of the applicants' land within two years existed when they bought the land. Thus a provision in the 1974 Act empowering a court to refuse to enforce a regulated agreement may engage art 1 even though the Act was in force before the agreement was entered into.

[43] In the present case the relevant statutory provisions are framed differently. They do not empower the court to refuse to enforce the agreement now in question. They go further. The court is compelled to refuse to make an enforcement order. Is this difference material? I think not. It would be passing strange if art 1 were engaged in the former case but not the latter. A law regulating the effect of a transaction between the parties in the public interest does not always escape review under art 1 of the First Protocol. Such a law may infringe art 1 if it creates an 'imbalance' between the parties which would result in one party being arbitrarily or unjustly deprived of his possessions for the benefit of the other (see *Bramelid v Sweden* (1983) 5 EHRR 249 at 256).

[44] Thus the question in the present case is one of characterisation of the nature and effect of the relevant provisions of the 1974 Act, considered as a matter of substance rather than form. In my view, consistently with the underlying objective of art 1 of the First Protocol, the relevant provisions in the 1974 Act are more readily and appropriately characterised as a statutory deprivation of the lender's rights of property in the broadest sense of that expression than as a mere delimitation of the extent of the rights granted by a transaction. The rigid ban on enforcement of security and contractual rights prescribed by s 127(3) alone and in conjunction with ss 106 and 113 engages art 1 of the First Protocol. The lender's rights were extinguished in favour of the borrower by legislation for which the state is responsible. This was a deprivation of possessions within the meaning of art 1 (see *James v UK* (1986) 8 EHRR 123 at 140 (para 38)). Whether this statutory interference with First County Trust's peaceful enjoyment of its possessions was justified, and therefore not a breach of art 1, is a separate issue.

[45] I do not think there is any inconsistency between this conclusion and the conclusion stated above regarding art 6(1). A statutory provision may be characterised at one and the same time as a limitation on the scope of a creditor's rights for the purposes of art 6(1) and as a law depriving a person of his possessions for the (different) purposes of art 1 of the First Protocol.

RESTITUTION

[46] Before considering whether s 127(3) is compatible with art 1 of the First Protocol I must digress to deal with two preliminary matters. The first concerns the legal consequences of s 127(3). When a regulated agreement is rendered irredeemably unenforceable by s 127(3), the lender is unable to enforce the agreement. But does he, quite apart from his (unenforceable) rights under the agreement, have a restitution claim against the borrower in respect of the money lent? The parties to the agreement intended the money would be repayable in accordance with the terms of the agreement. Inability to enforce the terms of the agreement does not inevitably carry with it the consequence that the borrower may simply keep the money. Retention of the money, it is said, would be unjust enrichment, for which the appropriate remedy would be an order that the borrower repay what was never intended to be other than a loan. Reliance was placed, by way of analogy, on the decision of the Court of Appeal in *Westdeutsche Landesbank Girozentrale v Islington London BC, Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890, [1994] 1 WLR 938. There a bank paid money to a local authority under an interest rate swap agreement, which was held later to be outside the local authority's powers. The local authority had been unjustly enriched and the bank was entitled to a restitutionary remedy.

[47] A secondary question also arises: if the lender does have a restitutionary claim, is that a matter to be taken into account when considering whether s 127(3) is compatible with art 1 of the First Protocol?

[48] I can deal with these two questions quite shortly, starting with the latter. I am in no doubt that a lender's restitutionary remedy, if he has one, is a matter to be taken into account when considering whether s 127(3) is compatible with art 1 of the First Protocol. The adverse consequences of an alleged infringement of a convention right cannot sensibly be assessed other than in the round. The real position of the claimant is what matters. If in practice a lender can ameliorate the immediate and directly adverse consequence of s 127(3) by resort to some other right or remedy readily available to him, that is a matter to which the court must have regard. I cannot accept the contrary arguments addressed to the House.

[49] I consider, however, that there is no relevant restitutionary remedy generally available to a lender in the circumstances now under consideration. The message to be gleaned from ss 65, 106, 113 and 127 of the 1974 Act is that where a court dismisses an application for an enforcement order under s 65 the lender is intended by Parliament to be left without recourse against the borrower in respect of the loan. That being the consequence intended by Parliament, the lender cannot assert at common law that the borrower has been unjustly enriched. That would be inconsistent with the Parliamentary intention in rendering the entire agreement unenforceable. True, the 1974 Act does not expressly negative any other remedy available to the lender, nor does it render an improperly executed agreement unlawful. But when legislation renders the entire agreement inoperative, to use a neutral word, for failure to comply with prescribed formalities the legislation itself is the primary source of guidance on what are the legal consequences. Here the intention of Parliament is clear.

[50] This interpretation of the 1974 Act accords with the approach adopted by the House in *Orakpo v Manson Investments Ltd* [1977] 3 All ER 1, [1978] AC 95, regarding s 6 of the Moneylenders Act 1927 and, more recently, in *Dimond v Lovell* [2000] 2 All ER 897, [2002] 1 AC 384, another case where s 127(3) precluded the making of an enforcement order. In *Dimond*'s case the restitutionary remedy sought was payment of the hire charge for a replacement car used by Mrs Dimond. The House rejected a claim advanced on the basis of unjust enrichment. Lord Hoffmann observed that Parliament contemplated that a debtor might be enriched consequential upon non-enforcement of an agreement pursuant to the statutory provisions. It was not open to the court to say this consequence is unjust and should be reversed by a remedy at common law (see [2000] 2 All ER 897 at 906, [2002] 1 AC 384 at 397–398).

USE OF HANSARD IN COMPATIBILITY CASES

[51] The second preliminary matter concerns the Court of Appeal's use of Hansard in the present case. When considering whether this was a case where the courts should be ready to defer to the considered opinion of elected representatives, the Court of Appeal ([2001] 3 All ER 229 at [33]) pointed to the need for the court to identify the social policy issue which the legislature or the Executive thought it necessary to address and 'the thinking which led to that issue being dealt with in the way that it was':

> 'It is one thing to accept the need to defer to an opinion which can be seen to be the product of reasoned consideration based on policy; it is quite

another thing to be required to accept, without question, an opinion for which no reason of policy is advanced.'

[52] In this connection the Court of Appeal considered the 'lengthy gestation' of the 1974 Act. The court referred to parliamentary debates on the Bill, not as an aid to interpretation, but on the reason which led Parliament to enact s 127(3). The Court of Appeal concluded (at [36]) that the debates provide no answer to this issue: such references as there are 'tend to confuse rather than to illuminate'. The court added (at [37]):

> 'In the present case, therefore, we are left without the assistance which examination of reports, preparatory material and debates in Parliament might have been expected to provide on the question "why was it thought necessary to deny to the courts the power to do what was just in those cases in which there was no document signed by the debtor which contained terms which would or might, at some future date, be prescribed by the Secretary of State?' ... We have been shown no material which helps us to understand why the executive thought it necessary to propose, or why Parliament thought it necessary to enact, s 127(3) of the 1974 Act in the form which it takes.'

[53] Although the references to Hansard in the present case were inconclusive, Mr Sumption QC expressed to your Lordships' House the concern of the Speaker of the House of Commons and of the Clerk of the Parliaments at the 'wider significance' of the exercise undertaken by the Court of Appeal. This exercise, he submitted, involved measuring against standards derived from the convention the acceptability of Parliament's reasons for legislating in a particular way, and doing so by reference to the 'thinking' apparent from the record of debates. Further, it involved treating the absence of expressed reasons, acceptable or otherwise, as a factor making it more difficult to justify the enactment in convention terms. The courts should not treat speeches made in Parliament, whether by ministers or others, as evidence of the policy considerations which led to legislation taking a particular form. The exercise on which the Court of Appeal engaged is not an appropriate exercise for a court. There are no circumstances in which it is appropriate for a court to refer to the record of parliamentary debates in order to decide whether an enactment is compatible with the convention. The policy and objects of a statute must be determined by interpreting its language, which alone represents Parliament's intention. Reference to debates for the purpose of determining whether the policy considerations put forward by those participating in debates in either House were justifiable in convention terms and proportionate to the remedy proposed would involve 'questioning' what is said in Parliament contrary to art 9 of the Bill of Rights 1689. That is a different exercise from the one undertaken in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, and it is an exercise essentially adverse to Parliament's intention, not supportive of it.

[54] These submissions raise a point of constitutional importance. This House sitting in its judicial capacity is keenly aware, as indeed are all courts, of the importance of the legislature and the judiciary discharging their own constitutional roles and not trespassing inadvertently into the other's province. Thus, in resolving any question which may arise on the practical application of this principle in a particular case, the courts welcome the participation of the Speaker of the House of Commons and the Clerk of the Parliaments in the

proceedings. The House has been much assisted by the submissions made on their behalf by Mr Sumption. The present case is in fact the first time the authorities of Parliament have sought to be heard on the use of Hansard by the courts.

**[55]** The starting point for any consideration of the matters raised by these submissions is, indeed, the respective roles of Parliament and the courts. Parliament enacts legislation, the courts interpret and apply it. The enactment of legislation, and the process by which legislation is enacted, are matters for Parliament, not the courts. Thus, art 9 of the Bill of Rights 1689 provides, in modern spelling, that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. This provision is part of the wider principle that the courts and Parliament are both astute to recognise their constitutional roles (see Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd* [1994] 3 All ER 407 at 413, [1995] 1 AC 321 at 332). These distinct roles reflect one aspect of the separation of powers under this country's constitution.

**[56]** The decision in *Pepper v Hart* removed from the law an irrational exception. When a court is carrying out its constitutional task of interpreting legislation it is seeking to identify the intention of Parliament expressed in the language used. This is an objective concept. In this context the intention of Parliament is the intention the court reasonably imputes to Parliament in respect of the language used. In seeking this intention the courts have recourse to recognised principles of interpretation and also a variety of aids, some internal, found within the statute itself, some external, found outside the statute. External aids include the background to the legislation, because no legislation is enacted in a vacuum. It has long been established that the courts may look outside a statute in order to identify the 'mischief' Parliament was seeking to remedy. Lord Simon of Glaisdale noted it is 'rare indeed' that a statute can be properly interpreted without knowing the legislative object (see *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 846, [1975] AC 591 at 647). Reports of the Law Commission or advisory committees, and government White Papers, are everyday examples of background material which may assist in understanding the purpose and scope of legislation.

**[57]** Before the decision in *Pepper v Hart* [1993] 1 All ER 42, [1993] AC 593 a self-imposed judicial rule excluded use of parliamentary materials as an external aid. The courts drew a veil around everything said in Parliament. This had the consequence that a statement made in a government White Paper, issued by the relevant government department before legislation was introduced, could be used as an external aid. But if the same statement were made by a minister of the department in Parliament when promoting the Bill in one or other House, the courts were strictly unable to take cognisance of the minister's statement.

**[58]** In relaxing this self-imposed rule the House enunciated some practical safeguards in *Pepper v Hart*. These were intended to keep references to Hansard within reasonable bounds. One of these safeguards is that the parliamentary statement must be made by the minister or other promoter of the Bill. In imposing this cautionary limitation the House was not, I believe, intending to attribute to ministerial statements some special status, thereby encroaching upon the court's constitutional task of determining objectively what was the intention of Parliament in using the language in question. A clear and unambiguous ministerial statement is part of the background to the legislation. In the words of Lord Browne-Wilkinson in *Pepper v Hart* [1993] 1 All ER 42 at 65 [1993] AC 593 at

635, such statements 'are as much the background to the enactment of legislation as white papers and parliamentary reports'. But they are no more than part of the background. As I emphasised in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195 at 218, [2001] 2 AC 349 at 399, however such statements are made and however explicit they may be, they cannot control the meaning of an Act of Parliament.

**[59]** Suggestions have been made that unequivocal ministerial statements made in Parliament regarding an ambiguous provision in a Bill may have a more exalted role. In his influential article 'Pepper v Hart; A Re-examination' (2001) 21 OJLS 59, Lord Steyn noted it may be unobjectionable for a judge to use Hansard to identify the mischief at which a statute is aimed. But he rightly drew attention to the conceptual and constitutional difficulties in treating the intentions of the government revealed in debates as reflecting the will of Parliament, as distinct from the possibility that they may give rise to an estoppel or the like against the government.

**[60]** In the present case Mr Sumption did not submit that *Pepper v Hart* was wrongly decided. Nor is it necessary to decide whether *Pepper v Hart* does more than permit courts, when ascertaining the intention of Parliament, to have regard to ministerial statements made in Parliament in the same way as they may have regard to ministerial statements made outside Parliament. What is important is to recognise there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative of the will of Parliament, and without in any other way encroaching upon parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone. The use by courts of ministerial and other promoters' statements as part of the background of legislation, pursuant to *Pepper v Hart* case, is one instance. Another instance is the established practice by which courts, when adjudicating upon an application for judicial review of a ministerial decision, may have regard to a ministerial statement made in Parliament. The decision of your Lordships' House in *Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, [1991] 1 AC 696 is an example of this. I now turn to consider whether a challenge to the compatibility of legislation with convention rights may be a further instance of the innocuous use by courts of statements made in Parliament.

**[61]** The Human Rights Act 1998 requires the court to exercise a new role in respect of primary legislation. This new role is fundamentally different from interpreting and applying legislation. The courts are now required to evaluate the effect of primary legislation in terms of convention rights and, where appropriate, make a formal declaration of incompatibility. In carrying out this evaluation the court has to compare the effect of the legislation with the convention right. If the legislation impinges upon a convention right the court must then compare the policy objective of the legislation with the policy objective which under the convention may justify a prima facie infringement of the convention right. When making these two comparisons the court will look primarily at the legislation, but not exclusively so. Convention rights are concerned with practicalities. When identifying the practical effect of an impugned statutory provision the court may need to look outside the statute in order to see the complete picture, as already instanced in the present case regarding the possible availability of a restitutionary remedy. As to the objective of the statute, at one level this will be coincident with its effect. At this level, the

object of s 127(3) is to prevent an enforcement order being made when the circumstances specified in that provision apply. But that is not the relevant level for convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision. Frequently that purpose will be self-evident, but this will not always be so.

**[62]** The legislation must not only have a legitimate policy objective. It must also satisfy a 'proportionality' test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a 'value judgment' by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force. (I interpose that in the present case no suggestion was made that there has been any relevant change of circumstances since the 1974 Act was enacted.)

**[63]** When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.

**[64]** This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be 'questioning' proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.

**[65]** To that limited extent there may be occasion for the courts, when conducting the statutory 'compatibility' exercise, to have regard to matters stated in Parliament. It is a consequence flowing from the 1998 Act. The constitutionally unexceptionable nature of this consequence receives some confirmation from the view expressed in the unanimous report of the Parliamentary Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-I, HC 214-I) p 28 (para 86)), that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability.

**[66]** I expect that occasions when resort to Hansard is necessary as part of the statutory 'compatibility' exercise will seldom arise. The present case is not such an occasion. Should such an occasion arise the courts must be careful not to treat

the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight. It should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions.

**[67]** Beyond this use of Hansard as a source of background information, the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which 'counts against' the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene art 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute. I agree with Laws LJ's observations on this in *International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA Civ 158 at [113], [114], [2003] QB 728 at [113], [114], [2002] 3 WLR 344.

ART 1 OF THE FIRST PROTOCOL AND PROPORTIONALITY

**[68]** I turn now to consider whether s 127(3) of the 1974 Act is compatible with the rights guaranteed by art 1 of the First Protocol. Inherent in art 1 is the need to hold a fair balance between the public interest and the protection of the fundamental rights of creditors such as First County Trust. It is common ground that s 127(3) pursues a legitimate aim. The fairness of a system of law governing the contractual or property rights of private persons is a matter of public concern. Legislative provisions intended to bring about such fairness are capable of being in the public interest, even if they involve the compulsory transfer of property from one person to another (see the leasehold enfranchisement case of *James v UK* (1986) 8 EHRR 123 at 141 (para 41)). More specifically, persons wishing to borrow money are often vulnerable. There is a public interest in protecting such persons from exploitation.

**[69]** There must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The means chosen to cure the social mischief must be appropriate and not disproportionate in its adverse impact. Whether that relationship exists in the case of s 127(3) is the key issue.

**[70]** In approaching this issue, as noted in *R v Johnstone* [2003] UKHL 28 at [51], [2003] 3 All ER 884 at [51], courts should have in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and

appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified (see the Rent Act case of *Mellacher v Austria* (1989) 12 EHRR 391 at 411 (para 53)). The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.

**[71]** I turn to the statutory setting of s 127(3). The 1974 Act contains many requirements about the form and contents of regulated agreements. Parliament has singled out some obligations as having such importance that non-compliance leads automatically and inflexibly to a ban on the making of an enforcement order whatever the circumstances. These obligations are specified in s 127(3) and (4). In these two subsections Parliament has chosen, deliberately, to exclude consideration of what is just and equitable in the particular case. The latter approach, enabling the court to consider the circumstances of the particular case, was adopted as the general rule in s 127(1). Section 127(3) and (4) are, expressly, exceptions to the general rule. In prescribing these two exceptions Parliament must be taken to have considered that the sanction generally attaching to non-compliance with the statutory requirements was not sufficient to achieve compliance with the duty to include all the prescribed terms in the agreement (s 61(1)(a)) or the duties to provide copies and notice of cancellation rights (ss 62–64). Something more drastic was needed in order to focus attention on the need for lenders to comply strictly with these particular obligations.

**[72]** Undoubtedly, as illustrated by the facts of the present case, s 127(3) may be drastic, even harsh, in its adverse consequences for a lender. He loses all his rights under the agreement, including his rights to any security which has been lodged. Conversely, the borrower acquires what can only be described as a windfall. He keeps the money and recovers his security. These consequences apply just as much where the lender was acting in good faith throughout and the error was due to a mistaken reading of the complex statutory requirements as in cases of deliberate non-compliance. These consequences also apply where, as in the present case, the borrower suffered no prejudice as a result of the non-compliance as they do where the borrower was misled. Parliament was painting here with a broad brush.

**[73]** The unattractive feature of this approach is that it will sometimes involve punishing the blameless pour encourager les autres. On its face, *considered in the context of one particular case*, a sanction having this effect is difficult to justify. The Moneylenders Act 1927 adopted a similarly severe approach. Infringement of statutory requirements rendered the loan and any security unenforceable. So did the Hire-Purchase Act 1965, although to a lesser extent. This approach was roundly condemned in the Crowther report (*Report of the Committee on Consumer Credit*, under the presidency of Lord Crowther, March 1971) (Cmnd 4596), vol 1, p 311 (para 6.11.4):

> 'It offends every notion of justice or fairness that because of some technical slip which in no way prejudices him, a borrower, having received a substantial sum of money, should be entitled to retain or spend it without any obligation to repay a single penny.'

[74] Despite this criticism I have no difficulty in accepting that in suitable instances it is open to Parliament, when Parliament considers the public interest so requires, to decide that compliance with certain formalities is an essential prerequisite to enforcement of certain types of agreements. This course is open to Parliament even though this will sometimes yield a seemingly unreasonable result in a particular case. Considered overall, this course may well be a proportionate response in practice to a perceived social problem. Parliament may consider the response should be a uniform solution across the board. A tailor-made response, fitting the facts of each case as decided in an application to the court, may not be appropriate. This may be considered an insufficient incentive and insufficient deterrent. And it may fail to protect consumers adequately. Persons most in need of protection are perhaps the least likely to participate in court proceedings. They may well let proceedings go by default (see, in relation to moneylending agreements, the Crowther Report, p 236 (para 6.1.19)).

[75] Nor do I have any difficulty in accepting that moneylending transactions as a class give rise to significant social problems. Bargaining power lies with the lender, and the social evils flowing from this are notorious. The activities of some lenders have long given the business of moneylending a bad reputation. Nor, becoming more specific, do I have any difficulty in accepting, in principle, that Parliament may properly make compliance with the formalities required by the 1974 Act regarding 'prescribed terms' an essential prerequisite to enforcement. In principle that course must be open to Parliament. It must be open to Parliament to decide that, severe though this sanction may be, it is an appropriate way of protecting consumers as a matter of social policy. In making its decision in the present case Parliament had the benefit of experience gained over many years in the working of the 1927 Act and the hire-purchase legislation, and also the views of the Crowther Committee. Further, it must be open to Parliament so to decide even though the lender's inability to enforce an agreement will not assist a borrower who consents to the enforcement of the agreement in ignorance of the true legal position.

[76] The one point which has caused me difficulty is whether the requirement to state the amount of 'credit' is sufficiently clear and certain. The more severe the sanction, the more important it is that the law should be unambiguous. In the present case the confusion over the treatment of the document fee of £250 as 'credit' may have been due to a widespread misunderstanding within the trade. Certainly it was shared by an experienced trial judge. Mr Hibbert on behalf of the Finance and Leasing Association submitted it is sometimes far from easy to apply the complex provisions of the 1974 Act and the ancillary regulations. He gave examples of types of cases where, he said, identifying the amount of 'credit' is fraught with difficulty.

[77] That there was genuine confusion in the present case is admitted. But I am not persuaded the degree of uncertainty involved in identifying the amount of 'credit' is unacceptably high. The consumer credit legislation has to cope with a wide range of types of transactions. It is not surprising that now and again problems of definition will arise. With the assistance of court decisions, points of uncertainty, when they occur, can be clarified. The mere fact that a legal provision is capable of more than one interpretation does not mean that it fails to meet the requirement implied in the convention concept of 'prescribed by law' (see *Vogt v Germany* (1995) 21 EHRR 205 at 233 (para 48)). Moreover, I have in mind that the statutory provisions apply only to loans up to a prescribed financial

limit, currently £25,000. So the exposure of a creditor in any one case is confined. The burden imposed on him is not excessive. a

[78] Accordingly, in my view s 127(3) is compatible with art 1 of the First Protocol.

[79] The Court of Appeal reached the opposite conclusion. In doing so the court approached the matter from a slightly different angle. The effect of the court's judgment was to treat s 127(1) as the touchstone for proportionality and b then require positive justification for any more draconian provision (see [2001] 3 All ER 229 at [38], [39], [2002] QB 74 at [38], [39]). I respectfully consider this is an erroneous approach. Section 127(3) is one provision in an overall package of measures, some more severe than others, approved by the legislature in response to a perennial social problem. In this type of case the court should approach the c relevant statutory provision without any preconceptions of the requirements of proportionality based on other provisions of the statute. The court should simply have regard to the relevant statutory provision and its policy objective and consider whether the provision bears so unfairly on the applicant that it was not open to Parliament to adopt this provision, even as part of an overall package, in response to the social problem in question. In other words, is it apparent that d Parliament must have attached insufficient importance to the applicant's convention right? As I have indicated, I would answer 'No' to this question in the present case.

[80] As a footnote I should add that in stating this conclusion I am not to be taken as expressing a view on what would be the position if, as is now under consideration, the current limit of £25,000 were removed and the 1974 Act were e to apply to loans regardless of their amount. An adverse consequence, acceptable for a loan of £25,000, may not be acceptable when applied to a loan of £250,000.

**LORD HOPE OF CRAIGHEAD.**

[81] My Lords, it is a mark of the importance of the issues which have been f raised by the case that neither of the parties to the dispute which have given rise to it have taken any part in the appeal to this House. It has been brought by the Secretary of State for Trade and Industry, who was joined as a party to the proceedings in the Court of Appeal ([2001] EWCA Civ 633, [2001] 3 All ER 229, [2002] QB 74) in response to a notice which was served on her under s 5(1) of the g Human Rights Act 1998. It has been responded to by four providers of motor insurance to the general public in the United Kingdom, by the Speaker of the House of Commons and the Clerk of the Parliaments (the House authorities) and by the Finance and Leasing Association which is the leading trade association representing the consumer finance industry. Your Lordships have also had the h benefit of helpful submissions by an amicus curiae appointed by the Attorney General. In this situation the facts of the case may seem to be of little importance. But they cannot be overlooked entirely, as they provide the context for an examination of the wider issues that need to be dealt with.

[82] My noble and learned friend, Lord Nicholls of Birkenhead, has set out the underlying facts. I am happy to adopt what he has said about them and confine j myself to what I see as the essential details. The first point is that the transaction between Mrs Wilson and First County Trust (FCT) was entered into, was acted upon by both sides and was the subject of proceedings in the county court all before the relevant provisions of the 1998 Act were brought into force on 2 October 2000 by the Human Rights Act 1998 (Commencement No 2) Order 2000, SI 2000/1851.

[83] The loan agreement was signed on 22 January 1999. The loan was for a period of six months. It was due to be repaid, together with interest, on 21 July 1999. Mrs Wilson did not repay the loan on that date. On 23 July 1999 FCT sought payment of the amount due under the agreement. Mrs Wilson then instituted proceedings against FCT in the county court. She sought a declaration under the Consumer Credit Act 1974 that the agreement was unenforceable, its reopening on the ground that the rate of interest at 94·78% was grossly excessive and an injunction forbidding FCT from disposing of the motor car which it had taken from Mrs Wilson in pawn as security for the loan. An interim injunction was granted on 12 August 1999. On 24 September 1999 the judge refused Mrs Wilson's application for a declaration that the agreement was void and unenforceable. But he granted a declaration that the credit agreement was extortionate, substituted a monthly interest charge at an agreed rate and permitted Mrs Wilson to redeem the motor car on payment of the loan with interest on or before 1 October 1999. On 18 October 1999 she gave notice of an appeal against the rejection of her claim that the agreement was unenforceable. But on 17 December 1999 she redeemed her car by paying the whole of the sum that was then due to FCT.

[84] Mrs Wilson's appeal against FCT came before the Court of Appeal for hearing on 9 November 2000. By that date the 1998 Act had come into force. As Sir Andrew Morritt V-C observed when judgment was given on 23 November, neither party relied on it ([2001] QB 407 at 417, [2001] 2 WLR 302 at 312 (para 25)). But he said that that did not absolve the court from considering its application. So it was that the court, having concluded that it was barred by s 127(3) of the 1974 Act from enforcing the agreement and that Mrs Wilson was entitled to repayment of the sum which she had paid to redeem her motor car, decided to adjourn the appeal to enable further consideration to be given to the question whether the bar on its enforcement infringed FCT's convention rights (European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) and, if so, whether it should make a declaration of incompatibility under s 4 of the 1998 Act.

[85] This brief history shows that the transaction which has given rise to this appeal was over and done with before the relevant provisions of the 1998 Act were brought into force, subject only to the question whether Mrs Wilson is entitled to repayment of the sum which she paid over to redeem her motor car. This raises a difficult and important question about the extent to which the 1998 Act can be relied upon so as to affect rights and obligations arising from previous transactions (the retrospectivity issue). Then there is the question whether, if the 1998 Act can be relied upon in these circumstances, the effect of s 127(3) of the 1974 Act in the events which have happened is to engage any of FCT's convention rights (the convention rights issue).

[86] The second point is that, in the course of its discussion in the judgment which was delivered on 2 May 2001 of the question whether the provisions of s 127(3) of the 1984 Act were incompatible with FCT's convention rights, the Court of Appeal examined the content of the debates on the Consumer Credit Bill in Parliament as reported in Hansard in order to identify the aims and issues of social policy which led to its enactment ([2001] EWCA Civ 633 at [35]–[37], [2001] 3 All ER 229 at [35]–[37], [2002] QB 74). In the Court of Appeal the Secretary of State submitted that an attempt to do this was illegitimate. Her position before your Lordships was, as the learned Attorney General put it on her behalf, more moderate. But he urged caution in the use of this material and criticised the way

it had been used by the Court of Appeal. The argument that its use is illegitimate has not gone away, however. It was the subject of submissions made by Mr Sumption QC on behalf of the House authorities, and it is plain in view of its importance that we must deal with it: (the reference to Hansard issue).

**[87]** There is one other issue which has to be addressed. As has already been mentioned, the Court of Appeal held in its first judgment that the effect of s 127(3) of the 1974 Act was that the agreement between Mrs Wilson and FCT was unenforceable and that she was entitled to repayment of the sum which she paid over to redeem her motor car. Sir Andrew Morritt V-C ([2001] QB 407 at 416, [2001] 2 WLR 302 at 311 (para 20)) said that he would not wish to arrive at a conclusion which permitted Mrs Wilson both to retain her car and to recover the money which she paid to redeem it unless the statutory provisions left no alternative. Having considered the decision of your Lordships' House in *Dimond v Lovell* [2000] 2 All ER 897, [2002] 1 AC 384 however he concluded that prima facie she was entitled to the orders which she sought ([2001] QB 407 at 417, [2001] 2 WLR 302 at 312 (para 25)). FCT have not sought to appeal against this decision, and it will not be disturbed. But the Secretary of State submits that the decision in *Dimond*'s case is distinguishable and that, if the agreement is unenforceable, FCT is entitled to a restitutionary remedy against Mrs Wilson (the *Dimond v Lovell* issue).

THE RETROSPECTIVITY ISSUE

**[88]** The Court of Appeal decided ([2001] 3 All ER 229 at [50], [2002] QB 74 at [50]) that it would be appropriate to declare that, having regard to the terms prescribed by reg 6(1) of and Sch 6 to the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, the provisions of s 127(3) of the 1974 Act, in so far as they prevent the court from making an enforcement order under s 65(1) of that Act unless a document containing all the prescribed forms of the agreement has been signed by the debtor or hirer are incompatible with the rights guaranteed to the creditor or hirer by art 6(1) of the convention and art 1 of the First Protocol. The issue is whether it was open to the Court of Appeal to make this declaration.

**[89]** The Secretary of State submits that it was not open to the Court of Appeal to do so, as ss 1 and 4 of the 1998 Act came into force after the agreement was made, after the due date for payment under that agreement and after judgment had been pronounced in the county court on Mrs Wilson's application for a declaration that the agreement was void and unenforceable. Her argument is that FCT had at the relevant times no convention rights under the 1998 Act that were capable of being infringed by the operation of s 127(3) of the 1974 Act. In short, as the declaration was made in relation to events which occurred before the 1998 Act fully came into force, it offends against the general principle that legislation does not have effect retrospectively (see Bennion *Statutory Interpretation* (4th edn, 2002) pp 265–269 and 689–690).

**[90]** The only provision in the 1998 Act which gives retrospective effect to any of its provisions is s 22(4). It directs attention exclusively to that part of the Act which deals with the acts of public authorities (see ss 6–9). What it says is that s 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place. I do not think that there is any mystery as to why this provision was included in the 1998 Act, although the consequences that flow from it are much less certain. The explanation lies in the fact that the purpose of ss 6–9 of the Act is to provide a remedial structure in

domestic law for the rights guaranteed by the convention. As art 13 of the convention makes clear, it is the obligation of states which have ratified the convention to provide everyone within their jurisdiction with an effective remedy if the rights or freedoms which it protects are violated. The scheme of the Act is to give effect in domestic law to the obligation which is set out in art 13. If that scheme was to be followed through, victims had to be given an effective remedy in domestic law for a violation by the state of their convention rights. The principle upon which the Act proceeds is that actions by public authorities are unlawful if they are in breach of convention rights (s 6(1)). Effect is given to that principle in s 7. But it was appreciated that victims of a violation by the state of their convention rights were already entitled to obtain a remedy in the European Court of Human Rights under art 41 of the convention. In that context it made sense for the provisions of s 6(1) to be made available for use defensively where proceedings are brought against the victim by or at the instigation of a public authority, whenever the violation took place. That is what s 22(4) achieves by enabling s 7(1)(b) to be given effect retrospectively.

**[91]** But we are not concerned with the acts of public authorities in this case or with proceedings brought by or at the instigation of a public authority. There is no claim by a victim that a public authority has acted in a way that is made unlawful by s 6(1) of the Act.

**[92]** It has been held that acts of courts or tribunals which took place before 2 October 2000 which they were required to do by primary legislation and were done according to the meaning which was to be given to the legislation at that time are not affected by s 22(4) (see *R v Kansal (No 2)* [2001] UKHL 62 at [84], [2002] 1 All ER 257 at [84], [2002] 2 AC 69; *Wainwright v Home Office* [2001] EWCA Civ 2081 at [29]–[36], [2003] 3 All ER 943 at [29]–[36], [2002] QB 1334). It has also been held that the Act cannot be relied upon retrospectively to make unlawful conduct which was lawful at the time when it took place (see *Wainwright's* case (at [40])). The effect of these decisions is that the 1998 Act cannot be applied retroactively so as to deem the law to have been different from what it was when these acts were done. But we are not concerned in this case with the lawfulness of acts done or the lawfulness of conduct which took place before the Act was brought fully into force. The question in this case is whether the rights and obligations of parties to an agreement made before 2 October 2000 are, as a result of the coming into force of the relevant provisions of the 1998 Act, different now from what they were when the agreement was entered into.

**[93]** The approach which the Court of Appeal took to this problem was to apply s 6(1) of the 1998 Act to the facts of this case, as the court was required by that subsection to act in a way which was compatible with convention rights, and then to ask itself whether the order which it was about to make was or was not compatible with convention rights. Its conclusion was that, approached in this way, the relevant event was not the making of the agreement on 22 January 1999 but the making of its order on the appeal. Section 22(4) had no relevance, as the court had had to have regard to the facts as they were at the time when it made its order (see [2001] 3 All ER 229 at [22]).

**[94]** While it is true that the court is required by s 6(1) of the 1998 Act to act in a way that is compatible with convention rights, the issue in this case relates to the meaning and effect of legislation. The first task which confronts the court in a case of this kind is to construe the provisions of the statute which it is being asked to apply. The question which the Court of Appeal posed for itself in November 2000 was whether it was possible to read and give effect to s 127(3) of

the 1974 Act in a way that was compatible with FCT's rights under art 6(1) of the convention and art 1 of the First Protocol. a

**[95]** But one does not need to go to s 6(1) of the 1998 Act to discover the obligation which the court had to fulfil in these circumstances. Its obligation is to be found in s 3(1). That subsection provides that, so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way that is compatible with convention rights. A person who claims that a court or tribunal b has acted in a way that is made unlawful by s 6(1) may bring proceedings under s 7(1)(a) in the manner provided for by s 9(1) and, if compensation is required under art 5(5), may be awarded damages under s 9(3). But a person who claims that a court or tribunal has failed to fulfil the interpretative obligation laid down by s 3(1) has no need to go to s 7(1)(a) for his remedy. The meaning and effect of legislation is a question of law, so if an error is made about this the ordinary c avenues of appeal are available.

**[96]** In my opinion the issue about retrospectivity in this case resolves itself into a question as to whether s 3(1) permits the court, when it is determining after 2 October 2000 whether s 127(3) of the 1974 Act is compatible with FCT's convention rights, to hold that the rights and obligations of parties to the d agreement are, as a result of the coming into force of the relevant provisions of the 1998 Act on that date, different now from what they were at the time when the agreement was entered into in January 1999.

**[97]** The first thing to notice about s 3(1) of the 1998 Act is that, as to its temporal effect, it is entirely general and unqualified. But some guidance can be found in s 3(2)(a), which says that s 3 applies to primary and secondary legislation e 'whenever enacted'. So at least it can be said that it was plainly not the intention that legislation which was enacted before 2 October 2000 should be immune from the interpretative obligation which s 3(1) lays down. It would have been surprising if the Act had that effect. It would have greatly emasculated the underlying concept of bringing human rights home. f

**[98]** Then there is the general presumption that legislation is not intended to operate retrospectively. That presumption is based on concepts of fairness and legal certainty. These concepts require that accrued rights and the legal effect of past acts should not be altered by subsequent legislation. But the mere fact that a statute depends for its application in the future on events that have happened in g the past does not offend against the presumption. For a recent example of this point reference may be made to *R v Field, R v Young* [2002] EWCA Crim 2913, [2003] 3 All ER 769, [2003] 1 WLR 882. In that case it was held that the making of a disqualification order under s 28 of the Criminal Justice and Court Services Act 2000 against a defendant from working with children in the future did not offend against the presumption where the offending behaviour had occurred h before that Act came into force. It illustrates the point that there is an important distinction to be made between legislation which affects transactions that have created rights and obligations which the parties seek to enforce against each other and legislation which affects transactions that have resulted in the bringing of proceedings in the public interest by a public authority. The concepts of fairness j and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2 October 2000 should be altered retrospectively.

**[99]** Account may also be taken of the purpose of the 1998 Act. Its long title states that it was intended to give further effect to rights and freedoms guaranteed under the convention. The rights to which the Act gives effect are rights

guaranteed by the convention which the United Kingdom has already signed and ratified. In *R v Field* [2003] 3 All ER 769 at [61] the Court of Appeal accepted a submission by the Secretary of State for the Home Department that the court should take a more relaxed approach to a potentially retroactive element in legislation where its intended purpose was, as it clearly was in the case of s 28 of the 2000 Act, to protect children. I would apply the same reasoning to s 3 of the 1998 Act. Its purpose is to ensure that legislation is read and given effect in a way that is compatible with convention rights, so far as it is possible to do so, whenever the legislation was enacted. To restrict the application of the interpretative obligation, without exception, to 'events' that happened or 'transactions' entered into on or after 2 October 2000 would be to introduce a restriction which is not stated expressly anywhere in the 1998 Act. A restriction in such absolute and all-embracing terms would seem to be contrary to the intention of the legislation and incapable of being read into it by necessary implication.

**[100]** But the consequence of reading s 127(3) of the 1974 Act in a way that is compatible with FCT's convention rights cannot be looked at without taking account of the effects of doing so on the other party to the transaction, Mrs Wilson. She too acquired rights as a result of the transaction, as well as FCT. The set of provisions of which it forms part, and on which she relies, were enacted for the protection of consumers. Section 61(1) provides that a regulated agreement is not properly executed unless it satisfies certain requirements. It must include a statement of all the prescribed terms, which include a term stating the amount of the credit (see para 2 of Sch 6 to the 1983 regulations). Section 65(1) provides that an improperly-executed agreement is enforceable against the debtor or the hirer on an order of the court only. The amount of the credit in this agreement was incorrectly stated, so Mrs Wilson became entitled to the protection of s 65(1) as soon as it was entered into. What this right meant in her case was spelled out in s 127(3), which provides:

> 'The court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner).'

**[101]** Let it be assumed, then, that the effect of s 127(3) is to engage FCT's convention rights and that it is possible to read and give effect to the subsection in a way that is compatible with them. This will, inevitably, have the consequence of removing from Mrs Wilson the protection which ss 61(1)(a), 65(1) and 127(3) were designed to give her when the agreement was entered into. It seems to me that the presumption against the retrospective effect of legislation ought to be given its full weight in these circumstances. The case may be regarded as a typical example of the situation where legislation in question affects transactions that have created rights and obligations which the parties to it seek to enforce against each other. I recognise that there may be cases (and I have referred to *R v Field* [2003] 3 All ER 769 as an example) where a more relaxed approach will be appropriate. There is an obvious attraction in a solution to the application of the presumption to the obligation in s 3(1) which depends on clear, bright line rules which do not admit of any exceptions. But rules of that kind would be bound to lead to unfairness in some cases or to have consequences that

could not have been intended for other reasons. So I would prefer to base my decision in this case on the particular facts and circumstances. I would hold that the presumption would be violated in this case if s 127(3) were to be construed in FCT's favour in a way that deprived Mrs Wilson of the protection which it was designed to give her when she entered into the agreement on 22 January 1999.

**[102]** It follows that, as a determination of the question whether s 127(3) of the 1974 Act could be read and given effect in a way that was compatible with FCT's convention rights would offend against the principle that legislation does not have effect retrospectively, it was not open to the Court of Appeal in these proceedings to make a declaration of incompatibility.

THE CONVENTION RIGHTS ISSUE

**[103]** The question is whether the effect of s 127(3) of the 1974 Act in the events which have happened is to engage any of FCT's convention rights. If I am right on the retrospectivity issue this question does not arise. But the Court of Appeal dealt with the question, so I should like to make these brief observations about it. The convention rights that are in issue are those which are set out in art 6(1) of the convention and art 1 of the First Protocol. The Court of Appeal asked itself whether the exclusion of what it described as 'any meaningful consideration by the court' of the creditor's rights under an improperly executed agreement was legitimate, having regard to the fundamental nature of the right guaranteed by art 6(1), and it held that the exclusion of any judicial remedy engaged that article and also art 1 of the First Protocol (see [2001] 3 All ER 229 at [31], [32]).

**[104]** Article 6(1) of the convention provides a guarantee to everyone of access to the court for the determination of his or her civil rights and obligations. As the European Court of Human Rights has explained, this provision must be read in the light of the rule of law referred to in the preamble to the convention of which an integral part is the principle that a civil claim must be capable of being submitted to a judge (see *Golder v UK* (1975) 1 EHRR 524 at 535–536 (paras 35, 36)). A provision which operated as a procedural bar to access to the court for the enforcement of a civil right would be engaged by this article. But it is for domestic law to determine the extent and content of a person's civil rights (see *H v Belgium* (1987) 10 EHRR 339 at 346–347 (para 40)). The rights which art 6(1) guarantees are rights of procedural fairness. They do not guarantee that a person's substantive civil rights are of any particular character.

**[105]** As the European Court said in *Powell v UK* (App No 45305/99) (4 May 2000, unreported):

> 'For the court, it still remains the case that an applicant must be able to demonstrate an arguable claim under domestic law that there has been a breach of a civil right actionable in law. It is still impermissible for the court to arrogate to itself the task of creating in favour of an individual a substantive right where none is recognised under domestic law.'

What art 6(1) seeks to do, then, is to protect the individual against anything which restricts or impairs his access to the courts for the determination of a civil right whose existence is at least arguable. But the precise scope and content of the individual's civil rights is a matter for each state party to determine (see also *Matthews v Ministry of Defence* [2003] UKHL 4 at [49]–[53], [2003] 1 All ER 689 at [49]–[53], [2003] ICR 247).

**[106]** Article 1 of the First Protocol has a similar character. It does not confer a right of property as such nor does it guarantee the content of any rights in

property. What it does instead is to guarantee the peaceful enjoyment of the possessions that a person already owns, of which a person cannot be deprived except in the public interest and subject to the conditions provided for by law (see *Marckx v Belgium* (1979) 2 EHRR 330 at 350 (para 50)). Here too it is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into. One must, of course, distinguish carefully between cases where the effect of the relevant law is to deprive a person of something that he already owns and those where its effect is to subject his right from the outset to the reservation or qualification which is now being enforced against him. The making of a compulsory order or of an order for the division of property on divorce are examples of the former category. In those cases it is the making of the order, not the existence of the law under which the order is made, that interrupts the peaceful enjoyment by the owner of his property. The fact that the relevant law was already in force when the right of property was acquired is immaterial, if it did not have the effect of qualifying the right from the moment when it was acquired.

**[107]** The rights of property which are in issue in this case are those set in an agreement which is regulated by the 1974 Act. The Act subjects the rights of the creditor to restrictions in some circumstances. Section 65 declares that a regulated agreement which is improperly executed cannot be enforced by the creditor except by means of an order of the court, and s 127(3) declares that it is not to be enforceable at all except upon the condition which it lays down. The agreement which was entered into in this case was from the outset an agreement which was improperly executed. So it was always subject to the restrictions on its execution which ss 65(1) and 127(3) of the 1974 Act set out. I would hold that FCT's convention rights under art 1 of the First Protocol are not engaged in these circumstances.

**[108]** The Court of Appeal ([2001] 3 All ER 229 at [32]) said that the effect of ss 65(1) and 127(3) was to deprive the pawnbroker of its ability to enjoy benefit from the contractual rights arising from the agreement or from the rights arising from the delivery of the pawn. But the fact is that FCT never had an absolute and unqualified right to enforce this agreement or to enforce the rights arising from the delivery of the motor car. Article 6(1) of the convention and art 1 of the First Protocol cannot be used to confer absolute and unqualified rights on FCT which, having regard to the terms of the statute by which agreements of this kind are regulated, it never had at any time under the improperly executed agreement which it entered into.

**[109]** As I would hold that art 1 of the First Protocol is not engaged in this case, I do not need to examine the question whether s 127(3) is compatible with the rights guaranteed by that article. Had it been necessary for me to do so, I would have reached the same conclusion as Lord Nicholls of Birkenhead has done for the reasons he gives.

THE REFERENCE TO HANSARD ISSUE

**[110]** One of the happy characteristics of the Human Rights Act 1998 is that it did not attempt to solve all the problems that were bound to arise as a result of giving effect in domestic law to convention rights. Among these problems was the effect which its provisions would be likely to have on the relationship between the courts and Parliament. This was left to be worked out in accordance with familiar constitutional principles.

**[111]** One of these principles, which has repeatedly been emphasised, is that legislation is the exclusive responsibility of Parliament. The judges' task is to interpret, not to legislate (see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 at [75], [2001] 4 All ER 604 at [75], [2002] QB 48 per Lord Woolf CJ; *R v Lambert* [2001] UKHL 37 at [79], [2001] 3 All ER 577 at [79], [2002] 2 AC 545; *Re S (children: care plan), Re W (children: care plan)* [2002] UKHL 10 at [39], [2002] 2 All ER 192 at [39], [2002] 2 AC 291 per Lord Nicholls of Birkenhead). Another is that it is the intention of Parliament that defines the policy and objects of its enactments, not the purpose or intention of the Executive. The courts for their part must respect this principle, which means that the legislative function belongs to Parliament not to the Executive. Then there is the rule which art 9 of the Bill of Rights 1689 lays down that proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament. For their part both Houses of Parliament abstain from discussing the merits of disputes that are about to be tried and adjudicated on by the courts (*Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (22nd edn, 1997) pp 383–384 and 452–453). As Lord Nicholls has said, all courts are keenly aware of the importance of the legislature and the judiciary each discharging their own constitutional roles and not trespassing into functions that belong to the other.

**[112]** The question which the House authorities have raised is therefore an important one, and the position needs to be clarified. It has been prompted by the use which the Court of Appeal made of Hansard in its examination of the question whether this was a case where it should defer, on democratic grounds, to the considered opinion of the legislature (see [2001] 3 All ER 229 at [34]–[36]). The Court of Appeal rejected (at [34]) the Secretary of State's submission that, because the legislation had been enacted, it must be taken to represent the considered opinion of the elected body and that it was not for the courts to question the basis upon which that opinion was reached. Having done so, it embarked upon an examination of the parliamentary debates on the Bill. It did this (at [35]–[36]) not as an aid to construction of the legislation as its meaning was not in doubt, but to discover the reason which led Parliament to think that it was necessary to enact s 127(3) and thus to deny to the courts the power to do what was just in the cases to which it refers.

**[113]** Mr Sumption QC for the House authorities did not seek to question the use of Hansard for the limited purpose described in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, although he drew attention to some of the conceptual difficulties. As I understand that decision, it recognised a limited exception to the general rule that resort to Hansard was inadmissible. Its purpose is to prevent the Executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to those words when promoting the legislation in Parliament (see *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195 at 226–227, [2001] 2 AC 349 at 407–408). Mr Sumption recognised that the exception thus stated has commanded broad acceptance where it has operated as a kind of quasi-estoppel against the Executive. He also recognised that Hansard might be referred to where a statement made by a minister in Parliament was relevant to a challenge by way of judicial review to what he had done (see, for example, *Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, [1991] 1 AC 696). This was because what the minister said in Parliament was evidence of why he acted as he did. The position was no different from what it would have been

if his statement had been recorded in a letter. But Mr Sumption stressed that any such exceptions should be clearly defined and that they should be based on principle.

[114] The concern which he expressed was directed to the use of Hansard in this case for the purpose of seeking to discover from debates in Parliament the reasons which Parliament had for making the enactment. He said that this was quite different from seeking to discover what words mean. It was one thing to refer to Hansard to ensure that legislation was not misconstrued in favour of the Executive. That use could be said to be in support of the principle of parliamentary sovereignty. It was another to refer to it in order to form a view as to whether Parliament had given sufficient reasons for doing what it did and, if not, whether the legislation was incompatible with convention rights. To use Hansard in this way was to use it for a purpose which was adverse to the intention of Parliament.

[115] Mr Sumption put forward two objections to this use of Hansard on grounds of principle. The first was that it involved examining the nature and quality of Parliament's reasoning in a case where there was no doubt about what Parliament had enacted. Where it was used for the purpose explained in *Pepper v Hart* there was a threshold that had to be satisfied—the test of ambiguity. Here there was no such threshold, as the suggestion was that Hansard could be resorted to however clear were the provisions set out in the enactment. The second was that its object was not to give effect to the will of Parliament but to measure the sufficiency of reasons given for the legislation against standards derived from the convention. He said that this was contrary to art 9 of the Bill of Rights 1689. It was not for the courts to consider whether speeches made during debates in Parliament had put forward convention-compliant reasons for supporting it.

[116] I think that there is much force in these criticisms of the approach which the Court of Appeal took to this issue. But it would be going too far to say, as Mr Sumption did, that there are no circumstances where use may be made of Hansard where the purpose of doing so is to answer the question whether legislation is compatible with convention rights. The boundaries between the respective powers and functions of the courts and of Parliament must, of course, be respected. It is no part of the court's function to determine whether sufficient reasons were given by Parliament for passing the enactment. On the other hand it has to perform the tasks which have been given to it by Parliament. Among those tasks is that to which s 4(1) refers. It has the task of determining, if the issue is raised, whether a provision of primary legislation is compatible with a convention right. It does not follow from recognition that there is an area of judgment within which the judiciary will defer to the elected body on democratic grounds that the court is absolutely disabled from forming its own view in these cases as to whether or not the legislation is compatible. That question is ultimately for the court not for Parliament, as Parliament itself has enacted. The harder that question is to answer, the more important it is that the court is equipped with the information that it needs to perform its task.

[117] This, then, is the justification for resorting to Hansard in cases where the question at issue is not one of interpretation but whether the legislation is compatible. A cautious approach is needed, and particular care must be taken not to stray beyond the search for material that will simply inform the court into the forbidden territory of questioning the proceedings in Parliament. To suggest, as the Court of Appeal did ([2001] 3 All ER 229 at [36]), that what was said in debate

tends to confuse rather than illuminate would be to cross that boundary. It is for Parliament alone to decide what reasons, if any, need to be given for the legislation that it enacts. The quality or sufficiency of reasons given by the promoter of the legislation is a matter for Parliament to determine, not the court.

**[118]** But proceedings in Parliament are replete with information from a whole variety of sources. It appears in a variety of forms also, all of which are made public. Ministers make statements, members ask questions or propose amendments based on information which they have obtained from their constituencies, answers are given to written questions, issues are explored by select committees by examining witnesses and explanatory notes are provided with Bills to assist members in their consideration of it. Resort to information of this kind may cast light on what Parliament's aim was when it passed the provision which is in question or it may not. If it does not this cannot, and must not, be a ground for criticism. But if it does, the court would be unduly inhibited if it were to be disabled from obtaining and using this information for the strictly limited purpose of considering whether legislation is compatible with convention rights. This is an exercise which the European Court may wish to perform in order to determine, for example, whether the aim of the contested legislation was a legitimate one or whether an interference with the peaceful enjoyment of possession was justified (see *James v UK* (1986) 8 EHRR 123 at 143 (para 48); *Mellacher v Austria* (1989) 12 EHRR 391 at 409 (para 47); *Ambruosi v Italy* (2002) 35 EHRR 125 at 131 (para 28)). It is an exercise which the domestic court too may perform when it is carrying out the task under s 4(1) of the 1998 Act which has been entrusted to it by Parliament.

THE *DIMOND v LOVELL* ISSUE

**[119]** The Court of Appeal made it clear in its first judgment that it did not wish to arrive at a conclusion which permitted Mrs Wilson both to retain the car and to recover the £6,900 unless the statutory provisions left no alternative ([2001] QB 407 at 416, [2001] 2 WLR 302 at 311 (para 20) per Sir Andrew Morritt V-C). But it held, following Lord Hoffmann's observations in *Dimond v Lovell* [2000] 2 All ER 897 at 906, [2002] 1 AC 384 at 397–398, that the effect of s 127(3) of the 1974 Act was to render the agreement irredeemably unenforceable and that a claim for unjust enrichment must fail because this was precisely the consequence prescribed by Parliament.

**[120]** Mr Crow for the Secretary of State submitted that *Dimond v Lovell* was distinguishable and that it should not be applied in this case. He pointed out that the transaction in that case was different from that which Mrs Wilson had entered into with FCT. In *Dimond v Lovell* the payments which were in issue were the cost of hiring the replacement car. It was held that those payments were not recoverable as a matter of contract, and there was no basis for implying an obligation to pay which was contrary to the provisions of the statute. In this case Mrs Wilson's enrichment was not limited to the cost of the loan. It was not just that she was being relieved of the obligation of paying interest on it. Her enrichment extended to the principal of the loan itself, because the effect of s 127(3) was that she kept the sum of £5,000 as well as the motor car. He submitted that, while exoneration of the obligation to pay interest was plainly within the contemplation of the statute, retention of the principal sum which had been lent to her under the agreement was not.

**[121]** At first sight there is, to say the least, something odd about the result that Mrs Wilson has achieved in this case. But the effect of the failure to comply with

the requirements of the 1983 regulations was that the entire agreement under which FCT provided the loan to Mrs Wilson, having taken possession of her car in pawn, was unenforceable. The statutory bar on its enforcement extended to FCT's right to recover the total sum payable on redemption, which included the principal as well as interest. That is what the statute provides. I do not think that it is open to us to say that Parliament did not contemplate that the effect of this provision, which was to disable the creditor from recovering the principal of the sum lent as well as the interest on it, might be to enrich the borrower. Once that position is reached, the position is clear. The court cannot override the statutory provision by substituting a common law remedy.

**[122]** As Lord Hoffmann pointed out in *Dimond v Lovell* [2000] 2 All ER 897 at 907, [2002] 1 AC 384 at 398, the conclusion which he reached in that case was consistent with previous authority. In *Orakpo v Manson Investments Ltd* [1977] 3 All ER 1, [1978] AC 95 the transaction entered into under which loans were made to enable the borrower to acquire and develop certain properties were held to be unenforceable under ss 6 and 13(1) of the Moneylenders Act 1927. The effect was to enrich the borrower, who had fallen into arrears of payments of interest and moneys due but was successful in his defence that all the transactions including those which provided security rights to the creditor were unenforceable. Lord Diplock observed that, while the Moneylenders Acts were designed to protect unsophisticated borrowers from being overreached by unscrupulous moneylenders, they were capable of being used by unscrupulous borrowers to avoid paying their just debts to moneylenders. He considered whether a remedy in subrogation to redress the unjust enrichment might be available. But he concluded that, much as he should have liked to have done so, it was not open to him to mitigate the harshness to the moneylender and the undeserved enrichment of the borrower which had resulted from the technical failure to observe the provisions of the Act.

**[123]** In my opinion the same result must follow in this case. I would be reluctant to say that the enrichment of Mrs Wilson was an unjustified enrichment. There is no doubt that she has received a benefit which cannot be justified on legal grounds at the expense of the creditor. But s 127(3) of the 1974 Act too, like ss 6 and 13(1) of the 1927 Act, was designed to protect unsophisticated borrowers. There is no doubt that they would be exposed to the risk of harassment by unscrupulous creditors if creditors could override the statute by appealing to the common law. I would prefer to say that it would be inconsistent with the statute to provide FCT with a common law remedy to redress the enrichment which Mrs Wilson has received at its expense.

CONCLUSION

**[124]** I would allow the appeal and set aside the declaration of incompatibility.

**LORD HOBHOUSE OF WOODBOROUGH.**

**[125]** My Lords, this exceptional appeal raises important questions under two distinct heads, the first relating to the proper construction of the Human Rights Act 1998 and the second regarding the use of parliamentary materials, specifically Hansard, in relation to questions arising under the provisions contained in Sch 1 to the Act defining the convention rights (European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act)). The facts which gave rise to the original litigation have been set out in the opinion of my noble and learned friend Lord Nicholls of Birkenhead

as have the relevant dates and the unusual procedural history leading to this appeal which has been argued not by either of the original parties but by other interests. The House has also had the valuable assistance of counsel acting as amici curiæ.

THE 1998 ACT

**[126]** Although the main question of construction is to decide to what extent (if at all) the Act has retrospective effect, the first task is to examine the structure of the Act. The Act does not simply say, as do some comparable Acts (eg s 1(2) of the Carriage of Goods by Sea Act 1971), that the provisions of the convention 'shall have the force of law'. Its approach is more subtle. It has a limited definition of 'Convention rights' (s 1). It requires courts in determining a question in connection with a convention right to 'take into account' judgments of the European Court of Human Rights and other cognate material (s 2). It thus, at the outset, draws a distinction between the international obligations of the United Kingdom under the convention and what are to be the municipal law obligations of the three organs of the state, the Executive, the legislature and the judiciary. So far as the convention is concerned such distinctions are in principle irrelevant. If the provisions of the convention have been broken, the relevant state is in breach and no further analysis is required. The Act, on the other hand, follows a scheme which recognises that the role of the judiciary is to apply and enforce the 'Convention rights' municipally, treats the Executive branch of government, in the form of any public authority, as being civilly liable for any breach of the 'Convention rights' on its part and makes their offending conduct unlawful, and recognises that laws passed by the legislature may be incompatible with a 'Convention right'. Each of the three aspects of government are treated differently in the Act (though not in the convention). But there is one complicating factor to which I must return later—the inclusion of courts in the definition of 'public authority' (s 6(3)(a)).

THE LEGISLATURE, SECTION 4

**[127]** In order to preserve the traditional supremacy of Parliament in the constitution of the United Kingdom, legislation cannot be invalidated by the Act even if it is incompatible with the convention. This involves a recognition that the United Kingdom can, by reason of legislation on the statute book, be in breach of the convention if Parliament should so choose and it is the statute which must be upheld and applied by the judiciary. This situation is further confirmed by ss 4(6) and 6(2). A declaration of incompatibility under s 4 is thus unique. It has no effect in law except to provide a minister with the opportunity, by way of delegated legislation, to use the powers conferred by s 10 and Sch 2. Section 4 is different in character from any of the other provisions of the Act. It does not have as its subject matter the rights or obligations of any person in municipal law. It does not even affect the rights of the parties before the court at the time (s 4(6)). It merely contains a provision enabling—the word used is 'may'—the court, should it think fit, to make a declaration about the current state of the statute law of this country. The declaration applies only to the present (s 4(2) and (4)). If the legislation in question has been amended or repealed no question of a declaration under s 4 can arise. Section 4 involves no retrospectivity and there is therefore always jurisdiction to make a declaration. But it is unlikely that a court will make a declaration when it would be wholly gratuitous and, in such a case, the point probably would not have been argued and s 4(1) probably

would not be satisfied. The course adopted by the Court of Appeal in the present case ([2001] EWCA Civ 633, [2001] 3 All ER 229, [2002] QB 74), raising the question of incompatibility of its own motion when the parties had not, was in my view a work of supererogation and improper.

THE LEGISLATURE, S 3

**[128]** Section 3 has a different character although it again deals with legislation. It does change the law. It does change the parties' rights and obligations. Before the 1998 Act came into force, legislation had to be construed applying the ordinary canons of construction: the legislation would therefore have the legal effect 'x'. After the 1998 Act came into force, the same legislation may, because of the requirement that 'so far as it is possible' the legislation 'must be read and given effect in a way which is compatible with the Convention rights', have legal effect 'y'. Conduct that was lawful before may become unlawful and unlawful conduct may become lawful. A right or liberty that someone did not have before may be granted to them by the operation of s 3(1) when it came into force. Section 3 therefore has raised a question of retrospectivity answered in *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545 and *R v Kansal (No 2)* [2001] UKHL 62 at [83], [84], [2002] 1 All ER 257 at [83], [84], [2002] 2 AC 69 per Lord Hope of Craighead.

**[129]** But confusion has been created by the dual relevance of s 3. As well as the effect which I have explained in the preceding paragraph, it has a relevance to s 4. Sections 3 and 4 are both sections which came into effect on the same day, appointed under s 22(3). Therefore no question of incompatibility can arise under s 4 without the relevant legislation being construed in accordance with s 3. If s 3 provides the answer there is no incompatibility. But this is not to give a retrospective effect to s 3 any more than it is to give a retrospective effect to s 4.

THE EXECUTIVE, SECTIONS 6 AND 7

**[130]** Subject to certain qualifications, s 6(1) makes it unlawful for the Executive to act in a way that is incompatible with a 'Convention right' and s 7(1) empowers any victim of such unlawful conduct (or the threat of it) to take civil proceedings against the relevant authority or rely upon the 'Convention right' in legal proceedings. This, as regards the emanations of the Executive, ie public authorities, creates legal liabilities and, for the citizen, legal rights. These provisions therefore do raise a potential question of retrospectivity. Section 22(4) makes express provision answering this question: as regards the victim defending himself against the authority in proceedings brought by the authority, the victim can rely upon his 'Convention rights' whenever the act in question took place, but otherwise s 7(1) only applies to acts occurring after s 7 came into force. Two consequences flow from this express provision. First it expressly provides a limited retrospective effect to part of s 7(1). Secondly, it carries with it the clear implication that the Act in general does not have retrospective effect. Thus, far from permitting a view that the Act should in general be construed so as to have a retrospective effect, the conclusion is confirmed that the Act should not (save for the limited exception in s 22(4)) be construed so as to have any retrospective effect.

THE JUDICIARY, THE BASIC PRINCIPLE

**[131]** The judiciary is the part of government which has the responsibility for applying the law. The convention and the decisions of the European Court of

Human Rights recognise this, affirming the principles of certainty and 'legality'. There is nothing in the convention which requires the judiciary to do anything else. But, if, in complying with and applying the municipal law, the judiciary do not provide an outcome which is compliant with the rights of victims under the convention, for example, by failing to recognise a right or grant an adequate remedy, the state is in breach of its convention obligations and should change its municipal law. For a court, its duty in the determination of any dispute is to determine it in accordance with the municipal law applicable to the issue. This may include the duty to consider whether a particular statute or statutory provision has retrospective effect or not. If it does have retrospective effect, then that effect must be recognised but, if it does not, it must not be treated as determinative of the legality or legal result of earlier events or conduct, earlier, that is, than the date upon which the relevant change in the law came into effect. The duty I have described is the same for both the original trial court and any appeal court. Just as in a case with a foreign element, it may be necessary to apply the choice of laws rules of private international law, so, in another case when there has been a change in the municipal law between the time of the relevant events or conduct and the time of trial, it may be necessary to decide whether that change had retrospective effect or not. If the answer is that it did not then the change is irrelevant to the rights and liabilities of the parties (save possibly as relevant factual evidence on, say, a question of assessment of damages or causation of loss) and the position in an appellate court is the same. Article 7(1) of the convention provides an illustration of the need to apply the municipal law as it stood at the time of the relevant conduct and the objection to later making illegal conduct which was legal at the time.

THE JUDICIARY, ART 6

**[132]** Most of the other articles are substantive and, in so far as they affect remedies or procedures, are dependent upon the engagement of the substantive provision. But art 6 comes into a different category: it provides a right to a fair trial. This is a freestanding right and applies directly to the legal process and therefore (inter alia) directly to the conduct of the judiciary. But the article is drafted so as expressly to require that the proceedings be conducted in accordance with the law, that is to say the municipal law, in force at the relevant time—'an independent and impartial tribunal established by law'—'innocent until proved guilty according to law'. These phrases correspond to those used in other articles—'prescribed by law'—'in accordance with the law'. Thus, once the 1998 Act had been brought into effect, the litigant could call upon the tribunal before whom he is appearing to grant him the rights stated in art 6. But it does not follow from this that he can claim a right under the Act in respect of earlier events or conduct or hearings. It is a question of the construction of the Act and whether it is to be given a retrospective effect. It certainly does not follow that merely because he is before a court on a later occasion, he can claim art 6 rights in respect of some earlier hearing which took place before the Act came into force or require that the court apply s 3 of the Act in relation to something which occurred before it came into effect. In any event, in the present case there has been no denial to either party of their 'Convention rights' under art 6.

THE JUDICIARY, SECTIONS 6–8

**[133]** The inclusion of provisions relating to the Executive and to the judiciary all under the heading 'Public authorities' and the unqualified inclusion of courts

in the definition of the term 'public authority' do not assist the reader in making the necessary distinction between the Executive and the judiciary and their different constitutional functions. However, for present purposes and the consideration of what substantive rights were available to the original parties under the Act, the position is tolerably clear. The retrospective effect of ss 6 and 7 are dictated by s 22(4): no retrospective effect is available in the present case. Section 8 makes provision governing the remedies that a court may grant for a breach of a 'Convention right'. One can conceive of exceptional circumstances where art 6 might apply and might therefore give rise to a liability without more under s 8 such as the summary committal of a person for contempt in the face of the court without a fair hearing. But, where a 'judicial act' is concerned, s 9 provides that the remedy is to be by way of appeal. In other words any substantive breach or any failure to provide a fair hearing or to provide an adequate remedy within the confines of s 8, must be challenged by appealing the decision complained about. On the appeal, the substantive question will remain as it was in the lower court applying, in accordance with the basic principle I have identified earlier, the municipal law in force at the time of the events or conduct complained of or to be applied to it by reason of some later statutory provision having retrospective effect. The time at which the appeal is heard is irrelevant; equally irrelevant is which of the parties it is that has appealed.

**[134]** On this point as well the Court of Appeal was mistaken. The fact that the appeal was being heard after the Act had come into force did not alter what they had to decide or the municipal law which governed the dispute between the parties.

**[135]** Under these circumstances I will take the remaining points argued on the appeal relatively shortly.

INCOMPATIBILITY

**[136]** The relevant article is art 1 of the First Protocol. The complaint of those arguing for incompatibility is that the provisions of the Consumer Credit Act 1974 denied the lender its 'Convention rights' under this article. I agree with your Lordships that they did not but my reasoning is not wholly the same. The evidence of what really happened in the material transaction is exiguous and I recognise that the article may have been engaged. The transaction purported to be a transaction of pledge, that is to say, a transaction where the possession of a chattel of the borrower is given to and retained by the lender as security for the repayment of the money lent together with agreed interest. So long as the loan has not been repaid the pledgee has a special title in the chattel which is in his possession, by virtue of that possession. At common law the pledgee can thus sue if his possession is wrongfully interfered with, even by the owner. Dishonestly to deprive the pledgee of the possession of the chattel is theft (formerly larceny). Therefore, s 65 of the 1974 Act has the potential to deprive the pledgee of his special property in the pledged chattel. It follows that s 65 may deprive the pledgee of one of its possessions.

**[137]** Whether or not this is what actually occurred in the instant case is, for me at least, still not clear but I will proceed on the assumption that there was a true pledge involving a transfer of the possession of the motor car from the borrower to the lenders. The documentation purported to evidence a contract of pledge. On this basis, the lenders were seeking to exercise the rights of a person in possession of a chattel and were being prevented from doing so by s 65 so as, in effect, to deprive them of their possession of the motor car and there would be

the basis for an art 1 complaint. If, on the other hand, she actually remained in possession of the motor car throughout, the complaint of the lenders would be that they should have been allowed to seize the motor car from her after she defaulted and sell it to reduce or discharge her indebtedness to them. This would have been merely the purported enforcement of a claimed contractual right which the lenders had never in truth validly acquired, art 1 would never have been engaged and that would be the short answer to the complaint.

**[138]** On the basis that art 1 was engaged, does the 1974 Act go beyond what is justifiable under that article? For the reasons already given by your Lordships, I consider that it did not. The relevant provisions of the Act are a legitimate exercise in consumer protection. Borrowers are vulnerable and not on an equal footing with lenders. The Act legitimately regulates the transparency and recording of the terms of the loan transaction and makes provision for the clear obtaining of the borrower's informed consent to those terms. Any such Act would have to provide effective sanctions against the lender for any failure to comply with the requirements of the Act otherwise they will be liable to be flouted, as occurred in the instant case. The values to which the legislative provisions were applied were appropriate to consumer legislation, indeed arguably low, and the rates of interest chargeable, so far as your Lordships were told, unlimited. (In the instant case—a secured loan of some £5,000—the rate of interest claimed worked out at 99.66% pa.) The Act, as a matter of policy, places a strong emphasis on the clarity and transparency of the actual transaction and, although in respect of other infringements a degree of latitude is allowed and the sanctions are discretionary, for the infringement involved in the instant case the sanction is automatic, as the statute makes plain. It is argued that the legislature could have made the sanction discretionary. Maybe. But it does not follow that the view that the sanction should here be automatic was not a permissible view. There was no breach of art 1. The Court of Appeal was wrong to hold the contrary.

THE 'HANSARD' POINT:

**[139]** In *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, the House of Lords permitted the reference to parliamentary material, specifically Hansard, as an aid to the construction of an ambiguous, obscure or absurd statutory provision, if it would provide an authoritative and clear guide to the intended meaning. Even the majority accepted that the liberty so permitted needed to be specifically confined and recognised the potential adverse consequences if it were not strictly limited. Lord Mackay of Clashfern LC in his dissent ([1993] 1 All ER 42 at 47–48, [1993] AC 593 at 614–615) was primarily influenced by the practical considerations and the cost and waste of resources that the proposed liberty would entail. In this he followed the view adopted 25 years earlier by Lord Reid in *Beswick v Beswick* [1967] 2 All ER 1197 at 1203, [1968] AC 58 at 74. But, as is recognised by the passages quoted by Lord Browne-Wilkinson in *Pepper v Hart* [1993] 1 All ER 42 at 62, [1993] AC 593 at 632, there are further objections to the liberty. One is that the constitutional means by which laws are made is by the entry of a statute in the statute book. The source of the new law is the document itself not what anyone may have said about it or some earlier form of it. Still less is it what the executive says about it or some individual member of a House of Parliament may have said about it in the course of its passage through Parliament. As Mr Sumption QC pointed out in his submissions, it is a fundamental error of principle to confuse what a minister or a

parliamentarian may have said (or said he intended) with the will and intention of Parliament itself. Likewise, it is another fundamental principle that the verbal expression of the law be certain, whatever difficulties in interpretation the words used may cause. Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the legislature but that of some other source with no constitutional power to make law. The process of statutory construction/interpretation is objective not subjective. These points are clearly made in the citations made by Lord-Browne-Wilkinson (vs) from Lord Wilberforce, Lord Diplock and Lord Scarman. The principles are also fully familiar (mutatis mutandis) to commercial lawyers in deciding what was the bargain struck between two commercial parties by a written agreement (see, for example, Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989).

**[140]** Mr Sumption did not seek to challenge the authority of the *Pepper v Hart* decision nor did he found upon any argument of breach of parliamentary privilege. He founded upon two criticisms of the Court of Appeal's approach to the parliamentary material and the use they made of it. He criticised the confusion of the intention of individual members of Parliament with the intention of Parliament. He was quite right to do so and I need add nothing to what I have already said. He also criticised what he submitted was an extension of the application of the *Pepper v Hart* decision from a narrowly defined matter of statutory construction to an investigation of the justification for the inclusion of a particular provision in an Act. He submitted that *Pepper v Hart* should be confined to its actual subject matter, a taxation statute where, as he put it, the Executive had made statements about what use they would make of the relevant provisions and so gave rise to a quasi-estoppel (sic) by which they would be bound. Perhaps a better way of making the point would be to say that the Executive had created a legitimate expectation which they must honour. In so far as Mr Sumption argues against making any extension to the *Pepper v Hart* decision or relaxing the strict observation of the safeguards which it included, I need no persuasion. Judicial experience has taught me, particularly since I was appointed a member of this House, that the attempt by advocates to use parliamentary material from Hansard as an aid to statutory construction has not proved helpful and the fears of those pessimists who saw it as simply a cause of additional expense in the conduct of litigation have been proved correct.

**[141]** But on the directly pertinent question of what material it is proper for a court to be referred to when it has to decide a question of proportionality or justification in relation the 'Convention rights' scheduled to the Human Rights Act 1998, it is necessary to consider what his argument really amounts to. On this I agree wholly with your Lordships and will take the point more shortly than would otherwise be the case. Whether a particular statutory provision offends against any of the 'Convention rights' is an objective question to be answered having regard to all relevant evidence. It is a task which Parliament itself has by the 1998 Act required the courts to perform. It involves no breach of parliamentary privilege or protocol even if it leads to a declaration that the legislation is incompatible under s 4. The argument that the courts when they apply and give effect to the 1998 Act are frustrating the will of Parliament is a travesty of the true position: they are giving effect to the will of Parliament expressed in the 1998 Act.

[142] The questions of justification and proportionality involve a sociological assessment—an assessment of what are the needs of society. This in part involves a legal examination of the content and legal effect of the relevant provision. But it also involves consideration of what is the mischief, social evil, danger etc which it is designed to deal with. Often these matters may already be within the knowledge of the court. But equally there will almost always be other evidentially valuable material which can be placed before the court which is relevant, such as reports that have been made, statistics that have been collected, and so on. Oral witnesses may have important evidence to give. To exclude such evidential material from the case merely because it is to be found in some statement made in Parliament is clearly wrong, particularly if ministerial statements made outside Parliament were already being relied on. This has nothing to do with investigating or questioning the will of Parliament. Parliament has spoken by passing the relevant Act. The evidence is admitted because it relates to making the required sociological assessment. It has long been the case that ministerial statements made in the House may be referred to when they are relevant to a question to be determined by a court. An example which immediately comes to mind is the ministerial statements concerning immigration policy which used to be made at the time when immigration law was largely extra-statutory. So the broader submission of Mr Sumption which would exclude access to any such material must be rejected.

[143] But it is easy to understand why it was that Mr Sumption's clients thought it necessary to intervene. The Court of Appeal, having decided that they must consider s 4 and that art 1 was engaged, then entered upon a process of scrutinising what had been said in Parliament as reported in Hansard to see whether it disclosed any justification they were prepare to accept for the relevant provisions of the 1974 Act at the time they were enacted. This was an unacceptable approach and likely to give rise to abuse. It is not part of the duty of any member of Parliament to provide or state definitively in Parliament the justification for legislation which the legislature is content to pass. Still less was it the duty of anyone in 1974 to anticipate the passing of the 1998 Act 24 years later. I agree that that use of Hansard for that purpose has been rightly objected to.

[144] There is a further important error in the Court of Appeal's approach which may be of greater significance in other cases. The question of justification and proportionality has to be answered by reference to the time the events took place to which the statutory provision is being applied. The person claiming to be a victim has to show how he has been affected by the provision he complains about. Those who are seeking to justify the use of the statutory provision have to do so as at the time of that use. If they cannot justify it at that time, their use of it is a breach of the victim's 'Convention rights'. That is how the European Court would decide the question and it is also how the municipal court is require to look at it. In most cases the difference will probably be academic and it no doubt was so regarded in the present case. But as circumstances change so the justification or the absence of it may change. Merely to examine the situation at the time the Act in question was passed and treat that as decisive is wrong in principle. The same point can be seen equally clearly in relation to a question of compatibility arising under s 4. As I have explained earlier, the decision under s 4 has to be made as at the time of the decision; just as the current state of the legislation at that time is what has to be the subject matter of the decision so also the circumstances and social needs existing at that time are what is relevant, not

those existing at some earlier or different time. To look for justification only in the parliamentary debates at the time the statute was originally passed invites error.

**[145]** For these reasons and, subject to what I have said, the substance of those given by my noble and learned friends Lord Nicholls of Birkenhead and Lord Hope of Craighead, I too would make the orders proposed. I should also add that I agree with and gratefully adopt what my noble and learned friend Lord Rodger of Earlsferry is to say about the various usages of the word 'retrospective'.

## LORD SCOTT OF FOSCOTE.

### INTRODUCTION

**[146]** My Lords, this appeal is brought by the Secretary of State. She appeals against the declaration of incompatibility contained in the order of the Court of Appeal dated 2 May 2001 (as amended on 12 June 2001). Neither the claimant in the litigation, Mrs Penelope Wilson, nor the defendant, First County Trust Ltd (FCT) has taken any part in this appeal. None the less an array of counsel have appeared before your Lordships representing the Secretary of State, the Finance and Leasing Association, three leading insurance companies, the Speaker of the House of Commons and the Clerk of the Parliaments and, in addition, an amicus curiæ. The circumstances in which this has come about are set out in the opinions of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead, and I need not repeat them. The issues which have necessitated this appeal and have led to the representation to which I have referred include issues of commercial and of constitutional importance.

**[147]** The issues have arisen out of a simple moneylending transaction. Under an agreement made in January 1999 FCT lent Mrs Wilson £5,000 for six months on the security of her motor car. The agreement was a 'regulated agreement' within the meaning of s 8 of the Consumer Credit Act 1974. Section 61 of the Act requires a document containing all the 'prescribed terms' of a regulated agreement to be signed by the debtor. One of the prescribed terms is 'the amount of the credit'. FCT charged Mrs Wilson, inter alia, a £250 fee but, by agreement between them, the £250 was not paid by Mrs Wilson but instead was added to the £5,000 to be repaid by her. In the document presented by FCT to Mrs Wilson for signing, and signed by her accordingly, 'the amount of the credit' was stated to be £5,250. But the £250 was 'an item entering into the total charge for credit' (see s 9(4) of the Act) and, accordingly, was not part of 'the amount of the credit' (see Sch 6 to the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553). In short, the document signed by Mrs Wilson did not, in the respect I have mentioned, contain the prescribed terms.

**[148]** Mrs Wilson did not repay the loan, or pay the £250 fee, and claimed back her car which she had deposited with FCT as security. She contended that the loan agreement was unenforceable against her and that under s 113 of the Act she was entitled to have her car back. The case was heard in the county court and on 14 September 1999 judgment was given in favour of FCT. Mrs Wilson then appealed to the Court of Appeal ([2001] QB 407, [2001] 2 WLR 302).

**[149]** The events to which I have referred took place after the Human Rights Act 1998 had been enacted but before the Act had come into force. The Act came into force on 2 October 2000. Mrs Wilson's appeal was heard in November 2000 and was successful. She obtained a declaration that the loan agreement with FCT under which she had received £5,000 was unenforceable by FCT and an order for

repayment by FCT, with interest, of the sum of £6,900 that she had paid to redeem her car. But the Court of Appeal took the view that this result of the application of the relevant provisions of the 1974 Act might arguably be incompatible with the rights of FCT under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) or under art 1 of the First Protocol to the convention. So they directed the requisite notice to be given to the Secretary of State (see s 5 of the 1998 Act) and adjourned the appeal in order for the point to be argued. An amicus curiæ was appointed.

**[150]** The renewed hearing of the appeal took place in March 2001 and in a judgment given on 2 May 2001 ([2001] EWCA Civ 633, [2001] 3 All ER 229, [2002] QB 74) the Court of Appeal concluded that s 127(3) of the 1974 Act, which prevented the court from enforcing a loan agreement unless a document containing all the prescribed terms had been signed by the debtor, was incompatible with FCT's rights under art 6 of the convention and art 1 of the First Protocol to the convention. In reaching this conclusion the Court of Appeal examined and commented upon the contents of the Hansard reports of the deliberations in Parliament during the progress of the Bill.

**[151]** On this appeal the following broad issues arise (1) Can the court make a declaration of incompatibility under s 4 of the 1998 Act in relation to events which predated 2 October 2000, the date on which the Act came into force? (2) If it can, were FCT's convention rights under art 6 or under art 1 of the First Protocol infringed by the relevant provisions of the 1974 Act? (3) Was the use made by the Court of Appeal of the Hansard reports permissible?

RETROSPECTIVITY

**[152]** The Attorney General, Lord Goldsmith QC, appearing on behalf of the Secretary of State, based his submissions on this issue on a simple, and plainly correct, proposition, namely, that prior to 2 October 2000 FCT had had no convention rights. The 1998 Act, under which convention rights became rights enforceable under domestic law, was not yet in force. The loan transaction between FCT and Mrs Wilson had taken place in 1999. So, at the time the loan was made and at the time Mrs Wilson's claim for a declaration that the loan was unenforceable against her and for the return of her car (or repayment of the sum she had had to pay FCT to get it back) was tried in the county court, the 1998 Act and convention rights were irrelevant. They could not affect the rights and liabilities of FCT and Mrs Wilson respectively under the loan agreement. There can be no dispute but that this was the position prior to 2 October 2000.

**[153]** It is, of course, open to Parliament, if it chooses to do so, to enact legislation which alters the mutual rights and obligations of citizens arising out of events which predate the enactment. But in general Parliament does not choose to do so for the reason that to legislate so as to alter the legal consequences of events that have already taken place is likely to produce unfair or unjust results. Unfairness or injustice may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced if persons are subjected on account of those past events to liabilities that they were not previously subject to. There is, therefore, a common law presumption that a statute is not intended to have a retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect (see *Maxwell on Interpretation of Statutes* (12th edn, 1969) p 215 and Bennion *Statutory Interpretation* (4th edn, 2002)

pp 265–266 and 689–690). The presumption can be rebutted if it sufficiently clearly appears that it was indeed the intention of Parliament to produce the result in question. The presumption is no more than a starting point.

**[154]** The question, therefore, is whether Parliament intended the 1998 Act and the convention rights thereby incorporated into domestic law to be applied to transactions and events predating the coming into force of the Act and so as to alter the legal consequences of those transactions and events?

**[155]** Sections 3 and 4 of the 1998 Act are, in my opinion, neutral. Section 3(1) requires: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' The 1974 Act must be so read. Section 4(2) says: 'If the court is satisfied that the provision [of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility.' These statutory provisions do not, in my opinion, assist one way or the other in answering the question whether Parliament intended the Act to be applicable to past transactions and events. At the least it may be said that they contain nothing to displace the presumption that Parliament did not so intend.

**[156]** Section 6(1) of the Act says: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' And sub-s (3) says that a 'public authority' includes 'a court or tribunal'. It is plain that s 6 is looking to the future. It is not purporting to make unlawful a pre-2 October 2000 act of a public authority. It was s 6(1) on which the Court of Appeal relied in the present case. The reasoning proceeded like this: (i) the Court of Appeal is a public authority (see sub-s (3)); (ii) it is unlawful for a public authority, and therefore for the Court of Appeal, to act in a way incompatible with a convention right; (iii) if the relevant provisions of the 1974 Act are incompatible with a convention right it is therefore unlawful for the Court of Appeal to give effect to them; (iv) the Court of Appeal is bound, by s 3, to try to read down the relevant provisions of the 1974 Act so as to render them compatible with the convention; and (v) if that reading down is not possible, the Court of Appeal may make a declaration of incompatibility (see s 4). This reasoning does not confront the issue of retrospectivity. It avoids it by concluding that if the trial, or, as in the present case, the appeal, takes place after 2 October 2000, the court is bound by s 6(1) to apply the 1998 Act without regard to whether the transactions or events in question predate or postdate the coming into force of the Act.

**[157]** My Lords, in my opinion, this conclusion cannot be accepted. The function of the court in civil litigation between private citizens is to adjudicate on their rights and obligations in issue in the case and to grant the relief, if any, requisite to reflect those rights and obligations. If the rights and obligations of the parties require a particular result to be reached, whether by dismissal of the action, an award of damages, the making of a declaration, the grant of an injunction, or otherwise, it is the duty of the court to deal with the case accordingly. For the court to do so cannot be an unlawful act under s 6(1).

**[158]** The retrospectivity issue in this case is whether the coming into force of the 1998 Act on 2 October 2000 has altered the rights and obligations inter se of FCT and Mrs Wilson arising out of their loan transaction in 1999. Let it be supposed that the relevant provisions of the 1974 Act are, prima facie, inconsistent with the convention rights of moneylenders; but let it be supposed also that the inconsistent provisions can be read down so as to give the court a discretion to enforce a loan agreement notwithstanding that a document containing the prescribed terms had not been signed by the borrower. On that

footing, a loan agreement post-dating 2 October 2000 would, subject to the court's discretion under s 127(1), be enforceable. But would a loan agreement pre-dating 2 October 2000 be similarly enforceable? Only if the Act were to be given a retrospective effect would that be so. If the Act is not to be given a retrospective effect, if the pre-2 October 2000 rights and liabilities of lender and borrower are not altered by the coming into effect of the Act, then it would be the duty of the court, post 2 October 2000 as before, to hold the loan agreement to be unenforceable. In so holding the court would not be committing an unlawful act under s 6(1) for in relation to the pre-2 October 2000 transaction the parties would have no convention rights.

**[159]** Section 7(1)(a) of the 1998 Act says that a person who claims that a public authority has acted in a way which is made unlawful by s 6(1) may bring proceedings against the authority. Section 9 says that proceedings under s 7(1)(a) in respect of a judicial act may be brought only by exercising a right of appeal. But every appeal court, including your Lordship's House, must, in dealing with an appeal, give effect to the rights and obligations of the parties in issue on the appeal. If these rights and obligations arise out of pre-2 October 2000 events, the appeal court is no more entitled than the court below to alter the parties' rights and obligations in order to give effect to a reading down of some relevant statutory provision unless the conclusion is justified that the 1998 Act was intended to have that retrospective effect.

**[160]** The only positive indication as to whether or not the 1998 Act was intended to have retrospective effect is to be found in s 22(4) of the Act. Section 22(4) says that s 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place but that otherwise sub-s (1) does not apply to acts taking place before 2 October 2000. This express indication of a specific retrospective effect that the Act was to have in relation to proceedings brought by a public authority is, in my opinion, a fair indication that in no other respect was the Act intended to have a retrospective effect.

**[161]** The arguments against allowing the Act to have a general retrospective effect seem to me very powerful. The legal consequences under the civil law of a transaction or of events ought to be established by reference to the law at the time they take place. When events apt to create rights or obligations take place citizens affected by the events need to be able to ascertain the extent of their rights or obligations. They cannot do so if subsequent legislation may add to or diminish those rights or obligations. Where transactions calculated to continue for some considerable period are entered into, intervening legislation may in some respect or other affect the rights and obligations that accrue under the transaction after the legislation has come into force. Landlord and tenant legislation is a good example. If a lease is granted for, say, 99 years, there might well be intervening legislation capable of affecting the ability of the landlord to forfeit the lease, to operate a rent review clause, to claim damages for dilapidations or to recover possession on the expiry of the term. But it would be unusual for the legislation to alter the rights and obligations of the parties resulting from events that had already taken place, such as a forfeiture notice already served, a damages claim already instituted, rent review machinery already in train, and so on. However, whatever may be the position where there is an on-going transaction and intervening legislation, the present case involves a simple six-month loan transaction. All the relevant events, bar the completion of the appeal process, pre-dated the coming into effect of the 1998 Act. There is nothing to rebut the presumption that Parliament did not intend the Act to

operate retrospectively so as to alter accrued rights or to impose obligations where none previously existed.

**[162]** In my opinion, therefore, the Court of Appeal were in error in endeavouring to apply the 1998 Act to the loan transaction between FCT and Mrs Wilson. There was no occasion to attempt to read down the 1974 Act under s 3 and no occasion to make a s 4 declaration of incompatibility. I would accordingly allow the Secretary of State's appeal on this ground. My reasons are, I believe, substantially the same as those expressed by my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Rodger of Earlsferry, with which I respectfully agree.

IS SECTION 127(3) OF THE 1974 ACT COMPATIBLE WITH THE CONVENTION?

**[163]** The loan agreement between FCT and Mrs Wilson was an 'improperly executed regulated agreement' because the document signed by Mrs Wilson misstated the amount of the credit and so did not contain all the prescribed terms. That is common ground.

**[164]** Section 65(1) of the 1974 Act says that an 'improperly-executed regulated agreement is enforceable against the debtor ... on an order of the court only'. It is to be noted that the agreement is not void or unlawful. It is merely unenforceable except on an order of the court. Section 127(1) of the Act says, inter alia, that in the case of an application for an enforcement order under s 65(1) the court 'shall dismiss the application if, but (subject to subsections (3) and (4)) only if, it considers it just to do so'. Subsection (3) bars the court from making an enforcement order under s 65(1) in a case where there is no document containing all the prescribed terms that has been signed by the debtor. So, in the present case, the court was barred by s 127(3) from making an enforcement order in favour of FCT. Its discretionary power to make an enforcement order which otherwise would have been conferred by sub-s (1) had been excluded by sub-s (3).

**[165]** It was contended before your Lordships that s 127(3) infringed art 6 of the convention in that FCT was denied recourse to the court for the determination of the question whether the loan agreement should be enforced. This, in my opinion, is an impossible contention. Article 6, as each of my noble and learned friends has observed, provides a procedural guarantee of the right to have issues judicially determined. Article 6 is not concerned with the substantive law. True it is that the loan agreement between FCT and Mrs Wilson was a valid, lawful agreement. But the 1974 Act declared it to be unenforceable. Whatever the divide between substantive law and procedural law, and I respectfully agree that the line is sometimes difficult to draw, there is no doubt at all but that s 127(3) is a provision of substantive law denying the loan agreement the quality of enforceability.

**[166]** Mr Hibbert counsel for the Finance and Leasing Association submitted that any statutory provision that rendered a valid agreement unenforceable infringed art 6 of the convention. The extravagance of this submission became apparent when he extended it to contracts for the sale of land. If his submission were right it would follow that the familiar statutory provisions rendering contracts for the sale of land unenforceable unless in writing would be incompatible with art 6 convention rights. In agreement with all of your Lordships I would reject the art 6 submissions.

**[167]** Reliance was placed, in the alternative, on art 1 of the First Protocol. Section 127(3), it was submitted, deprived FCT of its right to enforce repayment of the £5,000 loan and thereby deprived it of its 'possessions'. The deprivation

was, it was argued, disproportionate. I would, for my part, reject the art 1 of the First Protocol point on two grounds.

**[168]** First, art 1 of the First Protocol is directed to interference with existing possessions or property rights. FCT never had, at any stage in the history of the loan agreement, the right to enforce against Mrs Wilson the repayment of the £5,000. Neither the 1974 Act as a whole nor s 127(3) in particular constituted an interference with a pre-existing right of FCT to enforce repayment by Mrs Wilson of the £5,000. The Act, and s 127(3) prevented FCT from ever possessing that right. No authority has been cited to your Lordships for the proposition that a statutory provision which prevents a transaction from having the quality of legal enforceability can be regarded as an interference for art 1 purposes with the possessions of the party who would have benefited if the transaction had had that quality. In my opinion, the proposition should be rejected.

**[169]** Second, the purpose or policy underlying the statutory bar on enforceability of a regulated loan agreement where no document containing all the prescribed terms has been signed by the debtor cannot, in my opinion, be categorised as disproportionate. The need to control moneylending transactions is as old as our civilisation and I know of no legal system that has not imposed such controls. Indeed in some legal systems any lending of money on interest terms is barred. In this country there were strict statutory controls under the Moneylenders Acts 1900 to 1927. The 1974 Act represented a relaxation of the rigidity of the controls. The discretion allowed to the courts by s 127(1) of the Act was not to be found in its predecessors (see s 6 of the 1927 Act). These controls recognise the vulnerability of those members of the public who resort to pawnbrokers and moneylenders when in dire need of funds to make ends meet. They are open to exploitation; their bargaining power is minimal; their understanding of legal procedures and remedies is likely to be sparse. They need protection and part of the protection is the insistence by the Act that the 'prescribed terms', representing the important terms of the loan transaction, must be set out in a document to be signed by the debtor if the repayment of the loan is to be enforceable. I do not accept that this protection, harshly though it may in some cases bear upon lenders, is disproportionate.

**[170]** In my opinion, even if the 1998 Act were applicable to the loan transaction between FCT and Mrs Wilson there would have been no infringement of FCT's convention rights.

**[171]** One of the sub-issues argued before your Lordships was whether, when considering whether the provisions of the 1974 Act infringed FCT's convention rights, the court should take into account other legal remedies which might be available to FCT. It was argued that under the general law a restitutionary remedy was available to FCT enabling recovery of at least the £5,000. I am not clear whether the proposed remedy would be a common law remedy for money had and received or an equitable remedy based on Mrs Wilson's unjust enrichment, but identifying the correct description of the remedy is not for present purposes important.

**[172]** My Lords there can, in my opinion, be no doubt at all but that in considering whether s 127(3), in rendering the £5,000 loan unenforceable, constitutes an infringement of FCT's convention rights, FCT's remedies in the round must be taken into account. If FCT is able under the general law to recover the £5,000 by some means other than suing on the debt, the 1974 Act provisions preventing FCT from suing on the debt could not on any argument constitute an infringement of FCT's art 1 rights. But it is, in my opinion, equally

clear that no such alternative means of recovery are available to FCT. The decisions of this House in *Orakpo v Manson Investments Ltd* [1977] 3 All ER 1, [1978] AC 95 and, more recently, *Dimond v Lovell* [2000] 2 All ER 897, [2002] 1 AC 384 stand in the way. Parliament's intention in enacting s 127(3) of the 1974 Act was to make a loan, made under a regulated agreement, unenforceable in certain events. The courts cannot defeat that intention by allowing some alternative means of recovery.

USE OF HANSARD

**[173]** On this issue I am in complete agreement with, and cannot usefully add anything to, what has been said by my noble and learned friend, Lord Nicholls of Birkenhead.

**LORD RODGER OF EARLSFERRY.**

**[174]** My Lords, on 9 November 1998 the Human Rights Act 1998 received the Royal Assent and, some 23 months later, on 2 October 2000 it came into force. The Act was intended to 'bring home' rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). In terms of s 1(2), the convention rights listed in the Schedule have effect for the purposes of the Act. The main effect is to give people remedies in the domestic law of the United Kingdom if public authorities infringe their convention rights—the so-called 'vertical effect'. The extent to which the Act also operates between private individuals—the so-called 'horizontal effect'—is controversial. But it is recognised that, since courts are public authorities for purposes of the Act, a court order pronounced against one private party at the instigation of another may potentially infringe the first party's convention rights. If giving effect to a convention right under the Act means that the order has to be refused or modified, then that affects the rights of the party who sought it.

THE FACTS

**[175]** The present is said to be an example of that kind of case. Since my noble and learned friend Lord Nicholls of Birkenhead has given a full account of the facts, I need mention only the most important. In 1999 Mrs Wilson entered into a loan agreement with First County Trust Ltd (First County). The agreement was regulated by the Consumer Credit Act 1974. Mrs Wilson pawned her BMW car as security. Under s 61(1)(a), if the debtor has not signed a document in the prescribed form containing all the prescribed terms, the agreement is 'not properly executed', with the result that it 'is enforceable against the debtor or hirer on an order of the court only' (s 65(1)). More particularly, in terms of s 127(3), if an agreement does not contain all the prescribed terms, the court is not to make an enforcement order unless the debtor has signed a document which does contain all the prescribed terms. Mrs Wilson's position was that the document in the prescribed form which she signed did not show the correct 'amount of the credit', one of the prescribed terms. Moreover, she had signed no other document containing the prescribed terms. As a result, by reason of s 127(3) the court would not be able to make an enforcement order.

**[176]** Section 142(1)(b) provides that, where a thing can be done by a creditor on an enforcement order only and the creditor has not made an application for such an order, an interested party may apply to the court for a declaration and—

'the court may if it thinks just make a declaration that the creditor or owner is not entitled to do that thing, and thereafter no application for an enforcement order in respect of it shall be entertained.'

Where the court makes such a declaration, by s 113(3)(d), s 106 is to apply to any security provided in relation to the agreement. As a result, inter alia, the security is to be treated as never having effect and any property lodged with the creditor solely for the purposes of the security is to be returned forthwith. Mrs Wilson sought a declaration which would have these effects.

**[177]** The county court judge held that the loan agreement contained all the prescribed terms and he therefore refused to make the declaration which Mrs Wilson sought. She appealed, but in the meantime paid the necessary sum to recover her car. Mrs Wilson's appeal was heard after the 1998 Act had come into force. Reversing the county court judge, the Court of Appeal held that the agreement did not contain the prescribed term in question, the 'amount of the credit'. The agreement was therefore unenforceable by reason of s 127(3) (see [2001] QB 407, [2001] 2 WLR 302). The Court of Appeal eventually went on to hold, however, that s 127(3) infringed First County's rights under art 6(1) of the convention and art 1 of the First Protocol. Since it was not possible to 'read down' s 127(3) under s 3 of the 1998 Act so as to make it compatible with First County's convention rights, the Court of Appeal gave effect to it by ordering First County to pay back the sum which Mrs Wilson had earlier paid to them to get her car back. But the Court of Appeal ([2001] EWCA Civ 633, [2001] 3 All ER 229, [2002] QB 74) also made a declaration under s 4 of the 1998 Act that s 127(3) of the 1974 Act is incompatible with the rights guaranteed to the creditor by art 6(1) and art 1 of the First Protocol.

**[178]** First County did not appeal, but the Secretary of State appealed, on a number of grounds, against the Court of Appeal's order making the declaration of incompatibility. I respectfully agree with Lord Nicholls of Birkenhead as to the disposal of all these grounds of appeal and, in particular, with what my noble and learned friend, Lord Hobhouse of Woodborough, has said on the use of Hansard. I confine my observations accordingly to the one matter, 'retrospectivity'. At the outset, it may be useful to recall some general features of the 1998 Act.

GENERAL FEATURES OF THE 1998 ACT

**[179]** The 1998 Act is beautifully drafted. Its structure is tight and elegant, being marred only by the obvious interpolation of ss 12 and 13 as a result of amendments made while the Bill was passing through Parliament. The presence or absence of particular features in the Act is therefore unlikely to be due to oversight.

**[180]** Although the Act is not entrenched, the convention rights that it confers have a peculiar potency. Enforcing them may require a court to modify the common law. So far as possible, a court must read and give effect to statutory provisions in a way that is compatible with them. Rights that can produce such results are clearly of a higher order than the rights which people enjoy at common law or under most other statutes.

**[181]** It is well recognised, however, that convention rights are to be seen as an expression of fundamental principles rather than as a set of mere rules. In applying the principles the courts must balance competing interests. So much was made clear, for example, by my noble and learned friend, Lord Hope of Craighead, in *R v DPP, ex p Kebeline, R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 847, [2000] 2 AC 326 at 384. Therefore, when deciding whether the order sought

by one private party would infringe a convention right of the other, a court must balance the interests of both parties. If the court finds that the order would infringe the convention right of the party against whom it would be made, this can only be because the court has concluded that his interests are to be preferred to any competing interests of the party seeking the order. In particular, the court must have concluded that the convention right of the party resisting the order is to be preferred to the other party's common law or statutory right to obtain it.

**[182]** The 1998 Act is unusual—perhaps unique—in its range. While most statutes apply to one particular topic or area of law, the 1998 Act works as a catalyst across the board, wherever a convention right is engaged. It may affect matters of substance in such areas as the law of property, the law of marriage and the law of torts. Or else it may affect civil and criminal procedure, or the procedure of administrative tribunals.

**[183]** Unlike some statutes, the 1998 Act did not arrive on the scene unheralded. The Bill embodied a flagship policy of the government and the date for the commencement of the Act was announced well in advance. During the long period between Royal Assent and commencement, not only the legal profession but public authorities also could prepare for the day when people would enjoy convention rights within the three domestic legal systems and when public authorities would have to respond to that new situation.

**[184]** When the 1998 Act did eventually come into force, inevitably it was in a world where events and transactions had been taking place and legal proceedings of various kinds were in progress. Naturally, questions arose as to how the new Act fitted into this world. For all but two of these questions, the draftsman has, deliberately, left it to the courts to supply the answers. Although counsel confined their argument to ss 3 and 4, for reasons which will become apparent, I consider that the issues relating to the application of these sections are best considered in the context of the 1998 Act as a whole.

**[185]** In dealing with the more general aspects of the difficult topic of 'retrospectivity', I have derived particular benefit from studying Côté *The Interpretation of Legislation in Canada* (3rd edn, 2000) Ch 2, section 1, and the literature cited there.

THE PRESUMPTION AGAINST THE RETROACTIVE OPERATION OF LEGISLATION

**[186]** At common law there is a presumption that a statute does not have 'retrospective' effect. The statement in *Maxwell on Interpretation of Statutes* (12th edn, 1969) p 215 is frequently quoted:

> 'Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.'

The very generality of this statement rather obscures the fact that it uses the term 'retrospective' to describe a range of different effects, some more and some less extreme. It is therefore important to identify what it is about any particular provision that is said to be 'retrospective'.

[187] So far as matters of substance are concerned, the essence of the core common law rule is conveniently stated by Sir Owen Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267:

> 'The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.'

In *Wainwright v Home Office* [2001] EWCA Civ 2081 at [27], [2003] 3 All ER 943 at [27], [2002] QB 1334, Lord Woolf CJ referred succinctly to—

> 'the general presumption that legislation should not be treated as changing the substantive law in relation to events taking place prior to legislation coming into force.'

Since statutes which change the substantive law in relation to events in the past can obviously cause serious injustice, the presumption against a statute being intended to have such an effect is powerful—so powerful indeed that any statutory provision, such as s 1 of the War Damage Act 1965, which is intended to apply in this way can be expected to say so expressly. Because such provisions do actually affect the position before the legislation came into force, they can conveniently be described as 'retroactive'.

STATUTES MAKING PROSPECTIVE CHANGES TO EXISTING RIGHTS

[188] Retroactive provisions alter the existing rights and duties of those whom they affect. But not all provisions which alter existing rights and duties are retroactive. The statute book contains many statutes which are not retroactive but alter existing rights and duties—only prospectively, with effect from the date of commencement. Although such provisions are often referred to as 'retrospective', Viscount Simonds rightly cast doubt on that description in *A-G v Vernazza* [1960] 3 All ER 97 at 99, [1960] AC 965 at 975.

[189] The distinction between the two kinds of provision, and the need to have regard to that distinction, were spelled out by the Court of Appeal long ago in *West v Gwynne* [1911] 2 Ch 1. In that case the plaintiffs were assignees of a lease dating from 1874. The lease contained a covenant by the lessees against underletting the premises or any part thereof without the consent in writing of the landlord. Section 3 of the Conveyancing and Law of Property Act 1892 provided:

> 'In all leases containing a covenant ... against ... underletting ... the land or property leased without licence or consent, such covenant ... shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent ...'

In 1909 the plaintiffs applied to the defendant landlord for his consent to a proposed underlease of part of the premises but he replied that he was prepared to grant a licence only on condition that he should receive for himself half of the sum by which the rent of the underlease exceeded the rent payable under the lease. The plaintiffs sought a declaration that the defendant was not entitled to impose the condition. The question was whether s 3 of the 1892 Act applied to a

lease executed before the commencement of the Act. The Court of Appeal held that it did.

**[190]** Cozens-Hardy MR said ([1911] 2 Ch 1 at 11):

> 'It was forcibly argued by [counsel for the defendant] that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. I assent to this general proposition, but I fail to appreciate its application to the present case. "Retrospective operation" is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute. Sect. 46 of the Settled Estates Act 1877 ... is a good example of this. Sect. 3 does not annul or make void any existing contract; it only provides that in the future, unless there is found an express provision authorizing it, there shall be no right to exact a fine. I doubt whether the power to refuse consent to an assignment except upon the terms of paying a fine can fairly be called a vested right or interest. Upon the whole I think s. 3 is a general enactment based on grounds of public policy, and I decline to construe it in such a way as to render it inoperative for many years wherever leases for 99 years, or it may be for 999 years, are in existence.'

Buckley LJ observed (at 11–12):

> 'During the argument the words "retrospective" and "retroactive" have been repeatedly used, and the question has been stated to be whether s. 3 of the Conveyancing Act, 1892, is retrospective. To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law. Numerous authorities have been cited to us. I shall not travel through them. To my mind they have but little bearing upon this case. Suppose that by contract between A. and B. there is in an event to arise a debt from B. to A., and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in *Moon v. Durden* (*Moon v Durden* (1848) 2 Ex 22, 154 ER 389) and in *Knight v. Lee* ([1893] 1 QB 41). But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A.'s right in an event to become a creditor of B. As matter of principle an Act of Parliament is not without sufficient reason

taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning.'

**[191]** Similarly—simplifying the complexities—in *Gustavson Drilling (1964) Ltd v Minister of National Revenue* [1977] 1 SCR 271 an oil exploration company was entitled to deduct certain drilling and exploration expenses when computing its income for tax purposes, but it did not do so. In 1962 the legislation was changed to disallow such deductions. Subsequently, a successor company none the less sought to deduct those accumulated expenses and invoked the presumption against legislation having retrospective effect. The majority of the Supreme Court of Canada rejected the argument. Dickson J said (at 279–280):

'The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as [the] appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute.'

**[192]** Since provisions which affect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply. Nor is there any general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future. So, as Dickson J went on to point out in the *Gustavson Drilling* case [1977] 1 SCR 271 at 282–283, with special reference to tax legislation:

'No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.'

As the sparks fly upward, individuals and businesses run the risk that Parliament may change the law governing their affairs.

PRESUMPTION AGAINST INTERFERENCE WITH VESTED RIGHTS

**[193]** Often, however, a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be

presumed that Parliament did not intend the new legislation to affect them in that respect. If undue weight is not given to his use of the term 'retrospective', Wright J gives a strong statement of the presumption in *Re Athlumney, Ex p Wilson* [1898] 2 QB 547 at 551–552, [1895–9] All ER Rep 329 at 331–332:

> 'Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.'

Another statement of the presumption is to be found in the judgment of Dickson J in the *Gustavson Drilling* case [1977] 1 SCR 271 at 282:

> 'The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board* ([1933] SCR 629 at 638). The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions.'

**[194]** Dickson J here makes the important point that this presumption applies to all legislation which affects vested rights, whether the legislation affects them retroactively or only prospectively. The decision of the Privy Council in *Zainal bin Hashim v Government of Malaysia* [1979] 3 All ER 241, [1980] AC 734 is an example of the presumption being considered in relation to a retroactive statute.

**[195]** More often, the presumption falls to be considered in relation to legislation which alters rights only for the future. Since it is more likely that Parliament intended to alter vested rights in this way than that it intended to make a retroactive change, in practice the presumption against legislation altering vested rights is regarded as weaker than the presumption against legislation having retroactive effect.

**[196]** The presumption is against legislation impairing rights that are described as 'vested'. The courts have tried, without conspicuous success, to define what is meant by 'vested rights' for this purpose. Although it concerned a statutory rule resembling s 16(1)(c) of the Interpretation Act 1978, the decision of the Privy Council in *Abbott v Minister for Lands* [1895] AC 425 is often regarded as a starting-point for considering this point. There Lord Herschell LC indicated (at 431), that, to convert a mere right existing in the members of the community or any class of them into an accrued or vested right to which the presumption applies, the particular beneficiary of the right must have done something to avail himself of it before the law is changed. The courts have grappled with this idea in a series of cases which Simon Brown LJ surveyed in *Chief Adjudication Officer v Maguire* [1999] 2 All ER 859, [1999] 1 WLR 1778. It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label 'vested' to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed so, then it is perhaps only to be expected since, as Lord Mustill observed in *L'Office Cherifien des Phosphates v*

*Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 All ER 20 at 29, [1994] 1 AC 486 at 525, the basis of any presumption in this area of the law 'is no more than simple fairness, which ought to be the basis of every general rule'.

**[197]** A caveat should be entered. In *Hedderwick v The Federal Comr of Land Tax* (1913) 16 CLR 27 at 37 Griffith CJ said: 'It is hardly necessary to remark that the Crown's vested rights are to be respected as much as are the rights of private persons.' There is no suggestion in the present case that the application of the 1998 Act would affect any vested rights of the Crown or of any other public authority. It is not therefore necessary to decide whether the observation of the Chief Justice is sound as a general proposition or whether, if it is, the presumption would prevail in the case of the 1998 Act, given its objectives.

PRESUMPTION THAT LEGISLATION DOES NOT AFFECT PENDING PROCEEDINGS

**[198]** The authorities refer to a further presumption, that legislation does not apply to actions which are pending at the time when it comes into force unless the language of the legislation compels the conclusion that Parliament intended that it should. A well-known statement of this rule of construction is to be found in the judgment of Sir George Jessel MR in *Joseph Suche & Co Ltd, Re* (1875) 1 Ch D 48 at 50 where he referred to—

> 'a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.'

In *Zainal bin Hashim v Government of Malaysia* [1979] 3 All ER 241 at 245, [1980] AC 734 at 742 the Board deliberately modified this rule and slightly reduced its force:

> '... for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature.'

The rule applies, of course, to all legislation, not just to legislation with retroactive effect. Indeed this particular presumption is a more limited version of the general presumption that legislation is not intended to affect vested rights. Since the potential injustice of interfering with the rights of parties to actual proceedings is particularly obvious, this narrower presumption will be that much harder to displace. In *Zainal bin Hashim*'s case, however, the Privy Council held that the language of the provision in question compelled the conclusion that it was intended to apply even to pending proceedings.

STATUTES ALTERING MATTERS OF PURE PROCEDURE

**[199]** So far I have been dealing with changes in substantive law. As can be seen from the statement of Wright J in *Re Athlumney* [1898] 2 QB 547 at 552, [1895–9] All ER Rep 329 at 331–332 which I quoted above, changes in matters of pure procedure have been treated differently. Wilde B stated the position most starkly in *Wright v Hale* (1860) 6 H & N 227 at 232, 158 ER 94 at 96:

> 'where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.'

The justification for treating matters of pure procedure differently was stated by Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at 69:

> 'No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done.'

**[200]** Although, at a general level, the distinction between matters of substance and matters of pure procedure is readily understandable, in practice it has not always proved easy to apply, especially in relation to legislation on limitation or prescription. For that reason, in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 at 836, [1983] 1 AC 553 at 558–559 Lord Brightman cautioned against the potential dangers lurking in the description of a measure as 'procedural'. In the *L'Office Cherifien* case [1994] 1 All ER 20 at 32–33, [1994] 1 AC 486 at 527–528 Lord Mustill went further and suggested that a single criterion of fairness should be applied to all provisions. He added ([1994] 1 All ER 20 at 30, [1994] 1 AC 486 at 525):

> 'Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.'

This is an application of the 'true principle' identified by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at 724—

> 'that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'

**[201]** On Lord Mustill's approach an appropriate test might be formulated along these lines: Would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be 'so unfair' that Parliament could not have intended it to be applied in these ways? In answering that question, a court would rightly have regard to the way the courts have applied the criterion of fairness when embodied in the various presumptions.

**[202]** In these proceedings your Lordships are called on to consider the application of the 1998 Act in civil proceedings. The language of 'vested rights' does not translate altogether easily into the language of the criminal law. For that reason any views that I express are confined to civil proceedings.

THE OPERATIVE PROVISIONS OF THE 1998 ACT TO BE CONSIDERED TOGETHER

[**203**] The argument at the hearing concentrated on ss 3 and 4 of the 1998 Act and, more particularly, on whether s 3 had 'retrospective' effect. In the light of the foregoing discussion even that argument requires to be broken down into two parts. The first is whether s 3 is retroactive. The second is whether s 3 applies generally or only in such a way as not to affect rights that were vested, or proceedings that were pending, on 2 October 2000. Those issues relating to s 3 cannot be resolved in isolation, however, but only by looking at the 1998 Act as a whole.

[**204**] A single statute may contain some provisions which are retroactive and some which affect existing rights only for the future. Similarly, some provisions may apply generally on commencement and others only without prejudice to vested rights or without affecting pending proceedings. But, having regard to the purpose and structure of the 1998 Act, and subject to any express provisions to the contrary, Parliament must have intended all the operative provisions of this particular statute to take effect in the same way in respect of any given convention right.

[**205**] Section 1(1) defines the expression 'the Convention rights' as the rights and fundamental freedoms set out in certain specific articles of the convention. The Act then goes on to provide the two mechanisms by which they are to have effect in the domestic law of the United Kingdom. First, under the appropriate cross-heading, in ss 3 to 5—later complemented by s 10—the Act provides a mechanism for giving effect to convention rights in relation to legislation. Secondly, again under an appropriate cross-heading, in ss 6–9 it contains a mechanism for giving effect to convention rights in relation to the acts of public authorities.

[**206**] These are the operative sections of the Act for present purposes and they all came into force on 2 October 2000. Subject to the specific regime in s 22(4), there is nothing to suggest that Parliament intended that there should be any difference in the way that they were to be applied on commencement. And, indeed, it would be surprising if there had been a difference, precisely because the two groups of sections constitute different, but complementary, mechanisms for giving effect to the same underlying convention rights. It is a matter of chance whether the relevant act of a public authority occurs in an area covered by the common law or by statute, or by a mixture of both. In that sense, it is equally a matter of chance whether ss 6 and 7 only, or ss 3–5 also, are in play. For instance, a party enjoying a right to equality of arms under art 6(1) can rely on that right, if appropriate, to challenge the way court proceedings are conducted (s 7(1)(b)). If the relevant aspect of the proceedings is regulated, in whole or in part, by a statutory provision, he must be equally able to deal with it by invoking the court's obligation under s 3 to read and give effect to the statutory provision compatibly with art 6(1). If appropriate, s 4 also comes into play. So far as any given convention right is concerned, it would make no sense for some of these sections to apply retroactively or to apply generally to the situation on commencement and for others not to apply in these ways. They must all apply in the same way or else the 1998 Act would not work smoothly.

[**207**] The Court of Appeal rightly saw that the various operative provisions of the 1998 Act are interlinked and based part of their argument for applying ss 3 and 4 on s 6(1) which makes it unlawful for a public authority, including a court, to act incompatibly with convention rights (see [2001] 3 All ER 229 at [10]–[12], [2002] QB 74 at [10]–[12]). Since the issue was not raised before the Court of

Appeal, that passage in their judgment naturally proceeds on the assumption that s 6(1) itself applies in all cases from the date of commencement of the Act. That is not, however, something that can simply be assumed.

**[208]** The issue which the House has to decide transcends ss 3 and 4. It relates to the intention of Parliament when incorporating the convention rights and enacting the operative provisions to give effect to them. Were those rights and provisions to apply retroactively? Or generally from the date of commencement? Or only so as not to affect vested rights or pending proceedings? In terms of the test as formulated in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 All ER 20 at 30, [1994] 1 AC 486 at 525, the answer is to be found by considering whether the consequences of applying the operative provisions retroactively or so as to affect vested rights or pending proceedings would be 'so unfair' that Parliament could not have intended them to be applied in these ways. In fact, the question does not admit of a single answer.

APPLICATION OF THE 1998 ACT IN RELATION TO DIFFERENT ARTICLES OF THE CONVENTION

**[209]** The operative provisions of the 1998 Act must all apply in the same way when used to give effect to the same convention right. But they may apply differently when used to give effect to different convention rights. Article 6 embodies rights in relation to matters of procedure. When the 1998 Act is used to give effect to those art 6 rights in our domestic law, it provides remedies for defects in procedure. There is no presumption against purely procedural statutory provisions applying generally on commencement since no one has a vested right to any particular form of procedure. It follows that, given its unqualified language, the 1998 Act applies generally from the date of commencement in so far as it gives effect to art 6 rights. That is only what one would expect. Suppose, for instance, that during the hearing of the appeal in this case the Court of Appeal had done something—such as refusing to listen to submissions on behalf of First County—which was incompatible with their rights under art 6(1). There can be no doubt that s 6(1) would have applied and that the Court of Appeal would have acted unlawfully in terms of it. Similarly, s 7(1)(b) would have applied and under it First County could have relied on their art 6(1) rights. Sections 3–5 would also have applied to the appeal for this purpose. So, if the alleged infringement of First County's art 6(1) rights had arisen out of a statutory provision regulating the procedure in the appeal, s 3 would have bound the Court of Appeal. Depending on how the statutory provision could be read under s 3, the Court of Appeal could also have used the mechanism in ss 4 and 5 to make a declaration of the incompatibility of the provision with art 6(1) rights.

**[210]** In so far as articles of the convention contain substantive rather than procedural rights, the presumption would be that Parliament did not intend that, when used to give effect to them, the operative provisions should interfere with vested rights or pending actions. It is, however, unnecessary, and would be unwise, to go through the various articles with a view to identifying those convention rights in respect of which Parliament would or would not have intended the 1998 Act to apply generally on commencement. For example, I reserve my opinion on whether, because of the overwhelming importance and the absolute nature of arts 2, 3 and 4, Parliament would have intended that on commencement the Act would apply generally for the purpose of giving effect to them.

THE 1998 ACT, INCLUDING SECTION 3, NOT RETROACTIVE

**[211]** It is convenient first to consider whether the 1998 Act, including s 3, is retroactive.

**[212]** Subject to one exception, there is nothing in the language of any of the sections in the Act to suggest that they are meant to be retroactive. The exception is s 22(4) which, expressly, gives retroactive effect to s (7)(1)(b) in one particular situation. The proper inference is that none of the other provisions is intended to apply retroactively. This inference is corroborated by the obvious, and potentially far-reaching, unfairness of unsettling the law relating to past events and transactions in different areas of the law. In these circumstances, applying the powerful presumption against retroactivity, I readily conclude that, subject to s 22(4), none of the operative provisions of the Act, including s 3, is retroactive.

**[213]** In the particular context of criminal proceedings this conclusion is fortified by the observations of Lord Clyde on s 3 in *R v Lambert* [2001] UKHL 37 at [142], [2001] 3 All ER 577 at [142], [2002] 2 AC 545:

> 'The usual understanding of the appeal process is that the correctness of the decision appealed against should be determined in accordance with the law as it stood when the case was decided by the lower court. But on the appellant's approach it would seem that any case either of a civil or a criminal nature, decided according to the law as construed in the ordinary way prior to 2 October 2000, if an appeal was brought so as to be heard on or after 2 October 2000, would require to be decided by the application of a rule of construction, namely s 3 of the 1998 Act, which was not obligatory on the lower court. But that involves giving an undue extension to the effect of s 3. In my view s 3 only became obligatory on courts on 2 October 2000. The rule of construction which it expresses applies to all legislation whenever enacted. But there is nothing to show that it was intended by s 3 that the meaning given to a statutory provision by a court prior to 2 October 2000 should be changed in the event of an appeal against that decision being heard on or after that date.'

The same thinking is to be found in the comment of Lord Hope of Craighead in *R v Kansal* (No 2) [2001] UKHL 62 at [83], [2002] 1 All ER 257 at [83], [2002] 2 AC 69:

> '... the interpretative obligation in s3(1) cannot be applied so as to change retrospectively the meaning which was previously given to a provision in primary legislation. It does not make unlawful acts of courts or tribunals or other public authorities which, as a result of provisions in primary legislation, could not at the time when the acts were done have been done differently: see s 6(2)(a).'

In a very different civil context Lord Wright MR had said much the same in *Re a Debtor, ex p Debtor (No 490 of 1935)* [1936] Ch 237 at 243:

> 'Thus while an Appellate Court is able, and bound, to give effect to new remedies which have been introduced by enactments passed after the order appealed from was made by the Court of First Instance, yet with regard to substantive rights it is well established that the Appellate Court must give effect to the same law as that which was in force at the date of the earlier proceeding ... A matter of substantive right which has become res judicata cannot be upset by a subsequent general change of the law, in the absence of

precise intention to make the change so retrospective being evidenced in the Act.'

**[214]** Although counsel referred to the passages from *R v Lambert* and *R v Kansal* during argument, in the present case that particular kind of problem does not arise. Because of his decision on the prior point of interpretation, the county court judge did not consider or apply s 127(3). The first court to consider and apply it was the Court of Appeal. Accordingly, the danger of an appeal court using s 3 to make a retroactive change in the law applied by a lower court, which was identified in *R v Lambert* and *R v Kansal*, simply did not present itself in this case. None the less, the remarks of Lord Wright MR in *Re a Debtor* suggest that this is merely one aspect of a wider question about the application of new statutory provisions to pending proceedings.

THE APPLICATION OF THE OPERATIVE PROVISIONS OF THE 1998 ACT WHEN USED TO GIVE EFFECT TO ART 1

**[215]** For the reasons given by Lord Nicholls of Birkenhead, art 6(1) is not engaged in this case. The only live question relates to the application of the operative provisions when used to give effect to the right in art 1. It is crucially important to bear in mind that this is not a question about the application of s 127(3) of the 1974 Act, as potentially modified by s 3 of the 1998 Act, so as to affect vested rights or pending actions. Rather, it is a general question about the application of the operative provisions of the 1998 Act, when used to give effect to the art 1 right, so as to affect vested rights or pending proceedings. That question admits of only a single answer in regard to vested rights and pending proceedings respectively. And that answer cannot be found by examining the circumstances of particular cases and then applying a more or less flexible test in the light of those circumstances. This is just an aspect of the point emphasised by Lord Mustill in *The Boucraa* [1994] 1 All ER 20 at 32, [1994] 1 AC 486 at 528, when he said that a court which sets out to apply the test of fairness is concerned—

> 'not with the merits of the particular case, but with the generality of rights which Parliament must have contemplated would suffer if the section took effect retrospectively.'

Furthermore, in the words of Isaacs J in *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 434, the whole circumstances must be considered—

> 'that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.'

So in this case the single answer to the broadly conceived question is to be found by considering how Parliament intended the operative provisions of the 1998 Act to apply in relation to the generality of vested rights or pending proceedings—not in relation to vested rights or pending proceedings under the 1974 Act, far less in relation to the individual plight of Mrs Wilson and First County. To descend to those levels of particularity would not only result in a myriad of single decisions but would be to attribute to Parliament the implausible intention that the

meticulously drawn 1998 Act, embodying a landmark reform, was to apply in a piecemeal and haphazard fashion.

[216] Indeed, it is only by taking that broad general view of the application of the 1998 Act that a puzzle at the heart of this case can be solved. Depending on the particular legislative provision to be read through its prism, s 3 either results in the provision being modified and vested rights being affected, or else it leaves the provision unmodified and any vested rights intact. So, if the application of s 3 depended on the terms of the individual statutory provision to be read and given effect, it would be impossible to tell whether vested rights were affected, and so whether s 3 applied, without first applying it. That vicious circle is avoided if s 3 is regarded as part of a package of operative provisions whose application falls to be determined by judging the consequences of applying the provisions so as to affect the generality of vested rights and pending proceedings.

[217] In considering how the package of provisions in the 1998 Act is to be applied, it would be pointless to scour them in the hope of finding clues in the minutiae of the language. Section 3(2)(a), which says that the section applies to primary and subordinate legislation whenever enacted, is one of the two express indications which the Act contains as to its application. The other is in sub-s (4) of s 22, the minimalist application section, which makes s 7(1)(b) apply retroactively in certain defined circumstances. It is unnecessary to decide in this case whether s 22(4) applies to pending proceedings or so as to affect vested rights. For the rest, there is nothing in the operative provisions of the Act to show whether, in the case of substantive convention rights, they are to apply generally or only so as not to affect vested rights or pending proceedings. In that sense, they are ambiguous and so the presumption against them applying to pending proceedings, in particular, comes into play. But it is necessary to consider whether that presumption is displaced by other relevant considerations.

THE APPLICATION OF THE OPERATIVE PROVISIONS OF THE 1998 ACT IN THE PRESENT CASE

[218] In deciding how the operative sections of the 1998 Act should be applied when used to give effect to the substantive right in art 1, I would attach significance to the importance, in general terms, of the rights which the 1998 Act incorporates into our domestic law. It could be argued that, because of their importance, Parliament would have intended all of them to take immediate effect for all purposes. Since art 6 rights, for instance, would clearly take immediate effect for all purposes, in the interests of uniformity the other rights—including the right under art 1—should do so too. That argument could be reinforced by noticing the peculiar potency of the convention rights by comparison with other rights under domestic law, which could therefore be expected to give way to them. Moreover, it might be said that, since a court applying art 1 must always balance competing interests, there would be no risk of the rights of parties to pending proceedings being crushed willy-nilly by the new convention right. Parliament could therefore have been satisfied that, when giving effect to the art 1 right, the Act could apply generally on commencement without there being any unacceptable risk of injustice. Finally, and less importantly, it could be argued that the long interval between Royal Assent and commencement was an indication that, once the delay was over, the 1998 Act when used to give effect to art 1 was to have general effect (see *Craies on Statute Law* (7th edn, 1971) pp 393–395).

[**219**] The last line of argument has rarely been accepted and I would not accept it in this case. The other arguments carry more weight, but against them it can be said that the very importance and potency of the art 1 right make it all the less likely that Parliament would have intended that it should suddenly descend as a deus ex machina into pending proceedings. Moreover, not only is the unfairness of interfering with the rights of parties to pending proceedings very considerable but it is distinct and different in kind from the unfairness which may have to be balanced as one of the competing interests whenever art 1 is given effect. For these reasons I would conclude that there is no sufficient reason to hold that the presumption is displaced. Applying the relevant rule of construction, since the language of the operative provisions admits another conclusion, they must be taken not to affect pending proceedings. To put the matter another way, in the case of art 1, the consequences of applying the operative provisions of the 1998 Act to pending proceedings would be so unfair that Parliament could not have intended it to apply to them.

[**220**] The present action was in progress when the 1998 Act came into force on 2 October 2000. So, for the purposes of art 1, the operative provisions of the 1998 Act, including ss 3–5, do not apply to this action. I am content to rest my decision on that narrow ground. It follows that the Court of Appeal had no power to make the declaration of incompatibility that they did—and, indeed, that the Secretary of State had no right to be joined as a party under s 5(3). Despite this technical quirk, I would allow her appeal and make the order proposed by Lord Nicholls of Birkenhead.

*Appeal allowed.*

Dilys Tausz Barrister.

# Moyna v Secretary of State for Work and Pensions

[2003] UKHL 44

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOFFMANN, LORD RODGER OF EARLSFERRY AND LORD WALKER OF GESTINGTHORPE

10, 31 JULY 2003

*Social security – Disability living allowance – Care component – 'Cooking test' – Social Security Contributions and Benefits Act 1992, s 72(1)(a)(ii), (2).*

The claimant applied for the care component of disability living allowance under s 72(1)(a)(ii)[a] of the Social Security Contributions and Benefits Act 1992 which provided that a person was entitled to that allowance for any period throughout which he was so severely physically or mentally disabled that he could not prepare a cooked main meal for himself if he had the ingredients. A further requirement was that under s 72(2) a person was not entitled to the allowance unless he had satisfied the condition in, inter alia, s 72(1)(a)(ii) for the three preceding months and was likely to continue to do so for the next six months. The allowance application form read: 'You may never have planned or prepared a cooked main meal for yourself. But try to imagine how much help you would need if you tried to do this.' It then went on to ask on how many days a week help would be needed. The claimant stated in her application that she needed help using cooking utensils and taps, and coping with hot pans, for one to three days a week. She was then visited by an examining medical practitioner, whose opinion was that she was capable of preparing a cooked meal without help, and who recorded the claimant's description of herself as a person who could cook a meal. Her claim was disallowed, and she appealed to a disability appeal tribunal, which dismissed her appeal holding that she could, on most days, prepare a cooked main meal for herself, and that it was not unreasonable to expect her to do so. Her appeal to a social security commissioner was also dismissed. The commissioner held that the tribunal had been entitled to take a broad view; that the test was whether an applicant could cook a labour intensive reasonable main daily meal freshly cooked on a traditional cooker; and that the tribunal had made no error of law in construing the requirements of s 72(1)(a)(ii). The claimant appealed to the Court of Appeal, which allowed her appeal, holding (i) that the provision of a cooked main meal was something required regularly if someone were to enjoy a reasonable quality of life so that if the inability to cook were on no more than occasional days, the test would not be satisfied, but that it would if there were a clear pattern of a person not being able to provide for himself; and (ii) that in the claimant's case there was such a clear pattern in that there would sometimes be weeks in which for three days she would have to forgo her one cooked meal. The Secretary of State appealed.

**Held** – The purpose of the 'cooking test' in s 72(1)(a)(ii) of the 1992 Act was not to ascertain whether a claimant could survive, or enjoy a reasonable diet, without

a Section 72, so far as material, is set out at [6] and [7], below

assistance. It was a notional test, a thought-experiment, to calibrate the severity of the disability. It did not matter whether the claimant actually needed to cook. A person who could not cook for himself was entitled to the allowance whether he solved the problem of eating by obtaining help, buying cooked food, or eating out. The Court of Appeal had therefore been wrong to lay such emphasis upon the fact that unless the claimant in the instant case could cook more or less every day she would not enjoy a reasonable quality of life. Moreover, the test said nothing about how often the person should be able to cook. Section 72(2) contemplated that one should be able to say of someone *throughout* a nine-month period that he was a person whose disability was such that he could not cook a main meal. The cooking test involved looking at the whole period and saying whether, in a general sense, the person could fairly be described as a person who was unable to cook a meal. It was an exercise in judgment rather than an arithmetical calculation of frequency. In the instant case the commissioner had therefore been right in considering that the question involved taking a broad view of the matter and making a judgment, and right to say that the decision of the tribunal disclosed no error of law. Accordingly, the appeal would be allowed (see [1], [2], [17]–[20], [29]–[31], below).

Decision of the Court of Appeal [2002] EWCA Civ 408, [2002] All ER (D) 425 (Mar) reversed.

**Notes**

For the care component and the special provisions relating to it, see 44(2) *Halsbury's Laws* (4th edn reissue) paras 104, 105.

For the Social Security Contributions and Benefits Act 1992, s 72(1)(a)(ii), (2) see 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 376.

**Cases referred to in opinions**

*Brutus v Cozens* [1972] 2 All ER 1297, [1973] AC 854, [1972] 3 WR 521, HL.

*Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14, [1955] 3 WLR 410, HL.

*Grayan Building Services Ltd (in liq), Re* [1995] Ch 241, [1995] 3 WLR 1, CA.

*Mallinson v Secretary of State for Social Security* [1994] 2 All ER 295, [1994] 1 WLR 630, HL.

*Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737, [1983] 2 AC 803, [1983] 3 WLR 163, HL.

*O'Kelly v Trusthouse Forte plc* [1983] 3 All ER 456, [1984] QB 90, CA.

*R v Radio Authority, ex p Bull* [1997] 2 All ER 561, [1998] QB 294, [1997] 3 WLR 1094, CA.

*Woodling v Secretary of State for Social Services* [1984] 1 All ER 593, sub nom *Re Woodling* [1984] 1 WLR 348, HL.

**Cases referred to in list of authorities**

*Cockburn v Chief Adjudication Officer, Secretary of State for Social Security v Fairey* [1997] 3 All ER 844, [1997] 1 WLR 799, HL.

**Appeal**

The Secretary of State for Work and Pensions, appealed, with leave of the Appeal Committee of the House of Lords given on 18 November 2002, from the order of the Court of Appeal (Dame Elizabeth Butler-Sloss P, Potter and Kay LJJ) on 27 March 2002 ([2002] EWCA Civ 408, [2002] All ER (D) 425 (Mar)) allowing the

appeal of the claimant, Munira Moyna, from the decision of the Social Security Commissioner (H Levenson) dated 13 November 2000, dismissing the claimant's appeal from the decision of the Disability Appeal Tribunal (chairman, M Laschinger) on 27 January 1999, that she was not entitled to the care component of disability living allowance. The facts are set out in the opinion of Lord Hoffmann.

*Nicholas Paines QC* and *Julie Anderson* (instructed by the *Office of the Solicitor to the Department of Work and Pensions*) for the Secretary of State.

*Richard Drabble QC* and *Daniel Kolinsky* (instructed by *Hodge Jones & Allen*) for Mrs Moyna.

Their Lordships took time for consideration.

31 July 2003. The following opinions were delivered.

**LORD NICHOLLS OF BIRKENHEAD.**

[1] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives I would allow this appeal.

**LORD STEYN.**

[2] My Lords, for the reasons given in his opinion by my noble and learned friend Lord Hoffmann, I would also allow the appeal.

**LORD HOFFMANN.**

[3] My Lords, the issue in this appeal is whether the disability appeal tribunal made an error of law in deciding on 27 January 1999 that the appellant, Mrs Munira Moyna, did not qualify for disability living allowance under s 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992. Mrs Moyna's condition subsequently deteriorated and she made a fresh claim which was allowed with effect from 14 June 2000. This appeal is concerned with whether it should have been paid before that date.

[4] The social security commissioner, to whom in the first instance an appeal from the tribunal lay under s 34(1) of the Social Security Administration Act 1992, decided that there had been no error of law but his decision was reversed by the Court of Appeal (Dame Elizabeth Butler-Sloss P, Potter and Kay LJJ) ([2002] EWCA Civ 408, [2002] All ER (D) 425 (Mar)). The functions of the disability appeal tribunal have since been transferred by s 4(1) of the Social Security Act 1998 to unified appeal tribunals constituted under that Act but the appeal to the commissioner (see s 14(1) of the 1998 Act) and thence to the Court of Appeal (see s 15(1) of the 1998 Act) is still only on points of law.

[5] Disability living allowance was introduced by the Disability Living Allowance and Disability Working Allowance Act 1991 to replace what had been called attendance allowance and mobility allowance. The qualifications for attendance allowance had required a severe degree of disablement: the applicant had to be so severely disabled physically or mentally that he required 'frequent attention throughout the day' or 'prolonged or repeated attention during the night' in connection with his 'bodily functions' or 'continual supervision'

throughout the day or night in order to avoid substantial danger to himself or others. Although the courts were willing to give 'bodily functions' a fairly wide meaning (see for example *Mallinson v Secretary of State for Social Security* [1994] 2 All ER 295, [1994] 1 WLR 630) the House of Lords decided in *Woodling v Secretary of State for Social Services* [1984] 1 All ER 593, sub nom *Re Woodling* [1984] 1 WLR 348 that it did not include the performance of domestic tasks like cooking.

[6] One purpose of the new benefit introduced by the 1991 Act was to enable persons with lesser degrees of disability to qualify for allowances at lower rates. In provisions which are now consolidated in s 72 of the Social Security Contributions and Benefits Act 1992, it provided for payment of the 'care component' of the allowance at three different levels. The present case is concerned with the lowest level, to which a person is entitled under s 72(1)—

> '... for any period throughout which—(a) he is so severely disabled physically or mentally that—(ii) he cannot prepare a cooked main meal for himself if he has the ingredients ...'

[7] Paragraphs (b) and (c) of s 72(1) prescribe the conditions for payment of allowances at the two higher levels. In order to ensure that the allowance is paid only for more or less chronic disabilities, sub-s (2) provides:

> '... a person shall not be entitled to the care component of a disability living allowance unless—(a) throughout—(i) the period of 3 months immediately preceding the date on which the award of that component would begin ... he has satisfied or is likely to satisfy one or other of the conditions mentioned in subsection 1(a) to (c) above; and (b) he is likely to continue to satisfy one or other of those conditions throughout—(i) the period of 6 months beginning with that date ...'

[8] Mrs Moyna was for 21 years a civil servant in the (then) Ministry of Agriculture, Fisheries and Food who retired in 1997, aged 58, on grounds of ill health. She has a number of illnesses and disabilities, including a heart condition which prevents her from exerting herself for any length of time without bringing on pain and discomfort. On 20 December 1996 she applied for disability living allowance. There is (or was) a comprehensive form for such applications called DLA 1, which includes a section on 'Help that you need—during the day—Preparing a cooked main meal for yourself'. The form said:

> 'You may never have planned or prepared a cooked main meal for yourself. But try to imagine how much help you would need if you tried to do this. If you had everything you needed for the meal, roughly how many days a week would you need help
>
> planning a cooked main meal?
> peeling and chopping vegetables?
> using cooking utensils?
> using taps?
> using a cooker?
> coping with hot pans?'

[9] The boxes to be ticked on the form offered the alternatives of 'No help needed', '1 to 3 days', '4 to 5 days' and '6 to 7 days'. Mrs Moyna ticked the

'1 to 3 days' boxes for help with cooking utensils, taps, and hot pans. By way of explanation, she added in the space provided:

> 'If pans are heavy, I need someone to carry them and put them on cooker or away. I cannot carry anything heavy as if I do, it brings on angina attacks.'

**[10]** Mrs Moyna was then visited by an examining medical practitioner, who had his own form to fill in. This starts with a statement of the 'disabled person's needs in their own words'. Under the heading 'Preparing a cooked meal', the doctor wrote 'Can prepare a cooked meal'. In the section for the doctor's own opinions, under the heading 'Need for attention: in your opinion can the disabled person safely ...', followed by a list of actions, he ticked 'Without someone's help' in respect of peeling and chopping vegetables, using taps, using a cooker and coping with hot pans.

**[11]** The application form and the medical report then went to an adjudication officer, Mrs Roberts, who on 4 February 1997 disallowed the claim. Mrs Moyna wrote on 13 February 1997 requesting a review. The case was reconsidered by another adjudication officer, who reaffirmed the decision:

> 'I accept the visiting doctor's opinion as it is based on the examination and observation of Mrs Moyna ... The cooked main meal is for one person only, therefore, I consider that she could manage the pans for cooking such a meal. I do not accept that she cannot prepare a cooked main meal for herself.'

**[12]** In her more detailed reasons, the adjudication officer said:

> 'In her claim pack, Mrs Moyna states that she needs help 1–3 days a week, to use cooking utensils and taps, and to cope with hot pans. She cannot carry anything heavy as it brings on angina attacks. In her statement to the visiting doctor, she states she can prepare a cooked meal. The visiting doctor's opinion is that she does not require help to prepare a cooked main meal.'

**[13]** Mrs Moyna then appealed to the disability appeal tribunal, which dismissed her appeal on 27 January 1999. She told the tribunal that she could cook, although 'nothing elaborate'. The tribunal concluded:

> 'Chopping and peeling is sometimes difficult—and always is with hard vegetables if they are large. She can manage a small saucepan for herself. The other difficulty is standing for a long time, and the appellant's tactic if she has to cook something for herself is to put it on the cooker then lie down. From this we concluded that, with some planning and careful arranging of cooking requisites and perhaps use of a high chair, appellant can, on most days, prepare a cooked main meal for herself, and that it is not unreasonable to expect her to do so. She therefore does not qualify for the care component on that basis.'

**[14]** Mrs Moyna then appealed to the commissioner, saying that the tribunal had misconstrued the requirements of s 72(1)(a)(ii). The commissioner found no error of law. The test, he said, is whether the claimant can cook a 'labour intensive reasonable main daily meal freshly cooked on a traditional cooker'. Not all tribunals might have reached the same conclusion but the tribunal was entitled on the evidence to reach the conclusion it did.

**[15]** In the Court of Appeal the leading judgment was given by Kay LJ and the other two members of the court agreed. He did not accept that one could have facts on which different tribunals could properly reach different conclusions

about whether the 'cooking test' had been satisfied. The test was intended to be 'straightforward' and produce the same answer on the same facts.

**[16]** Kay LJ said ([2002] All ER (D) 425 (Mar) at [31]–[35]) that the provision of a cooked main meal was something required 'not on an occasional basis but on a regular basis if someone is to enjoy a reasonable quality of life'. If the inability to cook was on 'no more than occasional days', the test would not be satisfied. But if there was a 'clear pattern' of a person not being able to provide for himself, it would. In the present case, there was such a clear pattern, because on the basis of Mrs Moyna's answers on the claim form, there would sometimes be weeks in which for three days she would 'have to forgo her one cooked main meal'. This was a 'significant' disability because there was a regular pattern rather than something 'occasional or intermittent'.

**[17]** My Lords, there are two points to be made about the 'cooking test' in s 72(1)(a)(ii). The first is that its purpose is not to ascertain whether the applicant can survive, or enjoy a reasonable diet, without assistance. It is a notional test, a thought experiment, to calibrate the severity of the disability. It does not matter whether the applicant actually needs to cook. As the form DLA 1 said, 'try to imagine how much help you would need if you tried to do this'. No doubt some people (disabled or otherwise) do need to cook or prefer to do so, although home cooking seems to be fighting a losing battle against convenience foods and ready-cooked meals. Not for nothing is the notional meal contemplated by the cooking test described in the authorities as 'traditional'. It must be remembered that disability living allowance is a non-contributory, non-means tested benefit. A person who cannot cook for himself is entitled to the allowance, now £14·90 a week, whether he solves the eating problem by obtaining help, having a wife, buying television dinners or dining at the Savoy. On the other hand, even if a person needs to cook and has the motor skills to do so, he may still need assistance; to obtain the ingredients which the test assumes him to have, or because he is culinarily incompetent. So in my view the Court of Appeal was wrong to lay such emphasis upon the fact that unless the applicant could cook more or less every day, she would not enjoy a reasonable quality of life.

**[18]** That leads on to the second point, which is that the test says nothing about how often the person should be able to cook. It would have been easy for Parliament to say that a person should be able to cook daily or six times a week or whatever. Instead, the statute approaches the question of frequency in a different way. Section 72(2) contemplates that one should be able to say of someone *throughout* a nine-month period that he is a person whose disability is such that he cannot cook a main meal. What does this mean? One possible construction is that if there was a single occasion during the period when a remission in his disability would have allowed him to cook a meal, it cannot be said that throughout the period he was unable to do so. But the Secretary of State does not contend for this construction and I do not think that it would be right. That is not because one occasion is de minimis but because the test does not in my opinion function at that day-to-day level. It involves looking at the whole period and saying whether, in a more general sense, the person can fairly be described as a person who is unable to cook a meal. It is an exercise in judgment rather than an arithmetical calculation of frequency.

**[19]** I therefore agree with the commissioner that the question involves taking 'a broad view' of the matter and making a judgment. The standard of motor abilities required by the cooking test is not so precise as to allow calibration by arithmetical formula. In the present case, I think that the Court of Appeal

attached too much weight to the fact that in her claim form Mrs Moyna had ticked the box '1 to 3 days' for the extent to which she needed help with heavy pans, cutting vegetables and so forth. In answering the generalised question of whether Mrs Moyna could fairly be described as a person unable to cook, it may be relevant to consider not only the number of occasions on which she says she would need assistance but also the reasons why it would be needed. The tribunal went into the matter in some detail. It observed that she could cook for herself using lighter pans and cutting up smaller vegetables. In addition, it had the opinion of the examining doctor and his record of Mrs Moyna's own description of herself as a person who could cook a meal—a description which is, as I have said, not inconsistent with her not being able to do so all the time. These are all items of evidence which go into the decision-making process.

**[20]** In any case in which a tribunal has to apply a standard with a greater or lesser degree of imprecision and to take a number of factors into account, there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal must have erred in law in deciding the case either way (see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737 at 743, [1983] 2 AC 803 at 815–816). I respectfully think that it was unrealistic of Kay LJ to think that he was able to sharpen the test to produce only one right answer. In my opinion the commissioner was right to say that whether or not he would have arrived at the same conclusion, the decision of the tribunal disclosed no error of law.

**[21]** That is sufficient to dispose of the appeal, but I must say something about an alternative submission by Mr Paines QC, who appeared for the Secretary of State. He said the words 'period throughout which ... he is so severely disabled physically or mentally that ... he cannot prepare a cooked main meal for himself ...' (see s 72(1)) were ordinary English words and that their meaning was not a question of law. Consequently the short answer to the appeal was that the decision of the tribunal raised no point of law.

**[22]** This submission was based upon some well-known remarks of Lord Reid in *Brutus v Cozens* [1972] 2 All ER 1297 at 1299, [1973] AC 854 at 861, in which the question was whether the appellant had been guilty of 'insulting behaviour':

> 'The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved.'

**[23]** I think that these observations have been given a much wider meaning than the author intended. Lord Reid was in my opinion making two very pertinent points. First, he was drawing attention to a feature of language; namely, that many words or phrases are linguistically irreducible in the sense that any attempt to elucidate a sentence by replacing them with synonyms will change rather than explain its meaning. Lord Kilbrandon made the same point in his reference to Dr Johnson ([1972] 2 All ER 1297 at 1303–1304, [1973] AC 854 at

867). On the other hand, Lord Reid insisted that, whether the statute used simple words or difficult ones, its construction was a question of law.

[24] Lord Reid was here making the well-known distinction between the meaning of a word, which depends upon conventions known to the ordinary speaker of English or ascertainable from a dictionary, and the meaning which the author of an utterance appears to have intended to convey by using that word in a sentence. The latter depends not only upon the conventional meanings of the words used but also upon syntax, context and background. The meaning of an English word is not a question of law because it does not in itself have any legal significance. It is the meaning to be ascribed to the intention of the notional legislator in using that word which is a statement of law. It is because of the nature of language that, in trying to ascertain the legislator's meaning, it is seldom helpful to make additions or substitutions in the actual language he has used.

[25] Lord Reid's second point is made in the last sentence of the passage I have quoted, when he says that the question of whether the facts found by the tribunal count as 'insulting' for the purposes of the statute is a question of fact. There is a good deal of high authority for saying that the question of whether the facts as found or admitted fall one side or the other of some conceptual line drawn by the law is a question of fact (see, for example, *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14 and *O'Kelly v Trusthouse Forte plc* [1983] 3 All ER 456, [1984] QB 90). What this means in practice is that an appellate court with jurisdiction to entertain appeals only on questions of law will not hear an appeal against such a decision unless it falls outside the bounds of reasonable judgment.

[26] It may seem rather odd to say that something is a question of fact when there is no dispute whatever over the facts and the question is whether they fall within some legal category. In his classic work *Trial by Jury, The Hamlyn Lectures* (8th series, 1956) p 61 Lord Devlin said:

> 'The questions of law which are for the judge fall into two categories: first, there are questions which cannot be correctly answered except by someone who is skilled in the law; secondly, there are questions of fact which lawyers have decided that judges can answer better than juries.'

[27] Likewise it may be said that there are two kinds of questions of fact: there are questions of fact; and there are questions of law as to which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment. But the usage is well established and causes no difficulty as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question (see *Re Grayan Building Services Ltd (in liq)* [1995] Ch 241 at 254–255, [1995] 3 WLR 1 at 12–13).

[28] Applying the first of these two points to the facts of the present case, I think that it was unhelpful for the Court of Appeal to construe the statutory language as if it included words like 'daily' or 'regularly'. Applying the second, I think that the decision of the tribunal was within the bounds of reasonable judgment. I therefore think that, properly understood, Lord Reid's remarks in *Brutus v Cozens* [1972] 2 All ER 1297 at 1299, [1973] AC 854 at 861 do not lay down some heterodox principle which provides a short cut to dismissing an appeal ('the last resort of counsel appearing on behalf of respondents' as Lord Woolf MR said in *R v Radio Authority, ex p Bull* [1997] 2 All ER 561 at 569, [1998] QB 294 at 304) but are in accordance with established principles and common sense.

[29] I would therefore allow the appeal and restore the decision of the tribunal. a

**LORD RODGER OF EARLSFERRY.**

[30] My Lords, I have had the privilege of considering the speech of my noble and learned friend Lord Hoffmann in draft. For the reasons that he gives I too would allow the appeal and restore the decision of the tribunal. b

**LORD WALKER OF GESTINGTHORPE.**

[31] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons given in his speech I would allow this appeal. c

*Appeal allowed.*

Kate O'Hanlon Barrister.

# Secretary of State for Work and Pensions v Nelligan

[2003] EWCA Civ 555

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, SCOTT BAKER LJJ AND BLACKBURNE J

13 MARCH, 15 APRIL 2003

*Social Security – Retirement pension – Entitlement – Social Security Contributions and Benefits Act 1992, s 45(3) – Social Security Administration Act 1992, s 1(1)(a).*

The respondent was aged 60 on 14 August 1986. She claimed and received a category A pension, the amount of which was determined by the contributions she had made over the whole of her working life. Her husband was 65 on 20 October 1992 and he claimed and received a category A pension from that time. The respondent could then have made a claim for a category B pension, entitlement to which was based on marriage and the contributions made by the other party to the marriage, but she did not do so until 1 March 2000. Her category B pension was larger than her category A one. Section 43[a] of the Contributions and Benefits Act 1992 (the Benefits Act) dealt with persons entitled to more than one retirement pension. Subsection (1) provided that a person was not entitled to more than one pension for the same period and sub-s (2) provided that a person who would otherwise be entitled to both a category A and a category B pension might give notice to the Secretary of State specifying which of the two he wished to receive. Subsection (5) provided that if no such notice were given, the person was entitled to whichever of the pensions was from time to time the most favourable to him 'whether it is the pension which he claimed or not'. The respondent claimed that her category B pension should have been backdated to 1992. The appeal tribunal dismissed her appeal. She appealed to the Social Security Commissioner, submitting that s 43 of the Benefits Act applied, that her category B pension was more favourable to her, and that the words in parenthesis in sub-s (5) enabled her to have her claim backdated to 1992 when her entitlement first arose. The Commissioner allowed her appeal. The Secretary of State appealed. He submitted that because the respondent did not claim a category B pension until 1 March 2000, s 1(1)(a)[b] of the Social Security Administration Act 1992 (the Administration Act) prevented her entitlement being backdated to 1992. That section provided that no person should be entitled to any benefit unless he made a claim for it in the manner, and within the time prescribed in relation to that benefit by regulations. Under the Social Security (Claims and Payments) Regulations 1997 the maximum period for which the payment could be backdated was three months before the application for entitlement. The 1997 regulations also provided that where a person was entitled to, inter alia, category A and

a Section 43, so far as material, is set out at [6], below

b Section 1, so far as material, is set out at [5], below

category B pensions, and had made a claim for one of them, the claim could be treated as a claim for either or both.

**Held** – Section 43(5) of the Benefits Act could only operate after the conditions of entitlement to a pension, including the precondition under s 1 of the Administration Act of a claim, had been met. Section 43 had nothing to do with establishing entitlement to a retirement pension, it simply provided a mechanism for choosing between different pensions to which there was entitlement. The words 'whether it is the pension which he claimed or not' in s 43(5) were to cover a specific situation, namely where regulations provided that a claim for one benefit could be treated as a claim for a different benefit. It was only once an entitlement was established under that s 1 of the Administration Act that one could choose between benefits under s 43(5), the beneficiary being entitled to the most favourable benefit irrespective of a claim to that particular benefit. Accordingly the respondent was not entitled to a category B retirement pension in respect of any period before 2 December 1999 and the appeal would therefore be allowed (see [22], [24]–[28] below).

**Notes**

For the rule that persons are not generally entitled to more than one retirement pension and for entitlement to Category A and B retirement pensions, see 44(2) *Halsbury's Laws* (4th edn reissue) paras 567–578.

For the Social Security Contributions and Benefits Act 1992, s 43 and the Social Security Administration Act, s 1, see 40 *Halsbury's Statutes* (4th edn) (2001 reissue), 338, 575.

**Cases referred to in judgment**

*Insurance Officer v McCaffrey* [1985] 1 All ER 5, [1984] 1 WLR 1353, HL.

*Social Security Decision CP 3/2001*, Tribunal of Comrs.

**Cases also cited or referred to in skeleton arguments**

*Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279.

**Appeal**

The Secretary of State for Work and Pensions appealed, with permission of Social Security Commissioner David Williams, given on 9 September 2002, from the Commissioner's decision on 22 April 2002 allowing an appeal by the respondent, Jessie Nelligan, from the decision of the Bexleyheath Appeal Tribunal on 5 January 2001 that not having made her claim for a Category B retirement pension until 1 March 2000, she was not entitled to that pension in respect of the period from 20 October 1992 to 1 December 1999. The facts are set out in the judgment of Scott Baker LJ.

*David Forsdick* (instructed by the *Solicitor to the Department of Work and Pensions*) for the Secretary of State.

The respondent did not appear.

*Cur adv vult*

15 April 2003. The following judgments were delivered.

**SCOTT BAKER LJ** (giving the first judgment at the invitation of Kennedy LJ).

[1] The state pays two different kinds of retirement pension. These are called Category A and Category B. Basically the amount of a Category A pension is determined by the contributions the recipient has made over the whole of his or her working life. In the case of a Category B pension, entitlement is based on marriage and the contributions of the other party to the marriage; the spouse must have reached retirement age and be entitled to a Category A pension. Sections 43–55 of the Social Security Contributions and Benefits Act 1992 (the Benefits Act) provide for payment of these pensions.

[2] The present appeal is by the Secretary of State against the decision of Dr David Williams, a social security commissioner, on 22 April 2002, allowing an appeal from the Bexleyheath Appeal Tribunal on 5 January 2001. It is made with the permission of Dr Williams, whose decision conflicts with an earlier decision of *Wood (Social Security Decision CP 3/2001)* by Mrs Deputy Commissioner Ramsay, and, we were told, the current practice. Its outcome is of general importance to the Department of Work and Pensions as well as of specific importance to the respondent.

[3] The respondent was 60 on 14 August 1986. She claimed and received a Category A pension on the basis of her own national insurance contributions. Because of the level of those contributions it was 34% of the maximum amount. Her husband, Mr Nelligan, was 65 on 20 October 1992. He claimed and received a Category A pension from that time. The fact that Mr Nelligan reached the age of 65 triggered the right for the respondent to claim what could be described as a parasitic pension under Category B. The respondent could have made such a claim in 1992 and the standard procedure is, and was in 1992, to send someone such as Mr Nelligan a standard pack about four months before he reaches state pension age. The pack should have contained a second claim form for his wife to make a Category B claim should she choose to do so. It was accepted that for some reason no such pack was sent in this case. However, the Secretary of State's position is that he was under no legal obligation to send a pack and that it would be administratively impossible to notify everyone entitled to a retirement pension, hence the provision to which I shall come in a moment that anyone entitled to a benefit must claim it. The respondent did not make her claim until 1 March 2000 and it was treated as securing entitlement to benefit from 2 December 1999 (three months before). This, according to reg 19 of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 is the maximum period for which payment can be backdated.

[4] A person who qualifies for both a Category A and a Category B pension is entitled to receive the larger one but not both. The respondent's Category B pension was larger than her Category A pension. Her claim is that her Category B pension should have been backdated to 1992 (when her husband was 65) rather than to December 1999. The Bexleyheath Appeal Tribunal dismissed her appeal on the ground that it had no jurisdiction to do as she wished because she did not claim the pension until March 2000. However, she appealed to the social security commissioner who allowed her appeal.

[5] The relevant statutory scheme is to be found in ss 43–55 of the Benefits Act. Section 44 sets out the basic requirements for entitlement to a Category A

pension. Section 48A sets out the basic requirements for entitlement to a Category B pension. However, these sections have also to be read in the context of s 1 of the Social Security Administration Act 1992 (the Administration Act) which provides:

> '(1) Except in such cases as may be prescribed, and subject to the following provisions of this section and to section 3 below, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied—(a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or (b) he is treated by virtue of such regulations as making a claim for it.'

[6] Section 43 of the Benefits Act deals with persons entitled to more than one retirement pension. It provides, so far as material, as follows:

> '(1) A person shall not be entitled for the same period to more than one retirement pension under this Part of this Act ...
>
> (3) A person who, apart from subsection (1) above, would be entitled—(a) to both a Category A and a Category B retirement pension under this Part for the same period ... may from time to time give notice in writing to the Secretary of State specifying which of the pensions referred to in paragraph (a) ... above he wishes to receive.
>
> (4) If a person gives such a notice, the pension so specified shall be the one to which he is entitled in respect of any week commencing after the date of the notice.
>
> (5) If no such notice is given, the person shall be entitled to whichever of the pensions is from time to time the most favourable to him (whether it is the pension which he claimed or not).'

[7] This appeal turns on the effect of the words in brackets in s 43(5) 'whether it is the pension which he claimed or not' and in particular whether they override or displace the general provision in s 1(1)(a) of the Administration Act that no one is entitled to any benefit unless he makes a claim for it within the prescribed time.

[8] The Secretary of State's submission is that because the respondent did not claim a Category B pension until 1 March 2000, s 1(1)(a) of the Administration Act prevents her entitlement being backdated to 1992. The respondent says that the Category B pension was more favourable to her and the words in brackets in s 43(5) of the Benefits Act enable her to have the claim backdated to 1992 when her husband was 65 and her entitlement first arose. The social security commissioner found in her favour. He said:

> '27. The proper context for the interpretation of s 43(5) is that of the section of which it forms part, noting the provisions that existed prior to the consolidation of those previous measures into the current section. As it is a section expressly designed to deal with conflicts between other sections, I do not find it of assistance to note those conflicts. Subsection (5) is a default provision that operates in cases where an individual has not given notice in writing of the kind which she is entitled to give from time to time under s 43(3). The effect of a notice is to choose which of the two pensions to which she is entitled the claimant wishes to receive. If notice

is given, then sub-s (4) provides that it is to have effect. If it is not, then sub-s (5) operates.

28. Subsection (3) is itself an exception to the rule in sub-s (2) if the claimant chooses to use it. A claimant does not have to give a notice under sub-s (3). Subsection (2) allows an individual to receive both a Category A pension and a Category B pension at the same time, but makes provision (by reference to s 73 of the Administration Act) to remove any overlap caused by the double entitlement. Section 73 is brought into effect by the Social Security (Overlapping Benefits) Regulations 1979. The effect of sub-s (2), read with this regulation, is to stop an individual receiving more than the specified maximum amount of pension despite the double entitlement. Subsection (3) does not allow this capping to be side-stepped. It merely provides that the claimant could decide, say, to receive her Category B pension entitlement without reference to her Category A entitlement.

29. Subsection (5) is not drafted in limited terms. Nor was its predecessor in s 27(2). In my view, sub-s (5) means what it says. The respondent was entitled from the date of her husband's claim to both a Category A pension and a Category B pension. Subsection (2) stopped her being entitled to more than the higher of them. Subsection (3) allowed her to choose whether she received the Category A pension topped up by Category B entitlement or simply the Category B entitlement. As she did not make any option under sub-s (3) the Secretary of State, under sub-s (5), awarded her the Category B entitlement. Before that date, she also had given no notice and she had not made a claim. But she was entitled to the Category B pension if this was from time to time the most favourable to her whether she had claimed it or not.'

[9] He went on to conclude that any other interpretation of s 43(5) failed to take into account the 'unambiguous final words of that subsection' and its legislative history. He said:

> 'I read those final words as requiring, as a precondition of the operation of the rule in sub-s (5), that the individual concerned must have claimed one of the two relevant pensions but not both. It follows that sub-s (5) recognises an entitlement to a pension for which no claim has been made in the limited circumstances in which the subsection applies. It is an express statutory exception to the general rule in s 1 of the Administration Act.'

[10] In my judgment the social security commissioner misunderstood the effect of s 43(5) and was wrong in his conclusion that it was an express statutory exception to the general rule in s 1 of the Administration Act. He failed to appreciate the distinction between establishing entitlement and choosing between benefits. Far from the legislative history supporting the social security commissioner's conclusion in my view it strongly supports the opposite conclusion.

[11] The predecessors of ss 44 and 48A of the Benefits Act were ss 28 (Category A) and 29 (Category B) of the Social Security Act 1975 (the Social Security Act). The tests for eligibility were not precisely the same as under the Benefits Act but the general structure was essentially the same. Just like s 43(1) of the Benefits Act, so s 27(6) of the Social Security Act said there was no

entitlement for the same period to more than one retirement pension. Section 27(6) of the Social Security Act (the predecessor of s 43(5) of the Benefits Act) provided:

> 'No person shall be entitled for the same period to more than one retirement pension; *but where under the following sections in this Part (whether Chapter I or Chapter II) a person would otherwise be entitled to more than one such pension, he shall be entitled (whichever pension he may apply for) to whichever one is from time to time the most favourable to him.*'

The words in my italics were repealed by the Social Security Pensions Act 1975 (the Pensions Act) (see s 65(3) and Sch 5), and replaced by s 25 of that Act in materially the same terms as s 43 of the Benefits Act which was passed as a consolidating statute. Section 25(1) of the Pensions Act provided:

> '(1) Where under Part II of the [Social Security Act] ... a person would, but for section 27(6) of that Act, be entitled to more than one retirement pension, he may give notice in writing to the Secretary of State from time to time stating which of the pensions he wishes to receive; and that pension shall then be the one to which he is entitled in respect of any week commencing after the date of the notice.
>
> (2) If no such notice is given, the person shall be entitled (whichever pension he may have claimed) to whichever one is from time to time the most favourable to him.'

**[12]** Subsection (1) subsequently became sub-ss (3) and (4) of s 43 of the Benefits Act and sub-s (2) subsequently became sub-s 43(5) of that Act. Significantly, when the Social Security Act became law there was no equivalent to s 1 of the Administration Act (the section that makes entitlement to a benefit dependent on a claim being made).

**[13]** The next step in the story is provided by the decision of the House of Lords in *Insurance Officer v McCaffrey* [1985] 1 All ER 5, [1984] 1 WLR 1353. That was a case under the Northern Ireland legislation which was, however, in substantially the same terms as the legislation that governed social security elsewhere in the United Kingdom. Margaret McCaffrey made a claim, after she had reached pensionable age, for a non-contributory invalidity pension. The relevant provision (s 36(1) of the Social Security (Northern Ireland) Act 1975) said that 'a person who has attained pensionable age shall not be entitled to a pension under this section unless he was so entitled ... immediately before attaining that age'. She met the necessary criteria but the insurance officer rejected her application because she had not made a claim before she reached pensionable age. The House of Lords rejected the insurance officer's appeal. The provision said nothing about making a claim being a condition precedent to entitlement. The insurance officer, however, relied on a later section in the same Act (s 79(1)) which said:

> 'Subject to the following provisions of this Chapter, and, in the case of retirement pensions, to section 27(6), it shall be a condition of a person's right to any benefit that he makes a claim for it in the prescribed manner and within the prescribed time.'

Lord Scarman rejected the insurance officer's argument that this modified the provision so that there was no entitlement until a claim was made, saying the

section should not be construed so as to place any restriction on entitlement but rather as dealing with the administration of benefit and the right to be paid.

[14] In order to reverse the effect of this decision Parliament enacted s 17 of the Social Security Act 1985, which added s 165A into the Social Security Act. That section was, so far as material, in the same terms as are now to be found in s 1 of the Administration Act. Thus, by enacting what is now s 1 of the Administration Act after the statutory predecessor to s 43(5) of the Benefits Act Parliament was showing that making a claim for a benefit was necessary in addition to meeting any conditions of entitlement.

[15] Consolidating legislation was passed in 1992 in the form of the Benefits Act and the Administration Act. The position is now governed by s 1 of the Administration Act and ss 43, 44 and 48A of the Benefits Act, and s 1 of the Administration Act must be satisfied before any entitlement to benefit arises.

[16] There is no doubt that 'benefit' in s 1 of the Administration Act includes Category A and Category B retirement pensions. Section 191 of the Administration Act defines benefit as meaning benefit under the Benefits Act, and s 122 of the Benefits Act defines benefit as including benefit under Pt II of that Act which is where retirement pensions are to be found.

[17] Section 1(1) of the Administration Act states the general position that entitlement to any benefit is dependent on a claim being made for it. Everything flows from a claim and this is so whether there is an actual claim under s 1(1)(a) or an applicant is treated by regulations as making a claim under s 1(1)(b).

[18] The only relevant regulations relating to the Administration Act are the 1987 regulations. Regulation 3, so far as is material, provides as follows:

> 'It shall not be a condition of entitlement to benefit that a claim be made for it in the following cases ... (d) in the case of a Category A or B retirement pension—(i) where the beneficiary is a woman over the age of 65 and entitled to a widowed mother's allowance or widowed parent's allowance, on her ceasing to be so entitled; or (ii) where the beneficiary is a woman under the age of 65 and in receipt of widow's pension or bereavement allowance, on her attaining that age.'

The respondent in the present case falls into neither category. Regulation 9 of the 1987 regulations deals with interchange with claims for other benefits. Regulation 9(1) provides:

> 'Where it appears that a person who has made a claim for benefit specified in column (1) of Part I of Schedule 1 may be entitled to the benefit specified opposite to it in column (2) of that Part, any such claim may be treated by the Secretary of State or the Board as a claim alternatively, or in addition, to the benefit specified opposite to it in that column.'

[19] The way that reg 9 and Sch 1 operate is that where a person may be entitled to both benefits, the claim can be treated as a claim for either or both. However, these provisions do not apply in the present case because the person has to satisfy the conditions of entitlement to both benefits at the date of the claim. The words 'may be entitled' in reg 9 plainly refer to the date on which the claim is made. Where, as in this case, the respondent made a claim to a Category A pension at a time when she was not entitled to a Category B

pension because her husband had not reached retirement age, she cannot later rely on that Category A pension claim as a Category B pension claim when her husband does later reach retirement age. As Mr Forsdick for the appellant pointed out, if it was not necessary to make a claim for benefit these provisions would be unnecessary.

**[20]** Mr Forsdick also referred us to s 8 of the Social Security Act 1998 which, so far as material, provides:

> '(1) Subject to the provisions of this Chapter, it shall be for the Secretary of State—(a) to decide any claim for a relevant benefit ...
>
> (2) Where at any time a claim for a relevant benefit is decided by the Secretary of State—(a) the claim shall not be regarded as subsisting after that time; and (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.'

This simply translated into statutory form the law as it was previously understood to be.

**[21]** So, there cannot be two subsisting decisions in respect of the same claim. Also, there must be entitlement to each of two pensions, including a claim for each, before s 43 of the Benefits Act can bite on the situation.

**[22]** With what is s 43(5) of the Benefits Act concerned? The words in brackets are, in my judgment, to cover a specific situation. That is where regulations provide that a claim for one benefit can be treated as a claim for a different benefit. The beneficiary is entitled to the most favourable benefit irrespective of a claim to that particular benefit. A practical example is where a woman does not claim a Category A pension at retirement age, but subsequently claims a Category B pension when her husband retires. Because reg 9 and Sch 1 of the 1987 regulations apply, her claim for a Category B pension can be treated as a claim for a Category A pension if this is more favourable to her. Under s 43(5) of the Benefits Act the Secretary of State, in the absence of notification from her, can pay the Category A pension even though that is not the pension that she has claimed. What is critical, however, is that the s 43(5) interchange can only operate after the conditions of entitlement, including the precondition under s 1 of the Administration Act of a claim or a deemed claim, have been met.

**[23]** Section 43(5) of the Benefits Act is providing for a different application of the test in s 43(3). The contrary construction (ie that adopted by the social security commissioner) would mean that the words in brackets in s 43(5) overruled or supplanted the general rule of law spelt out in s 1 of the Administration Act. Section 1 of the Administration Act spells out the general position in very clear terms and it seems to me inconceivable that Parliament should have intended to achieve such a result by, as it were, a side wind.

CONCLUSION

**[24]** Section 43 of the Benefits Act has nothing to do with establishing entitlement to a retirement pension. It simply provides a mechanism for choosing between different pensions to which there is entitlement. One only reaches the s 43(5) analysis after one has determined to what pensions a person is entitled under other sections. The subsection is of limited and not general application.

a [25] The legislative history illustrates clearly why s 1 of the Administration Act, and more particularly its predecessor s 17 of the Social Security Act 1985, was enacted, namely to reverse the effect of the decision in *Insurance Officer v McCaffrey* [1985] 1 All ER 5, [1984] 1 WLR 1353 and make clear the fundamental position that entitlement to a benefit is ordinarily dependent on a claim being made for it.

b [26] I would therefore allow the appeal and direct that the respondent is not entitled to a Category B retirement pension in respect of any period before 2 December 1999.

**BLACKBURNE J.**

[27] I agree.

c

**KENNEDY LJ.**

[28] I also agree.

*Appeal allowed.*

Dilys Tausz Barrister.

# Corbett and another v Halifax plc and others

## [2002] EWCA Civ 1849

COURT OF APPEAL, CIVIL DIVISION

SCHIEMANN, SCOTT BAKER LJJ AND PUMFREY J

24 OCTOBER, 18 DECEMBER 2002

*Mortgage – Sale – Exercise of power of sale by mortgagee – Setting aside – Deception by purchaser – Purchaser deceiving vendor mortgagee – Relevance of deception to mortgagor – Whether sale liable to be set aside – Law of Property Act 1925, s 104(2).*

The claimants owned a house on which they secured a mortgage from the first defendant. The loan proposal was countersigned by the second defendant, then an employee of the first defendant. The claimants defaulted on the loan and an order for possession was made in the first defendant's favour. The first defendant instructed selling agents, including in its terms of engagement a standard provision of its in-house rules that 'under no circumstances may staff of the [first defendant] ... or their families purchase a property in possession'. The second and third defendants wished to purchase the property and the second defendant devised a plan to buy it in the name of M, his uncle. M purchased the property and, in a back-to-back transaction, sold it to the second defendant. The second and third defendants were then registered as first proprietors of the property. The claimants alleged that the sale should be set aside as having been fraudulent or at an undervalue. The judge held that the property had been sold below the best price attainable; that the second defendant had not been employed by the first defendant in any manner connected with the sale, but that he had acquired title by deceiving the first defendant into believing that M had been the true purchaser; that the second defendant had known the first defendant would not have sold to him had he disclosed the true facts; and that the second and third defendants were not purchasers in good faith and therefore could not take the benefit of s 104(2)[a] of the Law of Property Act 1925 which provided protection for a purchaser in good faith from a mortgagee exercising its statutory power of sale. In those circumstances, the judge held that the justice of the case required that the sale be set aside. On the second and third defendants' appeal, it fell to be determined whether the sale was liable to be set aside on the ground that they had deceived the first defendant into selling to them rather than to another purchaser.

**Held** – Equity would not intervene to set aside a conveyance of a legal estate made pursuant to the statutory power of sale unless there was some element of impropriety or bad faith on the part of the mortgagee in the exercise of that power. Moreover, a completed sale by a mortgagee was not liable to be set aside merely because it had taken place at an undervalue: impropriety was a prerequisite and it was made clear by s 104(2) of the 1925 Act that a purchaser was not protected if he or she had actual knowledge of the impropriety. It followed that a completed sale by a mortgagee pursuant to the statutory power of sale was

a Section 104 is set out at [22], below

vulnerable only if the purchaser had knowledge of or participated in an impropriety in the exercise of the power. In the instant case, the second defendant's deception of his employers did not confer upon the claimant mortgagors any right to set the sale aside which they would not have possessed against any other purchaser at an undervalue who had not known of the undervalue and was not involved in the exercise of the power of sale by the first defendant. There was therefore never any equity which could be asserted by the claimants to set aside the sale to the second and third defendants. Improper or irregular exercise of the statutory power of sale did not include circumstances of which the mortgagee had no knowledge and in which the claimants had no concern. The first defendant's in-house rules and their proper application were nothing to do with the claimants. The judge had therefore been wrong to set the sale aside on the basis that the second and third defendants could not take the benefit of s 104(2) of the 1925 Act. Accordingly, the appeal would be allowed (see [26], [30], [31], [35]–[39], [44], [46]–[48], [51], [52], below).

*Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310 and *Property and Bloodstock Ltd v Emerton* [1967] 3 All ER 321 applied.

**Notes**

For the protection of purchasers from irregularity in sale, see 32 *Halsbury's Laws* (4th edn reissue) para 669.

For the Law of Property Act 1925, s 104, see 37 *Halsbury's Statutes* (4th edn) (2003 reissue) 254.

**Cases referred to in judgments**

*Berwick & Co v Price* [1905] 1 Ch 632.

*China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839, [1990] 1 AC 536, [1990] 2 WLR 56, PC.

*Cuckmere Brick Co Ltd v Mutual Finance Ltd, Mutual Finance Ltd v Cuckmere Brick Co Ltd* [1971] 2 All ER 633, [1971] Ch 949, [1971] 2 WLR 1207, CA.

*Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626, [1993] AC 295, [1993] 2 WLR 86, PC.

*Farrar v Farrars Ltd* (1888) 40 Ch D 395, CA.

*Hounslow London BC v Hare* (1990) 24 HLR 9.

*Kennedy v De Trafford* [1897] AC 180, [1895–9] All ER Rep 408, HL.

*Kingsalton Ltd v Thames Water Developments Ltd* [2001] EWCA Civ 20, (2001) 1 P & CR 184.

*Medforth v Blake* [1999] 3 All ER 97, [2000] Ch 86, [1999] 3 WLR 922, CA.

*Midland Bank Trust Co Ltd v Green* [1981] 1 All ER 153, [1981] AC 513, [1981] 2 WLR 28, HL.

*National Bank of Greece SA v Pinios Shipping Co No 1, The Maira* [1990] 1 All ER 78, [1990] 1 AC 637, [1989] 3 WLR 1330, HL.

*Oliver v Hinton* [1899] 2 Ch 264, CA.

*Pilcher v Rawlins* (1872) LR 7 Ch App 259, LJJ.

*Property and Bloodstock Ltd v Emerton, Bush v Property and Bloodstock Ltd* [1967] 3 All ER 321, [1968] Ch 94, [1967] 3 WLR 973, CA.

*Taylor v London and County Banking Co, London and County Banking Co v Nixon* [1901] 2 Ch 231, CA.

*Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC.

*Waring (Lord) v London and Manchester Assurance Co Ltd* [1935] Ch 310, [1934] All ER Rep 642.

*Warner v Jacob* (1882) 20 Ch D 220.
*Yorkshire Bank plc v Hall, Hall v Yorkshire Bank plc* [1999] 1 All ER 879, [1999] 1 WLR 1713, CA.

**Cases referred to in skeleton arguments**
*Bailey v Barnes* [1894] 1 Ch 25, CA.
*Benedictus v Jalaram Ltd* [1989] 1 EGLR 251, CA.
*Blockbuster Entertainment Ltd v Leakcliff Properties Ltd* [1997] 1 EGLR 28.
*Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, CA.
*Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [2000] 1 WLR 377, CA.
*Forsyth v Blundell, Associated Securities Ltd v Blundell* (1973) 129 CLR 477, Aust HC.
*Gafford v Graham* [1999] 3 EGLR 75, CA.
*Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA.
*Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38, [1987] AC 189, [1987] 2 WLR 312, HL.
*Martinson v Clowes* (1882) 21 Ch D 857; *affd* (1885) 52 LT 706, CA.
*Moody v Cox and Hatt* [1917] 2 Ch 71, [1916–17] All ER Rep 548, CA.
*Pasquarella v National Australia Finance Ltd* [1987] 1 NZLR 312, NZ CA.
*Sewell v Agricultural Mortgage Bank of Western Australia* (1930) 44 CLR 104.
*Sindall (William) plc v Cambridgeshire CC* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA.
*South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.
*Spence v Crawford* [1939] 3 All ER 271, HL.
*Three Rivers DC v Bank of England (No 3)* [2001] UKHL/16, [2001] 2 All ER 513.
*Wolff v Vanderzee* (1869) 20 LT 353.

**Appeal**
The second and third defendants, Alan John Deakin and Jillian Deakin, appealed with permission of Judge Weeks QC sitting as a judge of the Chancery Division from his order on 17 October 2001 setting aside the sale by the Halifax Building Society, the predecessor of the first defendant, Halifax plc, as mortgagee in possession, of Yew Tree Farm, Sand, Wedmore, Somerset, to them. The claimants, Ian Dudley Corbett and Elaine June Corbett, had alleged that the sale was fraudulent or at an undervalue. Halifax appealed on a costs point. The facts are set out in the judgment of Pumfrey J.

*Thomas Jefferies* (instructed by *Wards*, Bristol) for the Deakins.
*Philomena Harrison* (instructed by *Bevan Ashford*, Bristol) for the Corbetts.
*Neil Levy* (instructed by *Hammond Suddards Edge*, Leeds) for the Halifax.

*Cur adv vult*

18 December 2002. The following judgments were delivered.

**PUMFREY J** (giving the first judgment at the invitation of Schiemann LJ).

INTRODUCTION

[1] The appellants, to whom I shall refer as 'the Deakins', appeal with the permission of Judge Weeks QC sitting as a judge of the Chancery Division against

his judgment delivered on 17 October 2001 setting aside the sale by the third respondent (the Halifax) as mortgagee in possession of Yew Tree Farm, Sand, Wedmore, Somerset, to them. The claimants, to whom I shall refer as 'the Corbetts', allege that the sale was fraudulent or at an undervalue. Judge Weeks ordered the register to be rectified to reflect his order, and made an order for possession of Yew Tree Farm in favour of the Halifax and for immediate sale.

[2] Although Judge Weeks' finding that the sale to the Corbetts was at an undervalue was challenged in the grounds of appeal and in the appellants' skeleton argument, Mr Jefferies, recognising the difficulties confronting him in pursuing a challenge to the judge's finding of fact, did not pursue the point with any enthusiasm, and it is now accepted that the judge's finding that the sale took place at an undervalue must stand.

[3] With that introduction, I turn to the facts of the case. Judge Weeks sets out the events fully and with great care, and I will only set out so much of the facts here as make this judgment comprehensible.

[4] The Corbetts purchased Yew Tree Farm in 1983. It then consisted of a site of about 1·5 acres fronting a quiet country lane, with (1) a 250-year-old farmhouse abutting the lane; (2) a barn and outbuildings behind the farmhouse, later converted by the Corbetts to a house called Little Sneyd; and (3) a paddock of about 1 acre, which the Corbetts still own. Yew Tree Farm, Little Sneyd and an adjoining property share access over a single shared drive from the lane. Until 1992, the Corbetts lived in Yew Tree Farm and ran a bed and breakfast business. Mr Corbett also ran a printing business from a caravan parked on the property.

[5] In 1987, the greater part of the property excluding the outbuildings was mortgaged to Western Trust and Savings Ltd to secure a loan of £75,125, which was used to finance the conversion of Little Sneyd. Mr and Mrs Corbett appear to have run into difficulties almost immediately, since in February 1989 they put the whole property, except the paddock and another strip providing access to the paddock from the lane on the market. They found no takers, and ultimately they raised the funds to discharge the loan by remortgaging the farmhouse and a small garden to the Halifax. The loan proposal was countersigned by Mr Deakin, then an employee of the Halifax at its branch in Weston-super-Mare and the transaction was completed on 23 March 1990. The loan secured was £160,000, of which £82,163 went to redeem the existing mortgage. The interest rate was 13·5% p a over the first two years, and the monthly repayment rate was £1,995. The rest of the money was used for Little Sneyd, and a further advance of £25,000 on the same security was obtained on 20 August 1990, raising the total indebtedness to £185,000 less the capital element of the repayments which the Corbetts made from March 1990. The repayment rate was then set at £2,286 per month, which the Corbetts knew they could not meet out of income. In January 1991 they borrowed a further £18,000 from Consumer Loans Co (Consumer Loans), and executed a further mortgage over 'Yew Tree Farm, Sand, Wedmore' on 13 February 1991 in favour of Consumer Loans. They applied £4,564 of the loan obtained from Consumer Loans in paying the December 1990 and January 1991 instalments of the principal loan, and then defaulted. By the following January the total indebtedness was £210,025·13.

[6] The Halifax's mortgage conditions then current were the 1988 edition, and the express power of sale is contained in cll 12 and 13:

> '12. The Redemption Money shall become immediately payable to the Society

(a) if there is a default in the payment of any two Monthly Payments or for two months in the payment of any moneys payable under the Mortgage these Conditions or the Rules ...

13. At any time after the Redemption Money has become immediately payable the Society may without any previous notice to or concurrence on the part of the Borrower:

(a) take possession of the Property

(b) exercise all the powers conferred on mortgagees by the Law of Property Act 1925 with all the incidences of such powers but so that the power of sale may be exercised whether the Society shall be in possession or not and without the restrictions imposed by s 103 of that Act ...

18. The Society's powers contained in the Mortgage or these Conditions are in addition and without prejudice to and not in substitution for all other powers and remedies of the Society under the Rules or by statute.'

[7] By 6 September 1991 it was clear to the Corbetts that possession proceedings were imminent, and their solicitor secured the agreement of the Halifax to postpone action for six months to enable the Corbetts to try to sell the property themselves. They failed to obtain a sale and ultimately the order for possession was made in the Weston-super-Mare County Court on 23 June 1992, possession to be given by 21 July. Their agents, Borough Mall, had by then reduced the asking price to £195,000. The Halifax did not take steps to execute the order until late in the year, by which time a single tentative offer of £150,000 had been obtained. The warrant for possession was obtained and was enforceable on 19 January 1993. Possession was obtained on 19 January 1993, and the Halifax formally instructed another firm of agents, Michael Gillett, as selling agents, having informally approached them some days earlier. The Halifax's standard terms of engagement included a provision that 'under no circumstances may staff of the Halifax group of companies or agent's staff or their families purchase a property in possession'.

[8] Two valuations of the property were obtained at this stage. The first, from Mr Dunscombe, a partner in Michael Gillett, was for a value after necessary repairs of £133,000 and an asking price in present condition of £137,000. The second, from Mr Hawthorne (an in-house valuer employed by the Halifax), valued the property at £142,000 with an asking price of £149,950. The Halifax's South East Property Unit (referred to as SEPU) considered the valuations and decided that the asking price should be £145,000 and the minimum price £135,000. On 9 February 1993 the Halifax gave instructions to Michael Gillett to start marketing the property. Particulars were prepared by Mrs Balson, the Wedmore manager of Michael Gillett. The amount outstanding was now about £236,000.

[9] During this period, the Corbetts decided to put Little Sneyd, which appears to have been unencumbered apart from the mortgage to Consumer Loans, on the market with a view to paying off the Halifax loan with the proceeds and retaining Yew Tree Farm. They found a potential purchaser, but the matter proceeded slowly because of uncertainty over the boundaries of Little Sneyd and the extent of the Halifax's charge.

[10] The Deakins had been on Michael Gillett's books since 1992. I take the account of what then happened from the judgment:

'Michael Gillett had kept a file on Mr Deakin with his address and telephone number in Wedmore and a work number, which was stated on the file to be a Halifax number. He had viewed several properties and made

an offer on one called The Coach House, which did not proceed, in the previous year. On 2 February 1992 he was recorded as still looking, and on 8 February he went to view a house in Theale. His limit was recorded as £160,000 on the file. On 11 February 1992 Mrs Balson took Mr Deakin and his wife and mother to see Yew Tree Farm. Mr Deakin has given different versions of the subsequent events on different occasions and I am not able to accept his evidence except where independently verified. Where it conflicts with that of Mrs Balson or Mr Gillett I prefer the latter. There is, however, no particular reason why Mr Deakin should have remembered Mr and Mrs Corbett's mortgage application in 1990 or been aware at this stage that the property was a Halifax repossession. It was immediately apparent to Mrs Balson that the Deakins liked the property very much. She says they "fell in love with it", although that is not the phrase they say they would have used. Mr Deakin said he made an immediate offer for £140,000 in writing. Mrs Balson cannot recall seeing such an offer and no copy of the document has been produced. She agrees, however, that the Deakins offered £140,000 straight away. She did not realise that Mr Deakin worked for the Halifax ... I find that Stephanie Balson told Michael Gillett that Mr Deakin had offered £140,000 for Yew Tree Farm. Mr Gillett was on nodding terms with Mr Deakin and knew that he worked for the Halifax. He told Stephanie Balson that Mr Deakin, as a Halifax employee, should not be purchasing a property repossessed by the Halifax. They agreed that one of them should speak to him. Either Mr Gillett or Mrs Balson did so, and Mr Deakin withdrew his offer. He was, however, quite determined to buy the property and over the weekend he devised a plan to buy it in his uncle's name. His uncle, Mr Marples, lived in Sheffield ... on 15 February 1993, Mr Deakin, or someone at his instigation, rang Stephanie Balson and made an offer for the property. Her note of 15 February says that "Mr A Marples offered £140,000", and gives his address and phone number in Sheffield. Mrs Balson was not stupid and knew that Mr Marples had not seen the property. She suspected, or realised, that Mr Deakin was using Mr Marples' name to circumvent the Halifax rules.'

[11] Judge Weeks found that the matter was raised with Mr Deakin again by Michael Gillett, who was told by Mr Deakin that the latter had his line manager's approval for the purchase.

[12] There were further complications in the sale of Little Sneyd, which did not have the benefit of any easement permitting access over the land which appeared to form part of the Halifax's security and whose boundary was in any case uncertain. The SEPU (which is located in Southampton) recommended a sale to Mr Deakin at the offer price having regard to the uncertainty in boundaries, and at the same time appears to have taken steps to make the sale of Little Sneyd difficult, so that the problems of boundaries and access could be overcome while it remained the Corbetts' property. A rival purchaser for Yew Tree Farm, Mr Shell, had also appeared on the scene, who consistently offered £145,000 but whose offer was never accepted, largely it would seem in consequence of Mrs Balson's failure to recommend it. The Halifax had a rule that an offer had to be 5% better to displace an existing firm offer, and the Shells were never told that if they wished their offer to be considered it would have to be £147,000 or above.

[13] By 20 July 1993, when contracts were exchanged in respect of Yew Tree Farm, the Shells had walked away because their offer of £145,000 had not been accepted. The intending purchaser of Little Sneyd had also abandoned the transaction, and the question of boundaries had finally been resolved. The price was £140,000 and the purchaser was Mr Marples. In a back-to-back transaction that took place on the same day, Mr Marples sold to Mr Deakin. Mr Deakin paid two lots of stamp duty on the transaction. On 12 November 1993, the Deakins were registered as first proprietors of Yew Tree Farm subject to a first charge in favour of the Abbey National under title no ST103445.

[14] The Deakins did not go into occupation immediately, preferring to stay at their old home in Wedmore until certain works were done. The Corbetts stayed in Little Sneyd. Mrs Corbett got hold of a MIRAS form sent to Mr Deakin at Yew Tree Farm, and showed it to her mortgage broker, who complained to the Halifax. The allegation, as advanced by the Corbetts' adviser, a licensed conveyancer called Mr Stait, was as follows, as reported by the Halifax:

> '... we have sold the ... property as mortgagee at an under-value to an employee of the Society. There is also an allegation that the Society frustrated the sale of an adjoining property (not in the mortgage) thereby preventing the borrowers from clearing off the arrears and avoiding a sale of our mortgaged property. Mr Stait says that the property was sold to a Mr Alan John Deakin who works at one of our Bristol offices. He has in his possession a copy of an Abbey National completion letter addressed to the property and a copy of Mr Deakin's MIRAS form. He also says that local workmen confirmed that they were carrying out work at the property for Mr Deakin. Mr Stait does not have a copy of the statutory post-mortgagee in possession notice which we will have served on the borrowers. We have been in correspondence with Dibb Lupton, who acted in the sale, who say that the buyer was Mr Alan Marples. The property was sold by some local agents, Gilletts of Wedmore, who he knows refused a higher offer for the property after the sale by the Society at £140,000 had been agreed. The sale was completed, apparently on 10 August.'

[15] Thus the battle lines between the Deakins and the Corbetts, now close neighbours, were drawn. After an investigation, Mr Deakin was punished by the Halifax for his actions, but was not dismissed. The Halifax took no steps to set the sale to him aside.

[16] In 1993 and 1994 the Deakins carried out certain works on Yew Tree Farm. They were unsuccessful in selling their old house in Wedmore, and contemplated selling Yew Tree Farm. On 13 October 1994 a letter before action was sent to the Halifax by the Corbetts' then solicitors. The Halifax's response was found by Judge Weeks not to be frank, but it seems to me that this is immaterial. A writ was eventually issued on 29 May 1996, followed by a statement of claim on 13 March 1997. The defence was served by the Deakins and a defence and counterclaim served by the Halifax in November. Neither the Corbetts nor the Deakins have sold their respective properties, with the consequence that over the whole period of this dispute they have remained neighbours.

THE JUDGMENT BELOW

[17] Before Judge Weeks, the Corbetts did not pursue their claim against the Halifax in respect of Little Sneyd (the sale of which was alleged to have been impeded by the Halifax) and advanced their claim against the Deakins and the

Halifax on two bases, fraud and sale at an undervalue. The material findings of Judge Weeks may be summarised as follows. (i) Mr Deakin, an employee of the Halifax, deceived the Halifax into selling to him, by interposing Mr Marples as a nominee purchaser. If the Halifax had known of Mr Deakin's involvement, it would not have sold to him. (ii) Mr Deakin was not employed by the Halifax in any manner connected with the sale, and thus the sale could not be set aside on the basis of *Farrar v Farrars Ltd* (1888) 40 Ch D 395. (iii) The decision to accept the offer made by Mr Deakin acting through Mr Marples was made by the employees of the Halifax in total ignorance of Mr Deakin's involvement. (iv) The Halifax's local agents (Michael Gillett and Stephanie Balson) were aware that Deakin was involved and that he would not be entitled to purchase according to the Halifax's own rules but they accepted his story that he had cleared the purchase with his management. They acted without dishonesty or improper motive. (v) The best price reasonably attainable for Yew Tree Farm was its open market value, which was £160,000 at the relevant time. (vi) If the Halifax had sold to the disappointed would-be purchasers (the Shells) for £145,000 there would have been no undervalue since the margin on the valuation was plus or minus 10%. (vii) The Deakins were not purchasers 'in good faith' within the meaning of the definition of 'purchaser' in s 205(1)(xxi) of the Law of Property Act 1925, and could not, therefore, take the benefit of s 104 of the 1925 Act.

**[18]** Judge Weeks rejected a submission that he was bound by the decision of the Court of Appeal in *Property and Bloodstock Ltd v Emerton* [1967] 3 All ER 321, [1968] Ch 94 to hold that damages was the only remedy for a mortgagor in the Corbetts' position, but that 'the remedies should be adjusted to fit the circumstances of the case'. He therefore set aside the sale to the Deakins. His reasoning was as follows:

> 'In the present case, the mortgagee sold at an undervalue in breach of its duty. It does not, I think, make any difference whether the duty was statutory or equitable. The undervalue was small, but the size of the undervalue is significant only as an indicator of the presence or absence of bad faith on the part of the vendor. There was therefore a breach, on any view, and the power was wrongly exercised.'

Having quoted a passage from the then current edition of *Emmet on Title* (19th edn, 1986) (a passage which no longer appears) the judge assimilated the rights of a purchaser from a mortgagee in possession selling pursuant to his statutory power under s 101 of the Law of Property Act 1925 to that of a mortgagee in possession selling pursuant to an express power contained in the mortgage:

> 'In principle, a purchaser from any vendor who wrongly exercises a power of sale will get a good title if he is a bona fide purchaser for value without notice of the breach. The sale to Mr Marples was made under an extension of the statutory power. Whether or not that qualifies as an exercise of an express or a statutory power, the rights of Mr Marples and Mr Deakin cannot, I think, be any greater than those conferred by s 104 of the Law of Property Act ...'

**[19]** The judge referred to the protection conferred on purchasers by s 104, and turned to the statutory definition of 'purchaser' contained in s 205(1)(xxi) of the Law of Property Act 1925. Having considered the well-known observations of Lord Wilberforce in *Midland Bank Trust Co Ltd v Green* [1981] 1 All ER 153,

[1981] AC 513 on the meaning of the words 'bona fide' or 'good faith' in this context, he continued:

> 'Mr Deakin was a purchaser for valuable consideration. In my judgment, he was not a purchaser in good faith. He acquired title by deceiving the vendor into believing that another person was the true purchaser and he knew the vendor would not have sold to him if he had disclosed the true facts. It is true that the Corbetts will gain more from setting aside than they have lost by the undervalue. But this arises from the increase in house prices since 1990. As between the Deakins and the Corbetts, I think it is fair that this increase should accrue to those who bought the house legitimately in 1983 rather than those who bought it dishonestly in 1993. In those circumstances, in my view, the justice of the case requires that the sale be set aside on terms.'

**[20]** The principal question which arises on this appeal is thus whether the sale to the Deakins was liable to be set aside, not because the Deakins or the Halifax knew or should have known of the undervalue, but because the Deakins had deceived the Halifax into selling to them rather than to somebody else. I shall consider Judge Weeks' reasons summarised above in more detail in considering this question.

THE POWERS AND DUTIES OF THE MORTGAGEE

**[21]** It is convenient to start with the statutory power of sale and the provisions contained in s 104 for the protection of the purchaser, as the express powers of sale in this case are drafted by reference to them. By s 101 of the Law of Property Act 1925:

> '*Powers incident to estate or interest of mortgage.*—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):—(i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby ...'

**[22]** Section 104 provides protection for a purchaser from a mortgagee:

> '(1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as he is by this Act authorised to sell or convey or may be the subject of the mortgage, freed from all estates, interest, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage.
>
> (2) Where a conveyance is made in exercise of the power of sale conferred by this Act, or any enactment replaced by this Act, the title of the purchaser shall not be impeachable on the ground—(a) that no case had arisen to authorise the sale; or (b) that due notice was not given; or (c) where the mortgage is made after the commencement of this Act, that leave of the court, when so required, was not obtained; or (d) whether the mortgage was

made before or after such commencement, that the power was otherwise improperly or irregularly exercised; and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) A conveyance on sale by a mortgagee, made after the commencement of this Act, shall be deemed to have been made in exercise of the power of sale conferred by this Act unless a contrary intention appears.'

[23] The mortgagee is not a trustee of his power of sale (see *Kennedy v De Trafford* [1897] AC 180, [1895–9] All ER Rep 408). The purpose of the power of sale is to enable the mortgagee to realise his security in the event of a default by the borrower. The scope of the power was described (as the judge rightly said) by Robert Walker LJ in *Yorkshire Bank plc v Hall* [1999] 1 All ER 879 at 893, [1999] 1 WLR 1713 at 1728:

'... the bank relied on principles stated by the Privy Council in the well-known cases of *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839, [1990] 1 AC 536 and *Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626, [1993] AC 295 and by the House of Lords in *National Bank of Greece SA v Pinios Shipping Co No 1, The Maira* [1990] 1 All ER 78, [1990] 1 AC 637. Those cases together establish or reaffirm that a mortgagee's duty to the mortgagor or to a surety depend partly on the express terms on which the transaction was agreed and partly on duties (some general and some particular) which equity imposes for the protection of the mortgagor and the surety. The mortgagee's duty is not a duty imposed under the tort of negligence, nor are contractual duties to be implied. The general duty (owed both to subsequent incumbrancers and to the mortgagor) is for the mortgagee to use his powers only for proper purposes, and to act in good faith (the *Downsview Nominees Ltd* case [1993] 3 All ER 626 at 639, [1993] AC 295 at 317). The specific duties arise if the mortgagee exercises his express or statutory powers (the *Downsview Nominees Ltd* case at [1993] 3 All ER 626 at 637, [1993] AC 295 at 315). If he exercises his power to take possession, he becomes liable to account on a strict basis (which is why mortgagees and debenture holders operate by appointing receivers whenever they can). If he exercises his power of sale, he must take reasonable care to obtain a proper price.'

[24] At the time the sale to Mr Marples and to the Deakins took place, an express duty was placed on building societies by the Building Societies Act 1986 by virtue of s 13(7) and Sch 4:

'1.—(1) Where any land has been mortgaged to a building society as security for an advance and a person sells the land in the exercise of a power (whether statutory or express) exercisable by virtue of the mortgage, it shall be his duty—(a) in exercising that power, to take reasonable care to ensure that the price at which the land is sold is the best price that can reasonably be obtained ...'

This provision has now been repealed but it is not suggested that the scope of the duty has changed.

**[25]** Between contract and completion, the position is described in *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310 at 318–319, [1934] All ER Rep 642 at 644–645, where in a passage subsequently approved by the Court of Appeal in *Property and Bloodstock Ltd v Emerton* [1967] 3 All ER 321, [1968] Ch 94, Crossman J said this:

> 'The only effect of the conveyance is to put the legal estate entirely in the purchaser: that follows from s. 104, sub-s. 1, of the Law of Property Act, 1925, which provides that a mortgagee shall have power to convey the legal estate; and the whole legal estate can be conveyed free from all estates, interests, and rights to which the mortgage has priority. Sect. 104, sub-s. 2, upon which also counsel for the plaintiff relied, does not seem to me to affect the question at all. Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course, if the purchaser becomes aware, during that period, of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then, in my judgment, he gets no good title on taking the conveyance. The result in the present case is, in my judgment, that the sale effected by the contract, assuming, for the moment, that there is no objection to it on any other ground, binds the plaintiff, and that it is too late after the sale for him to tender the mortgage money and become entitled to have the property reconveyed to him. A second point taken by counsel for the plaintiff is that the sale, considered as a pending sale, cannot be allowed to stand because it was made at a gross under-value, an under-value which would entitle the plaintiff, as mortgagor, to have it set aside. I do not want to go through all the evidence again. After having gone through the evidence of the four years between the date of the mortgage and the date of the contract, I can find no evidence showing anything like lack of good faith in the company's conduct with regard to the sale. The law, as stated by Kay J. in *Warner* v. *Jacob* ((1882) 20 Ch D 220 at 224), is perfectly clear. The learned judge there says: "... a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."'

**[26]** It would seem to follow from this that a completed sale by a mortgagee is not liable to be set aside merely because it takes place at an undervalue. Impropriety is a prerequisite, and s 104(2) makes it clear that the purchaser is not protected if he has actual knowledge of the impropriety. But if the purchaser has no notice of the impropriety, then on the face of it he takes free. Thus, the completed sale by a mortgagee pursuant to his statutory power is vulnerable only if the purchaser has knowledge of, or participates in, an impropriety in the exercise of the power.

**[27]** In the *Property and Bloodstock* case (see [18] and [25], above) Danckwerts LJ summarised the position as follows ([1967] 3 All ER 321 at 326, [1968] Ch 94 at 114):

> 'The actual decision of CROSSMAN, J., in *Lord Waring's* case was: (i) that a mortgagee's exercise of his power under s. 101(1)(i) of the Law of Property Act, 1925, to sell the mortgaged property by public auction or private

contract is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith; and (ii) that the fact that a contract for sale was entered into at an under-value is not by itself enough to prove bad faith.'

[28] Moving on to the position of Mr Deakin himself, one starts with the proposition that a sale by the mortgagee to his employee is not necessarily improper, but the burden is on the mortgagee to satisfy the court of the propriety of the transaction. In *Farrar v Farrars Ltd* (1888) 40 Ch D 395 at 409–411, Lindley LJ said, in a passage quoted by Judge Weeks, that—

'The other ground relied upon was of a much more serious character. It was alleged by the Plaintiffs in their statement of claim that the sale was fraudulent and collusive and at an undervalue. Mr. Justice *Chitty* decided that this allegation was not proved, and he gave judgment for the Defendants. The Plaintiffs on appeal did not question the view of the Judge that there was no fraudulent sale at an undervalue, but they contended that fraud or no fraud, undervalue or no undervalue, the sale could not stand, inasmuch as it was in substance a sale by a mortgagee to himself and others under the guise of a sale to a limited company. If this proposition were true the sale could not stand as against the mortgagor. It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself ... nor to any one employed by him to conduct the sale ... A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction. A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation itself is in every sense a sale valid in equity as well as at law. There is no authority for saying that such a sale is not warranted by an ordinary power of sale, and in our opinion, such a sale is warranted by such a power, and does not fall within the rule to which we have at present referred. But although this is true, it is obvious that a sale by a person to an incorporated company of which he is a member may be invalid upon various grounds, although it may not be reached by the rule which prevents a man from selling to himself or to a trustee for himself. Such a sale may, for example, be fraudulent and at an undervalue or it may be made under circumstances which throw upon the purchasing company the burden of proving the validity of the transaction, and the company may be unable to prove it. Fraud in the present case is not now alleged; it was alleged in the Court below, and was then clearly disproved. But, for reasons which will appear presently, the circumstances attending the sale were such as, in our opinion, throw upon the company the burden of sustaining the transaction. The circumstances alluded to are shortly as follows:—Mr. *John Riley Farrar* was a solicitor, he was one of three mortgagees with a power of sale, he acted for his mortgagees. He sold to a company, more or less promoted by himself, in which he had a substantial interest as a shareholder, and whose solicitor he

was. Such a transaction has a suspicious appearance, and at the time of the sale there was apparently such a conflict of interest and duty on the part of Mr. *Farrar*, and such notice to the company of that conflict, as to throw upon the company the burden of upholding the sale. But the sale cannot be set aside on the simple ground that Mr. *Farrar* was a trustee for sale, and was a promoter of and shareholder in the company which purchased from him. It is necessary to see what his duties to his mortgagors were, and what he really did. A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bonâ fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed ...'

**[29]** *Farrar*'s case was a case in which the sale was to a company in which the mortgagee had an interest. The rule is based upon the duty of all persons concerned with the sale to avoid the conflict of interest that will arise if they seek to purchase from the mortgagee. They must not place themselves in a position where their duties and interests conflict, but if there is in fact no such conflict the sale will not be set aside. In the present case, the Halifax discharged the onus of demonstrating that Mr Deakin was not in any way involved in the sale, save as purchaser, as Judge Weeks recognised.

**[30]** It having been established before Judge Weeks (1) that the sale was at an undervalue and that (2) the sale was to an employee, Mr Deakin, but that (3) Mr Deakin was not involved in the sale and was unaware of that undervalue, the question is whether the sale should be set aside. The judge recognised that on the face of it damages were the proper remedy, but he relied on two matters in particular for rejecting that conclusion. The first is the deception worked by Mr Deakin on his employers. Mr Deakin acquired Yew Tree Farm not merely in breach of the terms of his contract of employment, but having deceived the Halifax. This goes to the propriety of the exercise of the power of sale. The second is that Judge Weeks concluded that in consequence of his deception, Mr Deakin could not take advantage of s 104(2) of the Law of Property Act 1925.

**[31]** In my judgment, Mr Deakin's deception of his employers does not confer upon the mortgagors, the Corbetts, any right to set the sale aside which they would not have possessed against any other purchaser at an undervalue who did not know of the undervalue and who was not involved in the exercise of the power of sale by the Halifax. No doubt it rendered the sale voidable at the instance of the Halifax, but that is not relevant to the position of the Corbetts.

**[32]** Judge Weeks did not accept that the position of a completed sale is really a fortiori the position between contract and completion, which is described by Crossman J and Danckwerts LJ in the passages I have quoted at [25], [27], above. The judge said this of Danckwerts LJ's remarks:

'It is, I think, important not to read too much into that statement of the law. If it is read as meaning that the mortgagee's only obligation is one of good faith then it is plainly inconsistent with later authorities. It must, I think, be limited to the circumstances governing the grant of an injunction

between contract and completion and not to the rights and remedies available after completion.'

[33] I do not think that this is a sustainable basis upon which to distinguish these cases. It is absolutely correct that the mortgagee's duty is not limited to a duty of good faith, as the decision of the Court of Appeal in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633, [1971] Ch 949 makes clear, but it does not follow that the underlying rationale of the cases is affected. The rationale is that the sale must be tainted by some kind of impropriety, not merely an innocent undervalue.

[34] The second ground of distinction suggested by Judge Weeks is, I think, unsound. Of course, if the purchaser discovers the impropriety or other defect before completion, then he will take subject to the rights of the mortgagor. But it is not easy to see why the mortgagor's position should be stronger after completion of the sale than it was before. It is right that in *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 at 63, [1983] 1 WLR 1349 at 1359–1360 Lord Templeman said that—

'Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for the sale to be set aside.'

This statement is made in the context of a case of a sale to a company associated with the mortgagee: and it was held to be inequitable to set the sale aside having regard to the time which had elapsed. This case is analysed by Sir Richard Scott V-C in *Medforth v Blake* [1999] 3 All ER 97, [2000] Ch 86 as exemplifying the nature of the duty placed by equity on the mortgagee to ensure that he deals fairly and equitably with the mortgagor and the others interested in the mortgaged property. Sir Richard Scott V-C said ([1999] 3 All ER 97 at 111, [2000] Ch 86 at 102):

'These duties are not inflexible. What a mortgagee or a receiver must do to discharge them depends upon the particular facts of the particular case. A want of good faith or the exercise of powers for an improper motive will always suffice to establish a breach of duty. What else may suffice will depend upon the facts. *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349 is a very good example. The fact that the mortgagee had an interest in the purchasing company placed the mortgagee under an obligation to show that a proper price had been obtained. This was an obligation more onerous than would otherwise have been required. It is true that Lord Herschell in *Kennedy v De Trafford* ([1897] AC 180, [1895–9] All ER Rep 408) expressed the duty on the mortgagee in terms much less onerous than the terms in which Salmon LJ expressed the duty in the *Cuckmere Brick* case. That does not make the two cases inconsistent with one another. The facts that constituted the mortgagors' complaints were different. And the duty in equity appropriate to have been owed by a mortgagee selling in 1888 is not necessarily of the same weight as the duty appropriate to have been owed by a mortgagee selling in 1967. Equity is at

least as flexible as the common law in adjusting the duties owed so as to make them fit the requirements of the time.' a

[35] Judge Weeks relied on the last section of this passage as justifying an adjustment of the remedies 'to fit the circumstances of the case'. In my judgment, equity will not intervene unless there is some element of impropriety or bad faith on the part of the mortgagee in the exercise of its power of sale. It is not simply a matter of shaping the remedy to fit the circumstances, but of setting aside a conveyance of the legal estate. It is my view that there never was any equity which could be asserted by the Corbetts to set aside the sale to the Deakins. b

[36] Section 104(2) of the Law of Property Act 1925 is on this view irrelevant. It merely provides that between contract and completion the purchaser is not obliged to investigate the manner of the exercise of the power. Judge Weeks considered the question of the protection conferred on the Deakins by s 104(2). He quotes parts of the provision (cf the full version at [22], above): c

'Where a conveyance is made in exercise of the statutory power the title of the purchaser shall not be impeachable on the ground that the power was improperly or irregularly exercised and any person damnified by an improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.' d

This quotation omits the words releasing the purchaser from any concern to make inquiries before or on conveyance and is inaccurate in other respects. But the judge found that Mr Deakin did not have actual knowledge of the fact that the sale was at an undervalue. It was not suggested before the judge, and he does not find, that Mr Deakin had constructive knowledge of the undervalue, whatever the scope of the phrase 'constructive knowledge' is. Nor did the judge find that Mr Deakin's lack of knowledge of the undervalue was not genuine and honest. This is unsurprising, since Mr Deakin's offer price differed only slightly from the internal Halifax valuations. e f

[37] Nevertheless the judge set the sale to Mr Marples and to the Deakins aside. The judge held that because Mr Deakin was not a purchaser in good faith from the Halifax he could not avail himself of s 104(2). He took the definition of 'purchaser' in s 205(1)(xxi) of the Law of Property Act 1925, and held that Mr Deakin did not satisfy the definition. Recognising that the dishonesty of Mr Deakin did not relate to any aspect of the exercise of the power of sale other than the identity of the purchaser, he took the view that Mr Deakin's dishonesty vis-à-vis the Halifax was relevant to the question of good faith for the purpose of the statutory definition. He based himself on the well-known passage in the speech of Lord Wilberforce in *Midland Bank Trust Co Ltd v Green* [1981] 1 All ER 153 at 157, [1981] AC 513 at 528: g h

'My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened on his conscience and the composite expression was used to epitomise the circumstances in which equity would, or rather would not, do so. I think that it would generally be true to say that the words "in good faith" related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the j

Conveyancing Act 1882, s 3. But, and so far I would be willing to accompany the respondents, it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute the requirement of good faith became obsolete. Equity still retained its interest in, and power over, the purchaser's conscience. The classic judgment of James LJ in *Pilcher v Rawlins* (1872) LR 7 Ch App 259 at 269 is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. And there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into (see *Berwick & Co v Price* [1905] 1 Ch 632 at 639, *Taylor v London and County Banking Co*, (*London and County Banking Co v Nixon*) [1901] 2 Ch 231 at 256 and *Oliver v Hinton* [1899] 2 Ch 264 at 273). But did this requirement, or test, pass into the property legislation of 1925?'

**[38]** There is no doubt that Lord Wilberforce contemplated that the investigation of the question of 'good faith' in its context in the definition of 'purchaser' in s 205(1)(xxi) of the Law of Property Act 1925 might involve an investigation of motive. In the *Midland Bank* case there was no doubt that the purchaser had knowledge of the interest the defeating of which was the whole purpose of the transaction, and the passage in Lord Wilberforce's speech is intended to point up the difference between the definition of 'purchaser' in the Land Charges Act 1925 (where the crucial words do not appear) and that in the Law of Property Act 1925. There are no cases where such an investigation has been carried out, and the natural meaning of the words certainly suggests that the principal matter affecting 'good faith' is notice, as it was in *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (see [37], above) itself. But in any event, it seems to me that it is relevant to ask, good faith vis-à-vis whom? What makes this case unusual is that the lack of good faith has nothing to do with the Corbetts, but has only to do with the Halifax, whose internal rules were dishonestly broken by Mr Deakin. The lack of good faith is thus immaterial to the Corbett's interests, and did not affect those interests. I do not consider that Lord Wilberforce meant that a purchaser for value who has neither actual nor constructive notice of an impropriety connected with the exercise of the power of sale is none the less affected by that impropriety merely because of a lack of good faith that has no connection with the impropriety.

**[39]** Accordingly I consider that Judge Weeks was wrong to set the sale aside on the basis that the Deakins could not take the benefit of s 104(2) of the Law of Property Act 1925.

**[40]** If that is wrong, however, I consider that he was wrong in principle in the manner in which he exercised his discretion to set the sale to the Deakins aside. There is no doubt that there is such a discretion, as the passage I have quoted from Lord Templeman's opinion on behalf of the board in *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349 (see [34], above) demonstrates. In that case, relief other than damages was refused on the grounds of delay. The judge said this:

'It is true that the Corbetts will gain more from setting aside than they have lost by the undervalue. But this arises from the increase in house values since 1990. As between the Deakins and the Corbetts, I think it is fair that this increase should accrue to those who bought the house legitimately in 1983

rather than those who bought it dishonestly in 1993. In those circumstances, in my view, the justice of the case requires that the sale be set aside on terms.' a

Judge Weeks then considered a matter relating to the Corbetts' own behaviour, raised by the Halifax, which he rejected and which was not advanced before this court. He continued:

'I do not think that their conduct is really comparable to Mr Deakin's. Mrs Deakin was, I find, fully aware of what here husband was doing at the time. It has also been submitted that I should refuse equitable relief on the ground of delay. The Corbetts' solicitors have not pursued the action with great vigour, but I do not think that the delay has caused the Deakins to suppose that the claim was abandoned. It was not easy for the Corbetts to discover the truth of the transaction until Mr Marples provided them with a statement. In my judgment, notwithstanding the lapse of time, it is equitable as between the Corbetts and the Deakins to set the sale aside.' b c

[41] The Deakins' lender, the Abbey National, preserved its charge, which ranked before that of the Halifax, which was restored. The £20,000 advanced by the Deakins from their own funds was secured by a second charge, as were their capital payments to the Abbey National, and they were ordered to be paid any increase in the value of Yew Tree Farm attributable to works they had carried out, less any further advances received from the Abbey National. Judgment was given against the Corbetts for £204,415. Since the farm was worth some £320,000 at the date of judgment, the effect of the order is to enable the Corbetts to discharge a substantial part of their indebtedness to the Halifax on sale. Inquiries were ordered as to the capital repayments, the increase in value of the property attributable to the Deakins' works and any further advances by the Abbey National, with provision for disclosure, evidence of fact and expert evidence. d e

[42] In my view, Judge Weeks failed to take account of relevant factors. These are: (1) the prejudice caused by the delay between sale and writ, and the slowness in the prosecution of the claim; (2) the fact that Yew Tree Farm was the Deakins' family home for the period of nine years; (3) the fact that the Deakins had children who had not attained their majority; (4) the disruption that the order for sale would cause them. His concentration on the dishonesty of Mr Deakin obscured the fact that the Halifax, who did have the right to avoid the sale, did not do so and the fact that Mr Deakin had been punished for the lies he told his employer. f g

[43] The delay was in my view far too great. Exchange of contracts with Mr Marples took place on 20 July 1993. The Deakins were registered as proprietors on 12 November 1994, and by 19 January 1994 the Corbetts knew that Yew Tree Farm had been purchased by an employee of the Halifax. Obviously they knew the price. The Halifax had disciplined Mr Deakin by the end of May 1994. The letter before action was sent on 13 October 1994, but the writ is not issued until 29 May 1996, the statement of claim following on 13 March 1997. Where a market is rising, it seems to me that the claimant has a particular duty to press on with the action, so that the defendant is not prejudiced in the housing market more than necessary. In the result the benefit of Judge Weeks' order to the Corbetts was out of proportion to the actual undervalue or to the Deakins' loss. h j

[44] In my judgment, Judge Weeks should in any event have declined to set the sale aside but should have left the Corbetts to their remedy in damages.

[45] Finally, I should mention that Mr Jefferies for the Deakins addressed a separate argument to the effect that even had the judge been right in his order, he

was still wrong to order the register to be rectified, basing himself on *Kingsalton Ltd v Thames Water Developments* [2001] EWCA Civ 20, (2002) 1 P & CR 15 and *Hounslow London BC v Hare* (1992) 24 HLR 9. This argument raises difficult questions which do not need to be decided in this appeal, and I should prefer to consider them when it is necessary to do so.

**[46]** I consider that the appeal should be allowed to the extent that I have indicated. There will be judgment for the Corbetts for £20,000 and interest against the Halifax. I would invite submissions in writing as to the remainder of the order.

**SCOTT BAKER LJ.**

**[47]** I agree that this appeal should be allowed for the reasons given by Pumfrey J. The Deakins were only able to purchase Yew Tree Farm because Mr Deakin tricked the Halifax into believing that he was somebody else. The reason for Mr Deakin's dishonesty was that the Halifax's in-house rules prohibited a sale to an employee or his family. His dishonesty was neither here nor there as far as the Corbetts were concerned. Their only legitimate concern was that their house should be sold at a fair market value.

**[48]** The Deakins were unaware that the sale was at an undervalue and the dishonesty or lack of good faith on the Deakins' part should, in my judgment, be viewed as quite independent of the fact that the sale was at less than market value. Accordingly I agree that there never was any equity upon which the Corbetts could rely to seek to set aside the sale. Improper or irregular exercise of the power of sale in s 104(2) of the Law of Property Act 1925 does not include circumstances of which the mortgagee has no knowledge and in which the Corbetts had no legitimate concern. In short, the Halifax's in-house rules and whether they were properly applied was nothing to do with the Corbetts.

**[49]** I also agree that if, contrary to my view, the judge had a discretion to set the sale aside he exercised it wrongly. There were compelling reasons why the sale should stand and the Corbetts be left to their remedy in damages.

**[50]** These included: (1) that Yew Tree Farm was a family home housing minor children; (2) the delay; (3) the work that had been done to the property and; (4) the recent rise in property values.

**[51]** Accordingly, I agree with the order proposed by Pumfrey J.

**SCHIEMANN LJ.**

**[52]** I agree with both judgments.

*Appeal allowed.*

James Brooks Barrister.

# Nathan v Leonard and others

[2002] EWHC 1701 (Ch)

CHANCERY DIVISION

JOHN MARTIN QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

28 FEBRUARY, 28 MAY 2002

*Will – Forfeiture clause – Clause leaving entire estate to two beneficiaries in event any other beneficiary contested will – Whether condition valid.*

A testator had a professionally drawn will which included substantial gifts to the first and second defendants, friends of long standing, as well as gifts to her family, including a discretionary trust in favour of her son, the claimant, and to charity. She then executed a homemade codicil which included the words: 'As a safeguard to my wishes and to protect them from any parties be they family members or the charities, should they wish to contest or disagree with my will. Then, I want the following clause to over ride everything previously stated in my will. The following will become my will in its entirety. This I hope will prevent anyone from taking this case of action.' There followed a clause giving her whole estate to the first and second defendants and then: 'This clause cannot be superseded, and will only come into being if at anytime during the life of the Trust or up to 80 years has elapsed.' The claimant commenced proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 for further provision to be made for him out of the estate and the question arose whether his claim itself amounted to a contest or disagreement with the will. A trial of preliminary issues, including, inter alia, whether the condition imposed by the codicil was valid in law, was ordered. The third defendant, one of the charitable beneficiaries, contended inter alia (i) that the condition, which if effective would deprive not only the person contesting the will but all the beneficiaries other than the first and second defendants, was void for repugnancy; (ii) that the condition was void as contrary to public policy as a deterrent to claims under the 1975 Act and (iii) that the condition was too uncertain to be enforced.

**Held** – A testamentary condition would be struck down if it were truly repugnant to, or inconsistent with, the nature of the gifts made by the will. Such inconsistency existed only if the condition purported to limit or remove the incidents of ownership which necessarily attached to the gift. However, a condition which attached to the whole gift, as in the instant case, rather than merely the incidents, did not have that inconsistency. It made no difference that other gifts under the will might be divested too. Nor did the condition in the instant case prevent an applicant making a claim under the 1975 Act; he had his statutory rights whether or not the condition operated. That such conditions might present applicants with difficult choices was not an adequate ground for holding them void as contrary to public policy. However, in the instant case, the condition was insufficiently certain to be enforced and accordingly was not a condition valid in law (see [10], [13], [16], [20], [21], below).

**Notes**

For testamentary conditions attached to gifts, and for uncertain and inconsistent conditions, see 50 *Halsbury's Laws* (4th edn reissue) paras 367, 377 and 381.

**Cases referred to in judgment**

*Adams v Adams* [1892] 1 Ch 369, CA.
*Blathwayt v Lord Cawley* [1975] 3 All ER 625, [1976] AC 397, [1975] 3 WLR 684, HL.
*Clarke v Parker* (1812) 19 Ves 1, 34 ER 419, [1803–13] All ER Rep 301, LC.
*Clavering v Ellison* (1859) 7 HL Cas 707, 11 ER 282, HL.
*Clayton v Ramsden* [1943] 1 All ER 16, [1943] AC 320, HL.
*Cooke v Turner* (1846) 15 M & W 727.
*Evanturel v Evanturel* (1874) LR 6 PC 1, PC.
*Gaynor, In the Will of* [1960] VR 640, Vic SC.
*Kent, Re* (1982) 139 DLR (3d) 318, BC SC.
*Machu, Re* (1882) 21 Ch D 838.
*Powell v Morgan* (1688) 2 Vern 90, 23 ER 668.
*Rhodes v Muswell Hill Land Co* (1861) 29 Beav 560, 54 ER 745.
*Sandbrook, Re, Noel v Sandbrook* [1912] 2 Ch 471, [1911–13] All ER Rep 559.
*Simpson v Vickers* (1807) 14 Ves 341, 33 ER 552, Rolls Ct.
*Smith, Re, Smith v Smith* [1916] 1 Ch 369.
*Williams, Re, Williams v Williams* [1912] 1 Ch 399.

**Preliminary issues**

By order of Master Price made on 13 November 2001, the court was required to determine certain preliminary issues, summarised at [4] below, in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 between the claimant, Andrew William Nathan and the first and second defendants, Sally Ann Leonard and Paul Leo Leonard, all being beneficiaries under the will with two codicils of Diana Margaret Gamon Nathan (deceased). The third defendant, the National Association for Mental Health (Mind) was joined into the proceedings. The facts are set out in the judgment.

*James Pickering* (instructed by *Singh Karran & Co*, Hounslow) for Andrew Nathan.
*Penelope Reed* (instructed by *Banky & Burger*, Reading) for the Leonards.
*Michael King* (instructed by *Campbell Hooper*) for MIND.

*Cur adv vult*

28 May 2002. The following judgment was delivered.

**JOHN MARTIN QC.**

[1] Mrs Diana Nathan died on 13 November 1998. She was then living at a property called Oakwood Farm, Clay Lane, Beenham, Berkshire, in which she had a beneficial half-share. The other half share belonged to the first and second defendants, Sally and Paul Leonard, who also lived at the property. By her last will dated 30 April 1997 (as varied by a first codicil dated 17 July 1998) Mrs Nathan appointed Sally Leonard as her executor; directed that the Leonards be entitled to occupy the property for as long as they wished, subject to their maintaining it and paying the outgoings; made various specific and pecuniary bequests; and directed that her residuary estate (including her interest in the property, subject to the Leonards' right to occupy) be divided into three, two-thirds going to the Leonards and the other third being held on discretionary trusts for the claimant Andrew Nathan (who is a son of the deceased), Andrew's children and remoter issue, and two named charities—of which the third defendant, MIND, is one.

[2] The will and two codicils (the second of which gives rise to the matters I have to determine, and is referred to below) were proved by Sally Leonard on 18 January 2001. On 13 July 2001 Andrew Nathan started these proceedings, which are a claim under the Inheritance (Provision for Family and Dependants) Act 1975 for further provision to be made for him out of the estate. On 13 November 2001 an order was made for determination of preliminary issues relating to the second codicil; and these preliminary issues (which I identify below) were heard by me on 28 February 2002.

[3] The second codicil was made on 29 July 1998. Unlike the will and the first codicil, both of which were professionally drawn up, the second codicil was prepared by Mrs Nathan herself. It runs to four pages of typescript, and 'is written in letter form and not entirely to current legal standards'. A copy of it is annexed to this judgment [not reproduced]. The passage that is most relevant for present purposes appears at the bottom of the third page and the top of the fourth, and is in the following terms:

> 'As a safeguard to my wishes and to protect them from any parties be they family members or the charities, should they wish to contest or disagree with my will. Then, I want the following clause to over ride everything previously stated in my will. The following will become my will in its entirety. This I hope will prevent anyone from taking this case of action.
>
> I GIVE DEVISE AND BEQUEATH My beneficial share in the Property known as Oakwood farm, to my beneficiaries to SALLY LEONARD and PAUL LEONARD. Free of any taxes, which will be covered by my estate. I also give to the above named persons all my real and personal property. This clause cannot be superseded, and will only come into being if at anytime during the life of the Trust or up to 80 years has elapsed.'

[4] The possibility that Andrew Nathan's claim under the 1975 Act amounted to a contest to or disagreement with the will led to the direction that preliminary issues be tried. The issues (paraphrased from the order directing them) are as follows. (i) Is the first paragraph I have quoted ('As a safeguard ... this case of action') a valid condition in law? (ii) If so, has there been a breach of it? (iii) If so, what is the effect of the gift over in the second paragraph ('I GIVE ... 80 years has elapsed')?

[5] In relation to these issues, Andrew Nathan's position is largely neutral: his claim under the 1975 Act is unlikely to be substantially affected by whether the governing dispositions are those made by the will and first codicil or those substituted by the second codicil. It is in the Leonards' interests to argue that the second codicil is valid and has been triggered, and that the consequence is that the whole of the estate is vested in them. It is in the interests of the two charities to argue that the will dispositions stand; and MIND has been joined into the proceedings to make that argument. Counsel for all parties (including Andrew Nathan) have made submissions on the meaning and effect of the second codicil, and I have been greatly assisted by their observations.

VALID CONDITION?

[6] A condition to the effect that a beneficiary who challenges a will loses the benefits given to him by the will is in principle valid, at least where there is a gift over (see *Cooke v Turner* (1846) 15 M & W 727, approved by the Privy Council in *Evanturel v Evanturel* (1874) LR 6 PC 1).

[7] In the present case, however, the condition does not just deprive the person who challenges the will of the benefits he would otherwise have received: if effective, it deprives all beneficiaries other than the Leonards of their interests. Thus, if the condition is effective and has been triggered by Andrew Nathan's proceedings under the 1975 Act, the discretionary trusts of residue are revoked and MIND—which has not itself mounted any challenge to the will—loses any possibility of benefit from the estate. Such a condition goes further than those which have been the subject of decision in any case reported in the United Kingdom or any Commonwealth jurisdiction.

[8] This wide effect of the condition was said on behalf of MIND to verge on the capricious, and to make the condition void for repugnancy. A condition is void if it is inconsistent with, or repugnant to, the nature of an interest given to the donee—such as a condition that purports to impose restrictions on the alienation of property given absolutely, or—as in *Re Machu* (1882) 21 Ch D 838—that purports to forfeit property in the event of the donee's bankruptcy. An example closer to the type of condition in issue in this case is to be found in *Rhodes v Muswell Hill Land Co* (1861) 29 Beav 560, 54 ER 745. In that case, a testator directed that any dispute between the will beneficiaries relating to his estate or effects should be referred to arbitration; and he declared that if any beneficiary should commence proceedings 'touching or concerning or in anywise relating' to his estate and effects the gift to that beneficiary should become void. Sir John Romilly MR ((1861) 29 Beav 560 at 563, 54 ER 745 at 746) construed the condition as having the effect—

> 'that if the devisees commenced or instituted any proceedings at law or in equity in relation to the property devised to them, the devise to them would become void ...'

And after giving examples of the way in which the condition would operate (eg 'no devisee could take any proceedings to compel the payment to him of the rent') he held ((1861) 29 Beav 560 at 564, 54 ER 745 at 746) the condition void as 'absurd, inconsistent and repugnant'. It is possible to have doubts about the correctness of construing the condition as operating if a beneficiary took any step to protect the interest he had been given, rather than as taking effect if a beneficiary litigated disputes about the will instead of submitting them to arbitration; but once the condition is construed in that way, the decision represents a conventional application of the principles relating to repugnancy. It is inconsistent with the nature of an absolute gift that the donee should be deprived of it if he exercises one of the incidents of ownership—as by suing for the rent.

[9] In support of his argument that the condition in the present case was void for repugnancy, counsel for MIND pointed to its effect on the pecuniary legacies given by the will. These legacies are given immediately and absolutely, but if the condition is valid they may be defeated at any time by the commencement by someone else of proceedings wholly unconnected with the legacies themselves. The decision in *Rhodes'* case demonstrated the court's reluctance to allow a condition to lead to such an absurdity, and a condition having that effect was inconsistent with the nature of the gift. In consequence, he suggested, the condition was void as regards the legatees; and, since a condition fails for all gifts if it fails for any (see *Re Smith* [1916] 1 Ch 369), the condition was wholly ineffective.

**[10]** I cannot accept this argument. If the condition is to be struck down, it must be because it is truly repugnant to, or inconsistent with, the nature of the gifts made by the will. But *Cooke v Turner* shows that a condition divesting a gift if the donee disputes the will is valid, so such a condition is clearly not repugnant to the gift. That is because the law sees no inconsistency between the gift and the condition divesting it. There is only such inconsistency if the condition purports to limit or remove the incidents of ownership which necessarily attach to the gift, as where the condition operates if the donee wishes to sell the property given to him. Having given the property absolutely, the testator cannot control what the donee does with it. But a condition which attacks the whole gift, rather than merely the incidents of the gift, does not have the same inconsistency. If the matter is viewed in that way, it makes no difference that other gifts may be divested too. And although the condition may well have an arbitrary effect, that is not of itself enough to render it invalid: a testator may dispose of his property as he wishes, however capriciously.

**[11]** That last statement also disposes of the first of two arguments against the validity of the condition based on public policy. The argument is that the state has an interest in the prompt and orderly administration of a deceased's estate, and a condition that may disrupt that administration so fundamentally and divest interests without any action by or volition of those whose interests are divested is contrary to public policy. It does not seem to me necessarily correct to say that the state has the interest claimed, since the disposition of a deceased's estate is essentially a matter of private property; but in any event it is the policy of the law to uphold testamentary freedom (see *Blathwayt v Lord Cawley* [1975] 3 All ER 625 at 636, 650, [1976] AC 397 at 426, 442).

**[12]** That policy is reflected in the fact that English law has no concept of forced heirship, under which a testator is obliged to leave a proportion of his estate to his spouse or children. The nearest it has come to such a concept, and the most significant inroad that has been made into testamentary freedom, is the 1975 Act (and its predecessor, the Inheritance (Family Provision) Act 1938), under which provision may be made for an applicant within defined classes of relationship to the testator for whom reasonable provision has not been made. The second public policy argument against the validity of the condition is based on the policy of the 1975 Act that reasonable provision should be made for those dependent on a deceased, it being said that the condition cannot stand because its effect is to deter an applicant from making a claim under the Act for fear of losing the benefits given to him by the will.

**[13]** Two matters must be stated before this argument can be considered. First, it is necessary to assume that a claim under the 1975 Act is a contest to or disagreement with the will, so that the condition operates. Whether or not the assumption is actually correct is for determination under the second preliminary issue, if it arises. Secondly, it is not the case that the condition *prevents* an applicant from making a claim under the Act: he has his statutory right whether the condition operates or not. Moreover, in considering the application the court will have regard to any benefits the applicant derives from the estate; so if the condition has a confiscatory effect that will be taken into account. Indeed, it is so that the court can know in the present case what the effect of the condition is that the preliminary issues were ordered to be determined; and, as I have already remarked, it is because his claim can go ahead regardless of the effect of the condition that Andrew Nathan is largely neutral about its validity.

[14] The argument that the deterrent effect of the condition is enough to make the condition void as contrary to public policy does not seem to have been considered in any English case. It does, however, derive strong support from two Commonwealth decisions, one from Australia and one from Canada. The Australian case is *In the Will of Gaynor* [1960] VR 640, a decision of the Supreme Court of Victoria. After holding that a claim under Part IV of the Administration and Probate Act 1958 that adequate provision had not been made for the testator's daughter would fall within a provision in the will forfeiting her interest in the estate, O'Bryan J said the following (at 642–644):

> 'If it is correct to say that this part of the Act now in question is designed to serve a public purpose as well as to benefit individuals, and that the authority conferred upon the court was so conferred not merely in the interests of the widow, widower or child as the case may be, but of the public, because it is a matter of public concern that they should not be left without adequate provision for their proper maintenance and support, surely a condition whose object and purpose appears from its very language to be to deter such a beneficiary under a will from making such an application is one that is opposed to public policy ... The vice in this sort of condition is that a testator may leave a beneficiary a legacy or other provision by will which may or may not be adequate for his proper maintenance and support—and if he attaches a condition of forfeiture to that gift should the beneficiary make an application under Part IV, the condition is opposed to public policy because the object and effect of it is to deter the beneficiary from having recourse to the courts in a matter in which it is in the public interest that he should be free to have recourse. For these reasons, I am of the opinion that this condition of forfeiture is void because it is against public policy.'

In the Canadian case, *Re Kent* (1982) 139 DLR (3d) 318, the Supreme Court of British Columbia followed *Gaynor*'s case, quoting much of the passage I have set out above.

[15] I do not doubt that a condition such as the one in the present case and those considered in the two Commonwealth cases is capable of having a strong deterrent effect. It is not difficult to think of circumstances in which a potential applicant would be unwilling to give up the certainty of benefits under a will for the uncertainty of the court's decision. Nor do I doubt that the public policy embodied in the 1975 Act is in substance that identified by O'Bryan J in the passage I have quoted from *Gaynor*'s case. But, with respect to the judges in the two Commonwealth cases, I do not myself think that mere deterrence is enough to make the condition void as contrary to public policy. As I have already said, the condition does not prevent an applicant making his claim; and if he does so, and forfeits his interest under the will, that can be taken into account by the court. The court will determine whether reasonable provision has been made; and in doing so one of the circumstances it will take into account is that, because of the condition, the applicant has received nothing at all from the estate. The object of the 1975 Act is to ensure that certain dependants of a deceased should not be left without provision that is reasonable in all the circumstances; and the fact that the claim remains and will be determined in the light of the effect of the condition means that the object is attained regardless of the condition. I can see no reason why policy considerations which can be attained in that way should require the condition itself to be invalidated.

**[16]** Indirect support for the view I have taken is to be found in *Blathwayt v Lord Cawley* [1975] 3 All ER 625, [1976] AC 397. In that case, one issue concerned the validity of a condition forfeiting the interest of any beneficiary who was or became a Roman Catholic; and the House of Lords held that it was not void as contrary to public policy. In reaching that decision, the House considered *Re Sandbrook* [1912] 2 Ch 471, [1911–13] All ER Rep 559, in which the court held invalid a clause forfeiting an interest given to grandchildren if they should 'live with ... or continue under the custody, guardianship or control of their father' on the ground that it would operate to restrain the father from carrying out his parental duties. Declining to adopt similar reasoning, Lord Fraser of Tullybelton (who was in the majority on this aspect of the case) said the following ([1975] 3 All ER 625 at 650, [1976] AC 397 at 442):

> 'If a parent has strong convictions he may well regard the religious upbringing of his child as of overriding importance not to be set against purely material considerations; if, on the other hand, his religious convictions are weak or non-existent, he can weigh a testamentary benefit with a religious condition attached as one among the many factors affecting the welfare of his child. In neither case does the existence of the religious condition seem to me to offend against public policy merely because it might affect the parent's action. One must remember also the public policy that a testator should be free,. subject to the rights of his surviving spouse and children, to dispose of his property as he pleases.'

I read this passage both as containing a warning against taking too narrow a view of public policy and as casting doubt on the idea that mere deterrence will be enough to make a condition void as contrary to public policy. As in that case, the condition in the present case will do no more than add an additional factor to those to be considered by an applicant before he decides to launch a claim under the 1975 Act. In some cases, that factor will be of great importance, and in others of little or none; but, it can hardly be the case that whether the condition is to be upheld or avoided depends on identifying how much of a deterrent it is in any given case. If a condition of the present type is contrary to public policy, it is because of its capacity to deter; and that means that—except perhaps in cases where there is no potential applicant under the 1975 Act at all—all conditions of the same type must be treated in the same way. I do not think the fact that such conditions may present applicants with difficult choices is an adequate ground for holding them void on public policy grounds, and I decline to do so.

**[17]** I come, therefore, to the last of the grounds on which MIND challenges the condition, namely that it is too uncertain to be enforced. The starting point is the following passage from the speech of Lord Russell of Killowen in *Clayton v Ramsden* [1943] 1 All ER 16 at 18, [1943] AC 320 at 326:

> 'The courts have always insisted that conditions of defeasance, in order to be valid, should be so framed that the persons affected (or the court if they seek its guidance) can from the outset know with certainty the exact event upon the happening of which their interests are to be divested. The principle was enunciated many years ago by LORD CRANWORTH in *Clavering* v. *Ellison* ((1859) 7 HL Cas 707 at 725, 11 ER 282 at 289) in the following words: "... where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what

event it was that the preceding vested estate was to determine." In all such cases that is the test which has to be applied to the particular condition which the testator has chosen to impose.'

MIND says that that test is not satisfied in relation to four areas of the passage from the second codicil set out at [3], above.

**[18]** First, it is not clear who it is who may trigger a forfeiture by contesting or disagreeing with the will. Do the words 'be they family members or the charities' qualify the words 'any parties', and does the hope that the condition will prevent 'anyone' challenging the will broaden the class? Despite the fact that different views were expressed in argument about the meaning of these provisions, and in particular about whether a challenge by the Leonards would trigger a forfeiture, I do not think there is real difficulty about this part of the codicil. The overwhelming impression given by the codicil when read as a whole is that Mrs Nathan was concerned to justify her decision to leave the Leonards, who were friends not family, undisturbed in their occupation of Oakwood Farm, and was determined to ensure that her wishes on that score were observed one way or another. Read in that light, her expectation was that a challenge, if it came at all, would come from Andrew Nathan, or from her other sons Martin and Robert, or perhaps from the charities who had an interest in her residuary estate, but not from the Leonards themselves. Accordingly, I construe the reference to 'family members or the charities' as defining exclusively the persons whose challenge would operate the condition, and the word 'anyone' as referring back to them. The claim of uncertainty on this ground is not made out.

**[19]** The second and third complaints of uncertainty relate to the words 'should they wish to contest or disagree with my will'. Is it enough that someone should want to contest the will, without actually doing anything about it? Is it enough that someone should disagree with the way in which Mrs Nathan dealt with her estate, again without doing anything about it? What if the disagreement is taken to the extent of a letter before action, but no further? Again, it seems to me that these apparent difficulties lack reality. It cannot be supposed that Mrs Nathan intended to forfeit the interest of anyone who harboured, however secretly, the view that she had dealt with her estate unfairly: her objective was to deter anyone from taking steps to alter the dispositions she had made. Construed in that light, the words 'wish to' add nothing to the words 'contest or disagree'; and the latter words encompass any proceedings which might result in an alteration of the dispositions made by the will and first codicil. Threats would not be enough, but proceedings challenging the will on the ground of lack of capacity, want of knowledge and approval or undue influence would be. So also (to deal prematurely with the second preliminary issue) would a claim under the 1975 Act, since it would have the potential to bring about a redistribution of the estate. This ground of objection accordingly fails, too.

**[20]** The fourth complaint of uncertainty concerns the concluding words of the passage quoted in [3], above, namely: 'This clause cannot be superseded, and will only come into being if at anytime during the life of the Trust or up to 80 years has elapsed.' Whilst it is immediately obvious that some words have been mistakenly omitted from this provision, it is very difficult to guess what they might have been. The difficulty is compounded by the fact that 'the Trust' is undefined, and might refer to any one of four different trusts: the residuary trust created by the will, the trust created by Mrs Nathan's husband (referred to on the first page of the second codicil), a separate trust which Mrs Nathan was intending

to establish for Andrew (referred to in a letter of wishes made by her on the same day as she made the second codicil), and a trust relating to Oakwood Farm (created by a deed of trust dated 2 October 1995 made between Mrs Nathan and the Leonards). Counsel for the Leonards argued that these difficulties were of no consequence, since the concluding words were not designed to introduce any additional requirement and were merely a statement of the obvious. If one could be certain of that, it would indeed answer the objections; but the words 'and will only come into being if ...' seem to me equally capable of merely explaining something that is anyway obvious—rather as if the whole provision had been preceded by the words 'Of course'—and of indicating that the clause will only operate if something else happens. I am unfortunately quite unable to tell which was intended. In consequence I find it simply impossible to know whether or not Mrs Nathan intended by these words to impose a new requirement, and if so what it was. Moreover, the uncertainty this produces is not confined to the gift over: it is quite possible that by 'this clause' Mrs Nathan meant the whole of the condition and the substituted provisions that would come into effect if it operated. It therefore seems to me that the test set out in [17], above is not satisfied. I reach this conclusion with great reluctance, since Mrs Nathan took such trouble to make her wishes known; but I am afraid that in the end she has failed to do so with sufficient certainty.

**[21]** Accordingly, I answer the first preliminary issue by holding that the passage quoted in [3], above is too uncertain to be enforced and is not a valid condition in law.

**[22]** That means that the second and third preliminary issues strictly do not arise. However, because I have heard argument about them, and in case the matter should go further, I will briefly express my views on them.

BREACH OF CONDITION?

**[23]** I have already indicated (at [19], above) my view that a claim under the 1975 Act amounts to a contest to or disagreement with the will. On the face of it, that means that by commencing proceedings Andrew Nathan would—if the condition had been valid—have brought about a forfeiture of all the dispositions made by the will and the first codicil.

**[24]** However, it is suggested on behalf of MIND that there will be a forfeiture only if Andrew Nathan's claim is unsuccessful. There is some support for this argument in the authorities. In *Powell v Morgan* (1688) 2 Vern 90, 23 ER 668 it was held in relation to a condition that a legatee should not 'disturb or interrupt' the will that there was no forfeiture if there were 'probabilis causa litigandi'. In *Evanturel v Evanturel* (1874) LR 6 PC 1, where again the condition related to contesting the will, it was said (at 26): 'Upon principle, it is to be observed that the prohibition cannot be absolute, and can be invoked only where the validity of a will has been unsuccessfully contested.' In *Adams v Adams* [1892] 1 Ch 369, where the condition was that the beneficiary should not intermeddle with or interfere in the management of the estate, the Court of Appeal agreed with the trial judge that there would have been no forfeiture if an action had been brought bona fide in defence of the plaintiff's rights. In *Re Williams* [1912] 1 Ch 399, which concerned a provision that if any beneficiary should initiate an action for the administration of the estate the costs of all parties should be met out of that beneficiary's share of the estate, it was held that the provision did not apply to an action based on wilful default, but that if it had applied it would have been void for repugnancy.

[25] It is not altogether easy to identify the underlying rationale of these cases. In *Adams'* case and *Williams'* case, each of which concerned a condition designed to discourage interference in the administration of the estate, it is probable that the courts were construing the conditions as applying only to unjustified interference on the basis that it cannot have been the testator's intention that a beneficiary should be unable to enforce proper administration. The only alternative will often (as in *Williams'* case) be to avoid the condition as repugnant to the gift, since its effect would be to prevent the beneficiary suing to obtain what has been given to him. However, the other two cases—where the condition relates to any challenge to the will—do not seem to turn on construction, as the following passage from *Evanturel v Evanturel* ((1874) LR 6 PC 1 at 26–27) shows:

> 'If there be a clear and patent defect in the formalities attending the execution of the instrument, or if the incapacity of the alleged testator be clear and notorious, the heirs or other parties interested will, of course, contest the will, and, contesting it successfully, will set it aside with the clause of forfeiture. On the other hand, it is not easy to see why a testator may not protect his estate and representatives against unsuccessful attempts to litigate his will, by saying to a legatee, "I, being master of my own bounty, and free to give or to withhold, give you this legacy subject to the condition that you do not dispute the general disposition of my estate. You may contest the validity of my will if you please; but you will do so at the peril of losing, if it be established, what it gives you."'

The basis on which a successful challenge escapes the condition accordingly seems to be that the challenge has the effect of setting aside both will and condition. But that will not always be so: for example, where only certain gifts are challenged on the ground of want of knowledge and approval, or where—as here—the challenge takes the form of a claim under the 1975 Act, which leaves the will (but not its dispositions) intact.

[26] In such cases, it seems to me that the correct approach must be to construe the condition. It may be possible to construe it as applying only to unsuccessful challenges; but if not, then (assuming it does not fail for repugnancy) the condition must take effect whether the challenge succeeds or fails. Nothing in the authorities mentioned at [24], above supports any suggestion that there is a rule of law that forfeiture conditions only apply to unsuccessful challenges. In the present case, there can be no doubt that Mrs Nathan intended to deter any challenge to the way in which she had decided to dispose of her estate, and I think it impossible to construe the condition in the second codicil as confined to unsuccessful challenges. Accordingly, the effect of the condition is not dependent on the success or failure of Andrew Nathan's claim, and the bringing of the claim would have operated the condition had it been valid.

[27] If the second issue had arisen, therefore, I would have held that there had been a breach of the condition.

EFFECT OF GIFT OVER

[28] The third preliminary issue is directed to ascertaining what would be the consequence of breach of a valid condition. Subject to the point discussed in the next two paragraphs, the answer clearly would be that the entirety of Mrs Nathan's estate would pass to the Leonards: the second codicil is

unambiguous that this is to be the case both as regards her interest in Oakwood Farm and as regards all her other property.

**[29]** It is, however, suggested on behalf of MIND that relief from forfeiture is available and should be granted to those beneficiaries whose interests would be forfeit through no fault of their own. There seems little doubt that there is jurisdiction to relieve from forfeitures of the type in issue: see *Williams on Wills* (8th edn, 2002) para 34.25; and *Clarke v Parker* (1812) 19 Ves 1 at 17–18, 34 ER 419 at 425, where Lord Eldon LC speaks of—

> 'the Doctrine upon Conditions; which have been held not violated, where the Breach was not occasioned by the Fault of that Person; and a Court of Equity has upon that Ground said, the Party should stand in the same Situation as if the Condition had been observed.'

The jurisdiction is said, by reference to *Simpson v Vickers* (1807) 14 Ves 341, 33 ER 552, not to be exercisable where there is a gift over to any person other than the one who would take by operation of law. But *Simpson v Vickers* was a case of a condition precedent, whereas the condition in the present case is a condition subsequent; and that seems to me to give rise to a genuine distinction. In the case of a condition precedent, relief would involve divesting the existing owner and creating a new estate in the person who would have taken if the condition had been satisfied; whereas in the case of a condition subsequent the estate is already vested, and all that is required is relief from the divesting consequences of the condition.

**[30]** But even assuming relief from forfeiture is available, it is far from clear that it could be granted in the present case. To do so would involve doing real damage to Mrs Nathan's intentions: she intended that, if anyone challenged the dispositions of her estate, all beneficiaries except the Leonards should be dispossessed. Moreover, major rewriting of the will and codicils would be required: some parts of the will and first codicil would be preserved, so as to ensure that all beneficiaries save Andrew Nathan were unscathed; and some parts of the second codicil would be introduced, so that the Leonards took whatever was left. Although I see the force of the point that some of the beneficiaries, such as the pecuniary legatees and the two charities, would have lost their interests through no fault of their own, that point has less impact in the present case than it will often have. In a typical case, the forfeiture will have been the consequence of accident, or interference by some other interested party; and it will be easy to say that the testator could not have intended the beneficiary to lose his interest for such a reason. Here, however, it is absolutely clear that Mrs Nathan did contemplate that some beneficiaries would lose their interests as a direct result of someone else's action over which they had no control; and because of that, and because of the substantial rewriting that would be required, I would not have granted relief from forfeiture.

**[31]** Accordingly, if the third issue had arisen I would have answered it by saying that the gift over took effect according to its terms.

*Order accordingly.*

Gareth Williams Barrister.

# R (on the application of Edison First Power Ltd) v Central Valuation Officer and another

[2003] UKHL 20

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOFFMANN, LORD MILLETT AND LORD SCOTT OF FOSCOTE

17, 18 FEBRUARY, 10 APRIL 2003

*Rates – Valuation – Electricity undertaking – Aggregate rateable value of hereditaments occupied for the purpose of generating electricity – Order containing annual formula calculating value based on generating capacity – Whether order ultra vires – Local Government Finance Act 1988, Sch 6, para 3(2) – Electricity Supply Industry (Rateable Values) Order 1994, SI 1994/3282.*

PowerGen's business included generating electricity and it was liable for non-domestic rates on the hereditaments it occupied for that purpose. Schedule 6 to the Local Government Finance Act 1988 determined the rateable value of non-domestic hereditaments and laid down a general valuation formula based on annual letting value. Paragraph 3(2)[a] empowered the Secretary of State, inter alia, to provide, in the case of certain non-domestic hereditaments, that the general valuation formula should not apply and that their rateable value should be such as was specified by order. Pursuant to that power the Secretary of State made the Electricity Supply Industry (Rateable Values) Order 1994, which applied to PowerGen, and which prescribed the aggregate rateable value of the hereditaments which it occupied for generating electricity. The 1994 order prescribed a fixed yearly sum, with an annual recalculation according to a formula based on changes in PowerGen's declared net capacity in respect of electricity generation. The provisions of the 1994 order were similar in principle to the rating provisions which had applied to electricity generating businesses since 1958. In July 1999 PowerGen sold two electricity power stations to the claimant, which was rated for the purposes of non-domestic rating by reference to its occupation of rateable hereditaments. The claimant therefore became liable to pay, and paid, non-domestic rates, assessed on the annual letting value of the power stations, for the period from July 1999 until the end of the 1999–2000 rating year. PowerGen's liability for rates in that rating year was unaffected by the sale of the power stations as, under the 1994 order, changes in the actual hereditaments which it occupied had no effect on the aggregate valuation until the end of the rating year and then only if they resulted in a change in declared net generating capacity. Under the sale agreement the claimant had agreed to pay PowerGen an apportionment of the rates payable by PowerGen in relation to the power stations and it duly made that payment. The claimant considered that rates had been paid twice over on the same hereditaments for the same period and sought judicial review, contending that the assessment on PowerGen under the 1994 order was ultra vires, as a valuation regime which took no

a Paragraph 3, so far as material, is set out at [50], below

account of the disposal of hereditaments to a rateable occupier in a rating year was so unreasonable that Parliament could not be supposed to have intended para 3(2) of Sch 6 to the 1988 Act to authorise it; or alternatively, that the assessment infringed the presumption against double taxation or double recovery. The judge dismissed that application and his decision was upheld by a majority in the Court of Appeal. The claimant appealed.

**Held** – (Lord Bingham and Lord Steyn dissenting) The 1994 order was not ultra vires the 1988 Act. The system of rating prescribed by the Secretary of State in the 1994 order, which carried the inevitable consequence that the aggregate rateable value of hereditaments occupied by PowerGen would not be affected by changes during the rating year, was not so unreasonable that Parliament could not have intended to authorise it by the general words of para 3(2) of Sch 6 to the 1988 Act. The system was one which, in its essential principles, Parliament had thought appropriate for the electricity generating industry for the previous 30 years. The purpose of para 3(2) was to allow that system to be retained, with whatever formulae the government thought appropriate and as long as it thought it expedient to do so. Although it would be generally regarded as oppressive for the same person to be taxed twice over in respect of the same matter, the instant appeal was not such a case. The payment by the claimant of an apportioned part of the rates payable by PowerGen which were treated as attributable to the declared net generating capacity of the two power stations was part of the price which the claimant was willing to pay for the power stations. It was not, from the claimant's point of view, a payment of rates. Accordingly, the appeal would be dismissed (see [55]–[57], [60], [103], [111], [114], [118], [127], [147]–[150], below).

Decision of the Court of Appeal [2001] All ER (D) 146 (Jul) affirmed.

**Notes**

For rateable property, rateable occupation, and hereditaments entered in central non-domestic rating lists, see 39(1) *Halsbury's Laws* (4th edn reissue) paras 608, 613 and 669.

For the Local Government Finance Act 1988, Sch 6, para 3(2), see 36 *Halsbury's Statutes* (4th edn) (2002 reissue) 1467.

**Cases referred to in opinions**

*Brook (Valuation Officer) v National Coal Board* [1975] RA 367, CA.

*Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474, [1984] 2 WLR 226, HL.

*IRC v Clifforia Investments Ltd* [1963] 1 All ER 159, [1963] 1 WLR 396.

*IRC v FS Securities Ltd* [1964] 2 All ER 691, [1965] AC 631, [1964] 1 WLR 742, HL.

*IRC v Hinchy* [1960] 1 All ER 505, [1960] AC 748, [1960] 2 WLR 448, HL.

*Kingston Union Assessment Committee v Metropolitan Water Board* [1926] AC 331, [1926] All ER Rep 1, HL.

*Milford Haven Conservancy Board v IRC* [1976] 3 All ER 263, [1976] 1 WLR 817, CA.

*R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21, [2002] 3 All ER 1, [2002] 2 WLR 1299.

*R v Dimsey (No 2)* [2001] UKHL 46, [2001] 4 All ER 786, [2002] 1 AC 509, [2001] 3 WLR 843.

*R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.

*Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39, [1974] AC 235, [1973] 2 WLR 683, HL.

*Smith & Son v Lambeth Assessment Committee* (1882) 9 QBD 585; *affd* (1882) 10 QBD 327, CA.

*Stradling v Morgan* (1560) 1 Plowd 199, 75 ER 305.

*Vestey v IRC (Nos 1 and 2)* [1979] 3 All ER 976, [1980] AC 1148, [1979] 3 WLR 915, HL.

*Westminster City Council v Southern Rly Co* [1936] 2 All ER 322, [1936] AC 511, HL.

*Woolwich Equitable Building Society v IRC* [1991] 4 All ER 92, [1990] 1 WLR 1400, HL.

**Cases referred to in list of authorities**

*Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2001] EWCA Civ 713, [2001] 3 All ER 393, [2002] Ch 51, [2001] 3 WLR 1323; *rvsd* [2003] UKHL 37, [2003] 3 All ER 1213, [2003] 3 WLR 283.

*Darby v Sweden* (1991) 13 EHRR 774, [1990] ECHR 11581/85, ECt HR.

*Gasus Dosier- und Fördertechnik GmbH v Netherlands* (1995) 20 EHRR 403, [1995] ECHR 15375/89, ECt HR.

*Hammersmith and Fulham London BC v Secretary of State for the Environment* [1990] 3 All ER 589, sub nom *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London BC* [1991] 1 AC 521, [1990] 3 WLR 898, HL.

*McCarthy & Stone (Developments) Ltd v Richmond upon Thames London BC* [1991] 4 All ER 897, [1992] 2 AC 48, [1991] 3 WLR 941, HL.

*National & Provincial Building Society v UK* [1997] STC 1466, ECt HR.

*Nottinghamshire CC v Secretary of State for the Environment* [1986] 1 All ER 199, [1986] AC 240, [1986] 2 WLR 1, HL.

*R (Asif Javed) v Secretary of State for the Home Dept, R (Zulfiqar Ali) v Secretary of State for the Home Dept, R (Abid Ali) v Secretary of State for the Home Dept* [2001] EWCA Civ 789, [2002] QB 129, [2001] 3 WLR 323.

*R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 All ER 929, [2001] 2 WLR 1389.

*R v A (No 2)* [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45, [2001] 2 WLR 1546.

*R v Criminal Injuries Compensation Board, ex p A* [1997] 3 All ER 745, [1998] QB 659, [1997] 3 WLR 776, CA; *rvsd* [1999] 2 AC 330, [1999] 2 WLR 974, HL.

*R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257, [1986] 1 WLR 763, CA.

*R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1.

*R v Secretary of State for the Environment and Secretary of State for Wales, ex p British Telecommunications plc* [1991] RA 307.

*R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.

*R v Somerset CC and ARC Southern Ltd, ex p Dixon* [1997] COD 323.

*Wainwright v Home Office* [2001] EWCA Civ 2081, [2003] 3 All ER 943, [2002] QB 1334, [2002] 3 WLR 405.

*Westminster Bank Ltd v Minister of Housing and Local Government* [1970] 1 All ER 734, [1971] AC 508, [1970] 2 WLR 645, HL.

*Williams (Valuation Officer) v Scottish and Newcastle Retail Ltd* [2001] EWCA Civ 185, [2001] RA 41; *affg* sub nom *Scottish and Newcastle Retail Ltd v Williams (Valuation Officer)* [2000] RA 119, LT. a

*Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70, [1992] 3 WLR 366, HL.

**Appeal** b

The claimant, Edison First Power Ltd, appealed, with permission of the Appeal Committee given on 13 February 2002, from the judgment of the Court of Appeal (Simon Brown, May and Dyson LJJ) on 12 July 2001 ([2001] EWCA Civ 1096, [2001] RA 229) dismissing its appeal from the order of Carnwath J made on 27 November 2000 and amended on 5 December 2000 ([2001] RA 1) dismissing its application for judicial review of the decisions of the central valuation officer and the Secretary of State for the Environment, Transport and the Regions relating to the charge to non-domestic rates in the rating year 1999–2000 on certain hereditaments owned and occupied before 19 July 1999 by PowerGen (UK) plc and owned and occupied after that date by the claimant. PowerGen, with permission granted by an order made on 29 April 2002, filed written submissions as intervenor. The facts are set out in the opinion of Lord Hoffmann. c d

*Michael Beloff QC, Nigel Pleming QC* and *Christopher Lewsley* (instructed by *Jones Day Gordons*) for Edison.

*Richard Drabble QC* and *Timothy Mould* (instructed by the *Treasury Solicitor*) for the central valuation officer and the Secretary of State. e

Their Lordships took time for consideration.

10 April 2003. The following opinions were delivered. f

**LORD BINGHAM OF CORNHILL.**

[1] My Lords, I have the misfortune to differ from the majority of the House, and would for my part allow the appeal. Since my opinion cannot affect the outcome, I shall state the reasons for it briefly, adopting the helpful accounts of the facts and the relevant legislative provisions given by Carnwath J at first instance ([2001] RA 1), by the Court of Appeal (Simon Brown, May and Dyson LJJ) ([2001] EWCA Civ 1096, [2001] RA 229) and by my noble and learned friend Lord Millett. g

[2] I take as my starting point what is, I think, a trite proposition of law, that rates are a form of tax imposed on the occupier of a hereditament. In some circumstances rates may also be imposed on an owner, but the potential liability of a non-occupying owner plays no part in this case and can for present purposes be ignored. Unless there are joint occupiers, there can be only one occupier of a hereditament at any one time, and accordingly there can ordinarily be only one party liable to pay rates on that hereditament in relation to a given period. As a general rule of construction it will be presumed that a statute does not intend to tax or rate, or authorise the imposition of a tax or rate, on more than one occupier in relation to occupation of a hereditament during a given period. The juridical basis of this presumption may be open to argument. It may rest, in this context, on the legal nature of rates. But I do not think the existence of the presumption can be doubted. The cases cited by Simon Brown LJ ([2001] RA 229 at [30]–[32]) h j

are good authority for it (see *Smith & Son v Lambeth Assessment Committee* (1882) 9 QBD 585 at 593; *Westminster City Council v Southern Rly Co* [1936] 2 All ER 322 at 352, [1936] AC 511 at 565; *Brook (Valuation Officer) v National Coal Board* [1975] RA 367 at 371). The general presumption against rating two parties in relation to the same hereditament was described by Simon Brown LJ ([2001] RA 229 at [30]) as 'well established', and I did not understand the existence of the presumption to be challenged.

[3] But it is of course no more than a presumption. It is not conclusive or irrefutable. Parliament is sovereign. Since, however, the presumption exists (like the presumption against double taxation) for the protection of the citizen and operates to curb the power of the state to exact payment from the citizen, the presumption will be displaced only if 'sufficiently clear express words are used' or there are 'circumstances surrounding the enactment of the particular legislation which lead to an inevitable inference that Parliament intended, in using the words that it did' that the presumption should be displaced. I did not understand either party to question the correctness of the approach indicated in these quotations from the opinion of Lord Oliver of Aylmerton in *Woolwich Equitable Building Society v IRC* [1991] 4 All ER 92 at 103–104, [1990] 1 WLR 1400 at 1412–1413.

[4] In the judgments below, and in argument before the House, somewhat differing views were expressed on whether the facts of this case were such as to engage the presumption at all: whether (in other words) it is a case of double recovery. I would for my part adopt both the analysis and the conclusion of Dyson LJ ([2001] RA 229 at [70]–[74]). It is not in doubt that Edison First Power Ltd (Edison) paid non-domestic local list rates to the two relevant billing authorities in respect of occupation of the two transferred power stations for the period 19 July 1999–31 March 2000. During the same period PowerGen (UK) plc (PowerGen) continued to be liable to pay rates on a basis calculated so as to take account of their occupation of the two power stations. The transfer of the power stations did not reduce their liability in any way. Thus in effect the Secretary of State for the Environment, Transport and the Regions received payment twice, once from PowerGen and once from Edison. It was therefore a case of double recovery. The presumption was engaged.

[5] Neither party suggested that the presumption was displaced by sufficiently clear express statutory words. Thus the question is whether the circumstances surrounding the enactment of the particular legislation were such as to raise an inevitable inference (not just a reasonable or a not unlikely inference, but an inevitable inference) that Parliament intended, in using the words that it did, to displace the presumption. But here again the task of interpretation is made easier by the common approach of the parties. The Secretary of State did not contend that the Local Government Finance Act 1988 raised an inevitable inference that Parliament intended there to be double recovery in a situation where a hereditament formerly part of a class of hereditaments included in the central list was transferred mid-year to a non-designated person and so was included in a local list from the date of transfer, obliging that person to pay local list rates. Rather he contended that the 1988 Act raised an inevitable inference that Parliament intended to authorise the Secretary of State to introduce a scheme for central rating which would have that effect. It is this contention which Edison challenges. The answer must be found in the statute, read of course as a whole and in context.

[6] Sections 41–51 inclusive of the 1988 Act made provision for the local rating of non-domestic hereditaments not included in a central non-domestic rating list. The fine detail of the scheme is not important for present purposes. It is however clear from ss 43 and 44 that the amount chargeable in rates for each chargeable day was to be reached by multiplying the rateable value shown for the day (calculated in accordance with s 56(1) and Sch 6) by the non-domestic rating multiplier for the financial year (calculated in accordance with s 56(2) and Sch 7) and dividing the result by the number of days in the financial year. The product of that calculation, multiplied by the number of days during which the ratepayer has occupied the hereditament during the financial year, will represent the ratepayer's liability: the sum per day times the number of chargeable days.

[7] The central rating list scheme established by ss 52–54 of the 1988 Act was clearly intended to provide a simple and efficient means of imposing rates on and collecting rates from ubiquitous utilities with hereditaments in numerous local authority areas. So specified hereditaments occupied by designated persons were to be centrally rated en bloc, and instead of specific rateable values applied to individual hereditaments the rateable value of these centrally rated hereditaments was to be shown in the list as a whole (see s 53(1)–(3)). By s 54 the chargeable amount for each chargeable day was to be reached by multiplying the rateable value shown for the day in the central list against the ratepayer's name (calculated in accordance with s 56(1) and Sch 6) by the non-domestic rating multiplier for the financial year (calculated in accordance with s 56(2) and Sch 7) and dividing the result by the number of days in the financial year. Allowance being made for the aggregation of hereditaments inherent in the scheme of central list valuation, the formula was very similar to the local list formula. It was clearly contemplated that there was some purpose to be served by finding the chargeable amount of rates for each chargeable day. So far, one finds no indication that a designated person was to remain liable to pay the full amount of rates even though a hereditament or hereditaments whose value was included in the aggregated central list value of hereditaments occupied by that person had ceased to be owned or occupied by that person but had become subject to local list rates as a result of its occupation by a person subject to such rates. It is not, as it seems to me, inherent in a scheme for centralised rating en bloc of hereditaments in a certain class that rates should continue to be paid in the same amount even though the hereditaments comprised in the class have significantly changed.

[8] Counsel for the Secretary of State placed considerable reliance on s 67(9) of the 1988 Act:

> 'A hereditament shall be treated as shown in a central non-domestic rating list for a day if on the day it falls within a class of hereditament shown for the day in the list; and for this purpose a hereditament falls within a class on a particular day if (and only if) it falls within the class immediately before the day ends.'

This provision, read on its own, might be thought to warrant the imposition of rates on a designated person in respect of a broadly defined class of hereditaments whether or not the person ceased to occupy or own them at any stage in the financial year. But this reading is undermined by sub-s (9A), which reads:

> 'In subsection (9) above "class" means a class expressed by reference to whether hereditaments—(a) are occupied or owned by a person designated

under section 53(1) above, and (b) fall within any description prescribed in relation to him under section 53(1).'

This would suggest to me that a designated person does not remain liable to pay rates calculated by reference to a valuation in so far as it is based on the valuation of hereditaments he no longer owns or occupies, the more so (given the presumption) where the hereditaments are owned or occupied by another party liable to pay local list rates.

**[9]** The crux of the argument between the parties turned on the proper construction of Sch 6, entitled 'Non-Domestic Rating: Valuation'. Its effect, as stated in para 1, was to determine the rateable value of non-domestic hereditaments for the purposes of Pt III of the Act. Paragraph 2, equally applicable to central list and local list hereditaments, laid down a valuation formula based on annual letting value. Paragraph 2A applied to the valuation of buildings used for the breeding and rearing of horses when the buildings were occupied together with agricultural land. Paragraph 2B made special provision for valuing caravan sites. The Secretary of State's argument rests on para 3(2), but I should quote the whole paragraph:

> '3.—(1) The Secretary of State may by order provide that in the case of a non-domestic hereditament of such class as may be prescribed—(a) paragraphs 2 to 2B above shall not apply, and (b) its rateable value shall be such as is determined in accordance with prescribed rules.
>
> (2) The Secretary of State may by order provide that in the case of non-domestic hereditaments to be shown in a central non-domestic rating list by virtue of regulations under section 53(2) above—(a) paragraphs 2 to 2B above shall not apply, and (b) their rateable value shall be such as is specified in the order or determined in accordance with prescribed rules.
>
> (3) For the purposes of sub-paragraph (1) above a class may be prescribed by reference to such factors as the Secretary of State sees fit.
>
> (4) Without prejudice to the generality of sub-paragraph (3) above, a class may be prescribed by reference to one or more of the following factors—(a) the physical characteristics of hereditaments; (b) the fact that hereditaments are unoccupied or are occupied for prescribed purposes or by persons of prescribed descriptions.

Paragraph 3(2) makes quite plain that the Secretary of State may make regulations to disapply paras 2 to 2B, so as to depart from the annual letting basis of valuation, and either to specify a rateable value for central list hereditaments or to lay down rules governing the valuation of such hereditaments. What it does not do, as I read it, is authorise the Secretary of State to specify a value or prescribe rules which will permit double recovery of rates. But it is enough to say that no inevitable inference is to be drawn that Parliament intended to authorise the Secretary of State to introduce a scheme which would have that effect.

**[10]** If that conclusion is correct, it is unnecessary to go further. The Secretary of State cannot draw support from the Electricity Supply Industry (Rateable Values) Order 1994, SI 1994/3282, since it is the power of the Secretary of State to make that order which raises the issue before the House. Little assistance is gained from the Court of Appeal decision in *Milford Haven Conservancy Board v IRC* [1976] 3 All ER 263, [1976] 1 WLR 817, since in that case the court held that the Secretary of State had had express statutory authority to make the relevant

orders. If that conclusion was correct, it necessarily followed that the presumption had been overridden.

**[11]** Edison's standing to raise this challenge has not been challenged. It seems to me irrelevant that Edison would have been liable for local list rates only had it not agreed to indemnify PowerGen against PowerGen's liability for central list rates attributable to the two power stations from 19 July 1999 until the end of the financial year: but for that agreement, Edison itself would only have paid once, but there would still in effect have been double recovery. I do not think that consultation, particularly consultation at a time when divestment of hereditaments by designated persons at the behest of the Crown was not in the minds of those consulted, throws any light on the problem of statutory construction before the House.

**[12]** In agreement with Dyson LJ and for very much the same reasons, I would accede to Edison's argument.

**LORD STEYN.**

**[13]** My Lords, the Secretary of State received payment of rates twice in respect of the same hereditament. He received payment once from PowerGen (UK) Ltd (PowerGen) and once from Edison First Power Ltd (Edison). As Dyson LJ explained in his dissenting judgment in the Court of Appeal ([2001] EWCA Civ 1096, [2001] RA 229) it was a case of double recovery. Undoubtedly there is a presumption against rating two parties in relation to the same hereditament. The presumption was applicable. So I am tolerably satisfied that the basic approach of Dyson LJ was correct.

**[14]** On the other hand, at the end of oral argument, I felt somewhat reluctantly driven to the conclusion that under the 'swings and roundabouts scheme' the presumption was displaced (see [2001] RA 229 at [45] per Simon Brown LJ and [67] per May LJ).

**[15]** On further consideration of the matter, particularly in the light of the arguments presented by counsel for the appellant, the judgment of Dyson LJ and the speech of my noble and learned friend Lord Bingham of Cornhill, I now consider that this was not a satisfactory and principled basis for concluding that the statutory scheme demonstrates clearly that Parliament wished to displace the presumption. The question whether overall the scheme devised by the Secretary of State works fairly is logically distinct from the question whether the Secretary of State was empowered by the enabling legislation to devise a scheme involving double recovery in the first place. On balance it seems to me that the statutory language is susceptible of different interpretations and does not sufficiently clearly authorise a scheme involving double recovery.

**[16]** In the end the problem before the House is one of vires. The text of the statute must be the starting point. The question is how far, on a contextual reading of the statute, the language is capable of stretching. While I accept that all relevant contextual material must be taken into account, not all the material deployed by the Secretary of State can affect the point of statutory construction. Thus while I accept that the consultation process in this case is admissible, it ultimately does not warrant an interpretation which attributes to the language used by Parliament a meaning which displaces the presumption. The objective setting of the statute does not in logic and common sense reveal a Parliamentary intent to override the presumption.

[17] I must go back to what I regard as a strong presumption against double recovery. In my view the executive has not shown a displacement of this principle by a clear Parliamentary intent.

[18] For the reasons given by Lord Bingham of Cornhill, as well as my brief reasons, I would allow the appeal.

**LORD HOFFMANN.**

[19] My Lords, PowerGen (UK) plc (PowerGen) carries on the business of generating electricity. By an agreement dated 30 April 1999 (the sale agreement) it agreed to sell two power stations, Fiddlers Ferry and Ferrybridge C, to Edison First Power Ltd (Edison). The purchase was completed on 19 July 1999, when Edison went into occupation.

[20] PowerGen was rated under a special statutory regime by which the aggregate rateable value of the hereditaments which it occupied and used for generating electrical power was prescribed by the Electricity Supply Industry (Rateable Values) Order 1994, SI 1994/3282 made pursuant to para 3(2) of Sch 6 to the Local Government Finance Act 1988. This prescribed a fixed sum (£178,882,300) for the first year (1995–96) of the quinquennial valuation list subject to annual recalculation according to a formula based on changes in PowerGen's declared net capacity (DNC) in respect of electricity generation. Changes in the actual hereditaments which it occupied, such as the sale of a power station, had no effect upon the aggregate valuation until the end of the rating year and then only if they resulted in a change in DNC. The result was that PowerGen's liability for rates in the year 1999–2000 was unaffected by the sale.

[21] Edison, on the other hand, was rated in the ordinary way by reference to its occupation of the power stations. It was charged rates assessed on the annual value of the power stations for the period from 19 July 1999 until the end of the 1999–2000 rating year on 31 March 2000.

[22] By cl 9.3 of the sale agreement, Edison agreed that 'accrued charges ... payable' in respect of the power stations should be apportioned at the completion date. The clause said that 'for the avoidance of doubt' the apportionment should include an apportionment of rates payable by PowerGen in relation to the power stations 'which shall be in addition to any ... rates ... levied on the Buyer as a result of its occupation ... from the Completion Date'.

[23] Pursuant to this clause Edison paid PowerGen £13,517,937. But when it came to its own assessment for rates, Edison protested. It said that it was being made to pay rates twice over in respect of the same hereditaments. But Edison's own liability was hard to challenge. The hereditaments had properly been entered in the local rating lists from 19 July 1999 and it had been the occupier. Liability was clearly imposed by the 1988 Act. So it decided to attack the legality of the PowerGen rating regime. It said that the 1994 order was ultra vires and void so far as it imposed a liability upon PowerGen in respect of the power stations as from 19 July 1999.

[24] Paragraph 3(2)(b) of Sch 6 to the 1988 Act gave the Secretary of State power to provide by order that the rateable value of PowerGen's hereditaments should be 'such as is specified in the order or determined in accordance with prescribed rules'. These are very wide words. But Edison says that they do not allow him to prescribe a method of valuation which permits the same hereditaments to be taken into account for the purpose of rating both PowerGen and Edison. In the absence of express words or necessary implication, a statute

should not be construed as imposing or allowing double taxation. Edison brought proceedings for judicial review to have the 1994 order and associated statutory instruments quashed so far as necessary as ultra vires. If that application is successful, PowerGen will owe no rates in respect of the power stations as from 19 July 1999 and there will be nothing to apportion to Edison. It will be entitled to ask PowerGen for its money back. But Carnwath J dismissed the application ([2001] RA 1) and his decision was upheld by the Court of Appeal (Simon Brown and May LJJ, Dyson LJ dissenting) ([2001] EWCA Civ 1096, [2001] RA 229).

**[25]** My Lords, the presumption against double taxation is one facet of a wider commonsense principle of the construction of statutes by which courts will often imply qualifications into the literal meaning of wide and general words in order to prevent them from having some unreasonable consequence which it is considered that Parliament could not have intended (see *Stradling v Morgan* (1560) 1 Plowd 199, 75 ER 305 and, for a more recent example, *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21, [2002] 3 All ER 1, [2002] 2 WLR 1299). The strength of the presumption depends upon the degree to which the consequences are unreasonable, the general scheme of the legislation and the background against which it was enacted.

**[26]** The specific presumption against double taxation was considered by the House of Lords in *Woolwich Equitable Building Society v IRC* [1991] 4 All ER 92, [1990] 1 WLR 1400. That case also concerned a power in general terms to make regulations; in that case, for the taxation of building society interest. The society complained that the effect of the regulations was to make it subject to tax in respect of payments of interest which had already been taxed in a previous year and that the statute should not be construed as permitting such double taxation. But the House of Lords held that the background to the enactment of the statute made it clear that this was exactly what Parliament had in mind. Lord Oliver of Aylmerton said ([1991] 4 All ER 92 at 103–104, [1990] 1 WLR 1400 at 1412–1413):

> 'The suggested inhibition against such cumulative taxation lies not in the words which Parliament has chosen to use but in certain well-established presumptions or principles—a presumption against double taxation, a presumption that income tax, being an annual tax, is payable only on income of a particular year and so on. But these are only presumptions. They are clearly rebuttable if sufficiently clear express words are used. But they can also be rebutted, as it seems to me, by circumstances surrounding the enactment of the particular legislation which lead to an inevitable inference that Parliament intended, in using the words that it did, that these presumptions or principles should not apply.'

**[27]** In the present case, there was a division of opinion in the Court of Appeal about whether it really was an example of double taxation. The majority said that upon the true construction of the 1994 order and the 1988 Act, PowerGen was not rated in respect of the power stations as from 19 July 1999. It was rated only in respect of the hereditaments that it actually occupied. But the total rateable value of those hereditaments was treated as being the same as it had been when they included the power stations. Dyson LJ said ([2001] RA 229 at [72]) that this was merely a matter of form. In reality, PowerGen continued to pay rates which had been calculated by reference to the DNC of the two power stations.

**[28]** I do not think that it advances the argument to debate whether this is really a case of double taxation or not. The question is whether the 1988 Act

authorised what actually happened, whatever you choose to call it. The inevitable consequence of the valuation regime created by the 1994 order was to make the sale of the power stations irrelevant to PowerGen's rate liability in the 1999–2000 rating year but to allow the rating authority to claim rates from Edison for the period of its occupation. As the latter is conceded to be lawful, the question is whether a valuation regime which takes no account of the disposal of hereditaments to a rateable occupier in a rating year is so unreasonable, viewed against the scheme of the 1988 Act and the background to its enactment, that Parliament cannot be supposed to have intended para 3(2) of Sch 6 to authorise it.

**[29]** My Lords, the background is very important and I must therefore spend some time on the methods which had been used to value the hereditaments of public utilities like electricity generating companies before the 1988 Act.

**[30]** Rates are traditionally a local tax assessed upon occupiers of hereditaments in accordance with their annual value. Each local authority makes a rate according to its needs. There are however certain kinds of ratepayers whom it is not very practical to rate by reference to the individual hereditaments which they occupy in each local authority area. They may carry on activities for the purpose of which they occupy hereditaments which are situated in many local authority areas and which are extremely difficult to value separately. The problem emerged in consequence of the creation of canal, harbour, railway, gas, electricity, water and telegraph companies in the nineteenth century. The law insisted that such companies should pay the poor rate and other rates assessed upon them by reference to the annual value of the hereditaments which they occupied within each parish. But how were such values to be determined? The principle, as set out in s 1 of the Parochial Assessments Act 1836, was to estimate 'the Rent at which the [hereditaments] might reasonably be expected to let from Year to Year'. But, as Viscount Cave LC said in *Kingston Union Assessment Committee v Metropolitan Water Board* [1926] AC 331 at 338, [1926] All ER Rep 1 at 6:

> '[I]n applying that principle, so simple in appearance, to certain classes of hereditaments, great difficulties were encountered, and it was found necessary for rating experts and the Courts to have recourse to hypotheses of a more or less violent character.'

**[31]** The first difficulty, as explained by Viscount Cave ([1926] AC 331 at 338–339, [1926] All ER Rep 1 at 6–7), was that piecemeal valuations of the hereditaments in each parish would not necessarily add up to the value of the undertaking as a whole:

> 'The mains and other works in any particular parish, taken by themselves, might conceivably produce no rent at all, for it is almost impossible to suppose that any person would wish to become the tenant of them; but the same hereditaments, if looked upon as part of a great undertaking extending over a large and populous area, might be quite indispensable to the undertakers (who must be regarded as possible tenants) and so might command an extortionate rent. In these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which ... would not compel the undertakers to pay rates on an aggregate sum exceeding the whole yearly value of their undertaking; and accordingly rating surveyors, soon after the passing of the Act of 1836, began to assess

waterworks and other like concerns, such as railways, canals, gasworks, etc., upon the basis of the profits earned by the whole undertaking.' a

[32] I shall call this problem, which in the nineteenth century was solved by using the 'profits method' (later called the 'receipts and expenditure method') of valuation, the 'global valuation problem'. But then, having arrived at a global valuation, the next problem was to allocate that value fairly between the parishes in which the ratepaying company occupied hereditaments. I shall call this 'the distribution problem'. In the nineteenth century it was solved by an elaborate formula devised by experts and approved by the courts, which divided hereditaments into 'indirectly productive assets' like reservoirs and 'directly productive assets' like pipes carrying the water to properties in the parish, and giving each parish a proportion of the total valuation by reference to the cost of construction of the first class of assets and the revenue arising from the second class. b c

[33] These methods of rating public utility companies continued until after the 1939–45 war but for various reasons were not found altogether satisfactory. For one thing, a number of public utilities ran at a loss in the inter-war years. Assessment of rates by reference to the excess of receipts over expenditure was not very realistic. The rules were also very complicated because, once one had calculated the total value of the undertaking, it was necessary not only to apportion the total value among the rating areas in which the utility occupied hereditaments but also to make adjustments for cases in which it was not the occupier for the whole rating year. d e

[34] After the nationalisation of most public utilities after the war, resort was had to even more violent departures from traditional rating. So violent, indeed, that for ten years the sums payable by the nationalised electricity corporations were described not as rates but as payments in lieu of rates. One difficulty about continuing with the old method of global valuation was that the concept of profit seemed inapplicable to nationalised industries. I shall briefly outline how the payments in lieu were calculated, because they are relevant to the methods of rating adopted later when the industry was brought back into the rating system. f

[35] Payments in lieu of rates were introduced by s 85(1) of the Local Government Act 1948. It provided that hereditaments occupied by, among others, the statutory corporations in which the assets of the industry had been vested by the Electricity Act 1947 should not be liable to be rated or to be included in any valuation list. Instead, the nationalised corporations were to pay, for the year 1948–49 and all subsequent years, 'payments for the benefit of local authorities' in lieu of the rates which would otherwise have been payable. The amount payable for 1948–49 was to be 'the standard amount' (see s 96(2)(a) of the 1948 Act). This was defined in s 96(3) as meaning, in relation to the payment for the benefit local authorities in England and Wales, £11,250,000. In succeeding years the amount was to be adjusted for changes in the average rates levied in England and Wales and changes in the amount of electricity supplied. g h

[36] The new system therefore dealt with the global valuation problem in the same way as before; by making the industry's liability referable to the whole of its undertaking. But the method of calculation was greatly simplified; instead of valuing the undertaking, attributing proportions of that value to the various rating areas in which it occupied hereditaments and then applying the various local rates to those values, it used a single annual figure prescribed by Parliament, subject to adjustment in following years in accordance with a formula. It did not j

matter whether a corporation ceased to occupy hereditaments or occupied new ones. If a corporation sold a hereditament to a rateable occupier, it would pass out of the immunity to rates conferred by s 85(1) of the 1948 Act but the sum for which the corporation was liable to make payments in lieu would be unaffected.

**[37]** The distribution problem was dealt with equally simply: the payment was distributed to rating authorities in proportion to the rateable values of their respective areas in the year in question (see s 100(2)(a) of the 1948 Act). This method paid no regard to where any hereditament happened to be.

**[38]** This egalitarianism was no doubt in accordance with the spirit of the age but resulted in complaints from local authorities which had to sustain greater burdens on account of the industry's activities than others; in particular, those in which generating stations were situated. Equity between rating authorities was thought to require recognition of these differences. So the system was recast by the Local Government Act 1958. This abolished 'Payments for the benefit of local authorities in lieu of rates' (see s 12(1)). Instead, it brought the nationalised corporations (then consisting of the Central Electricity Generating Board (the CEGB) and 12 area boards) back into the rating system.

**[39]** Section 12(1) of the 1958 Act provided that after 31 March 1959 the 13 electricity boards were to be treated, for the purposes of any rate period, as occupying in each rating area 'a hereditament of a rateable value' calculated in accordance with provisions contained in Sch 2.

**[40]** The method of calculation, an example of what was known as 'formula rating', was briefly as follows. The Minister of Housing and Local Government certified 'the basic electricity rateable value' (see para 4(3) of Sch 2), which was his estimate (subject to certain adjustments) of the annual payment in lieu of rates falling due for 1958–59, the last year of the old system. Half of this amount was to be attributed to the CEGB and the other half to area boards in specified percentages. These sums were to be adjusted in subsequent years by reference to changes in the outputs of the boards. In calculating the rateable value of the hereditament which a board was deemed to occupy in each rating area during any given year, a distinction was made between the values of distribution activities and generating activities. There was a formula for deciding what proportion of the total value allocated to a board should be treated as attributable to each kind of activity: in the case of the CEGB it was half and half; in the case of the area boards it was more complicated. Value attributable to distribution activities was apportioned among rating authorities within the areas of each board in proportion to the aggregate net annual value of their rating areas. Value attributable to generating activities was apportioned only to the rating authorities in whose areas the board had generating stations in commission. Apportionment was made according to the proportion of the generating capacity in the rating area to the board's total generating capacity.

**[41]** The important point to notice about this system is that the hereditament which a board was treated as occupying in the year in question was entirely notional. It did not matter whether the board actually occupied hereditaments in that rating area for all or any of the year in question. The immunity from rating conferred by s 85(1) of the 1948 Act in respect of hereditaments actually occupied by the boards was preserved and there was substituted its liability in respect of the notional hereditaments created by the 1958 Act. So once again, the actual hereditaments occupied by the boards during the rating year were irrelevant to its overall liability. Occupation of hereditaments on which it had a generating

station in commission would affect the distribution of the rates which it paid but only by way of revision from year to year. The disposal of a hereditament to a rateable occupier in the course of a year would leave the board's liability to rates unaffected.

[42] Similar codes of formula rating were applied to other public utilities and they were all consolidated in the General Rate Act 1967, where the provisions relating to electricity boards will be found in s 34 and Sch 7.

[43] This system of formula rating lasted until the 1988 Act came into force on 1 April 1990. The revolutionary change made by the 1988 Act was to convert non-domestic rates from a local into a central tax. The rate is now set by the Secretary of State, paid over to him and then redistributed to local authorities according to the population living in their areas. This change solved at a stroke the distribution problem which had given so much trouble over the previous 150 years. It is no longer necessary for each local authority to be able to collect the rates on the hereditaments or notional hereditaments which the ratepayer occupies or is deemed to occupy in its rating area. They all go into the same pot for redistribution.

[44] Nevertheless, in the case of the great majority of hereditaments subject to the non-domestic rate, local valuation, assessment and collection were continued. It was obviously more convenient that valuation of individual hereditaments should be in the hands of local valuation officers. Local authorities maintain lists called 'local non-domestic rating lists' of non-domestic hereditaments within the authority's area, showing for each day in the year the rateable value of each hereditament as determined by the local valuation officer. The occupier of the hereditament is liable to the rate for each day on which it is shown in the list and he is in occupation. The local authority collects the rate and passes it on to the Secretary of State.

[45] For some cases, however, the 1988 Act provided for central assessment. Section 52 established a central non-domestic rating list. Section 53(1) provides that 'with a view to securing the central rating en bloc of certain hereditaments' the Secretary of State may by regulations designate a person to be included in the central list and prescribe the hereditaments in respect of which he is to be centrally rated. Regulation 6(1) of the Central Rating Lists Regulations 1994, SI 1994/3121 (the Central Rating Regulations), echoing s 53(2) of the 1988 Act, provides that the central list must show, for each day for which the list is in force, the name of the designated person and, against each name, each hereditament in England which on the day concerned is occupied or (if unoccupied) owned by that person and falls within the description of hereditaments for which the Secretary of State has prescribed that he is to be centrally rated. This might suggest that each hereditament must be separately identified on the list, but s 67(9) and (9A) provide that the requirement may be satisfied by specifying a class of hereditaments by reference to occupation by the designated person and the prescribed description. Thus PowerGen is designated by the Central Rating Regulations in respect of all its hereditaments 'wholly or mainly used for the purposes of the generation of electrical power' (see the Schedule to the regulations, Pt 2, para I) without specifying them individually. This means that if the designated person ceases to occupy a hereditament, it ceases to be a member of the class and it is no longer rated in respect of that hereditament.

[46] Section 54 deals with the liability of centrally rated persons. Such a person is liable in respect of a chargeable financial year 'if for any day in the year'

his name appears on the list. The amount for which he is liable is the aggregate of the chargeable amounts for each chargeable day. A chargeable day means a day for which the ratepayer's name is shown on the list and the chargeable amount for each such day is determined by multiplying the rateable value shown on the list for that day by the 'non-domestic rating multiplier'—the equivalent of the old poundage fixed by the local authority—and dividing it by the number of days in the financial year.

[47] Thus the statutory framework for central rating contemplates that although the designated ratepayers' centrally rated hereditaments will be valued en bloc, the method of valuation will, in the absence of contrary provision, be the traditional method of estimating the rent at which those hereditaments could reasonably be expected to let from year to year.

[48] An example of designation for central rating without the use of a formula is British Telecom, which was designated only in respect of its 'posts, wires, underground cables and ducts, telephone kiosks, towers, masts, switching equipment, or other equipment, or easements or wayleaves', which were to be treated as one hereditament (see reg 5 and Pt 5, para II of the Schedule to the Central Rating Regulations and reg 4(1) of the Non-Domestic Rating (Railways, Telecommunications and Canals) Regulations 1994, SI 1994/3123). Thus all other hereditaments occupied by British Telecom are rated on local lists in the ordinary way and even in respect of those centrally rated en bloc, valuation is according to the conventional method specified in paras 2–2B of Sch 6 to the 1988 Act: an estimate of the rent at which the hereditament might reasonably be expected to let from year to year.

[49] The 1988 Act therefore contains what may be regarded as a prima facie assumption that valuation, even of centrally rated hereditaments rated en bloc, will be according to the conventional method. For present purposes, the important feature of the conventional method is that each hereditament (or class of hereditaments deemed to be a single hereditament) is separately valued, so that disposal of a hereditament results in a cessation of liability in respect of the value of that hereditament.

[50] But para 3 of Sch 6 gives the Secretary of State power to disapply the conventional method, in respect of both hereditaments on local lists (see sub-para (1)) and hereditaments on the central list (see sub-para (2)):

> '(2) The Secretary of State may by order provide that in the case of non-domestic hereditaments to be shown in a central non-domestic rating list by virtue of regulations under section 53(2) above—(a) paragraphs 2 to 2B above shall not apply; and (b) their rateable value shall be such as is specified in the order or determined in accordance with prescribed rules.'

[51] It is the purpose and scope of this provision which is in issue in this appeal. The 1988 Act was a long time in gestation and the purpose of para 3 can be clearly understood only by reference to the rating law as it was before the Act and the admissible evidence of what were perceived to be the matters needing to be reformed. The proposal to introduce a central non-domestic rate was made in the 1986 Green Paper, *Paying for Local Government* (Cmnd 9714) which set out the results of more than a year of studies undertaken by ministers and officials in the Department of the Environment and 'special advisers' (of whom I was briefly one). Chapter 2 argued the case for central non-domestic rating; para 2.40 noted that the last revaluation had been in 1973 and that values had become 'badly out

of line with up-to-date rental values'. It proposed the preparation of a new list in time for introduction on 1 April 1990 and said (in para 2.42) that the government would issue a separate consultation paper on revaluation. This was issued in July 1987, entitled *Paying for Local Government: Non-domestic Rates*. Paragraph 7 dealt with formula rating:

> '7.1 The large majority of statutory undertakers, and some other activities, are now rated by statutory formula. The Government will be reviewing the various formulae, in consultation with representatives of the industries concerned, with the intention of bringing them all up to date at the same time as the general non-domestic revaluation in 1990.
>
> 7.2 At present, the provisions enabling formula rating to be applied, and the formulae themselves, are set out at great length in Schedules 4–7 to the General Rate Act and in various other Acts ...
>
> 7.3 The existing provisions would in any case require extensive recasting, not only because of the current review of the individual formulae, but also because, with the introduction of the national non-domestic rate, in the case of those industries where the formula is calculated at national level and then apportioned by a further formula to local authority areas, such apportionment will no longer be necessary. The review of the formulae could not in any case be completed in time to be included in the forthcoming main legislation.
>
> 7.4 The Government therefore has it in mind to replace all of the existing statutory provisions relating to formula rating with a simple enabling power. This would empower the Secretary of State to provide by order that hereditaments used for a specified activity, or occupied by a specified activity, or occupied by a specified occupier or class of occupier, should be formula-rated; to provide for the determination of the rateable value to be attributed to them in 1990 and at subsequent revaluations either as a specified sum or to be calculated in a specified manner; and to provide for the value to be adjusted for changes in the occupation of property by the industry.
>
> 7.5 The object would remain to replicate, in very broad terms, the rate burden a hereditament or industry might have borne had it been capable of being conventionally rated. The Secretary of State would consult representatives of the industry before varying the formula, or applying formula rating for the first time or ceasing to apply it. There is in practice no intention of substantially extending the scope of formula rating, though there may be some activities, for example private electricity generators, where it is appropriate; in other cases it may be possible to revert to conventional valuation.'

**[52]** As foreshadowed, the government made the Electricity Supply Industry (Rateable Values) Order 1989, SI 1989/2475 which continued formula rating for the industry for the 1990–95 quinquennium. By the time the 1988 Act had been passed, it appeared that the government had a further reason for not including the formulae in the Act itself. It regarded the whole idea of formula rating as a relic of outdated political theory. Public utilities should function in a market economy and there was no reason why their assets should not be valued in the same way as those of any other enterprise. And a point forcibly made by the public utility industries during consultation was that conventional valuation by

the valuation officer allowed them a right of appeal, whereas a statutory formula, even if devised after a process of consultation, was immovable.

**[53]** In a further consultation paper published after the 1988 Act had been passed, the government therefore made it clear that it would like to return the industry to conventional rating as soon as possible:

> 'While the Government believes that its proposals for prescribed rateable values are fair and reasonable, and are in line with what the 1990 revaluation is expected to show for other industries, it acknowledges that this is not an ideal method of rating assessment, particularly since the ratepayers' right of appeal is severely limited. The 1988 Act opens the way to returning these undertakings to conventional assessment; it removes the need to apportion rateable values to individual authorities, and it contains the power to set aside the restrictive case law associated with the profits method of valuing public utilities. Consequently, the Government intends, so far as it is practical, to return all hereditaments whose values are currently prescribed to conventional assessment for the next revaluation.'

**[54]** In the event it appears that it was not found practical to return the industry to conventional assessment in time for the start of the next quinquennium, so the government, after further consultation, made the 1994 order. But the industry's power station hereditaments were eventually transferred to local lists in 2000.

**[55]** The question, as I have said, is whether the system of formula rating prescribed by the Secretary of State by the 1994 order, which carried the inevitable consequence that the en bloc rateable value of hereditaments occupied by PowerGen would not be affected by changes during the rating year, was so unreasonable that Parliament could not have intended to authorise it by the general words of para 3(2) of Sch 6 to the 1988 Act. My Lords, I find it impossible to say this of a system which, in its essential principles, Parliament had thought appropriate for the electricity generating industry for the previous 30 years. In my opinion the purpose of para 3(2) was to allow that system to be retained, with whatever formulae the government thought appropriate and as long as it thought it expedient to do so.

**[56]** PowerGen acknowledges all this in the written submissions which it made to your Lordships by way of intervention in the appeal. Edison's claim of double taxation would not have any plausibility if it were not for the fact that it agreed to pay an apportioned part of the rates payable by PowerGen which were treated as attributable to the DNC of the two power stations. But this payment, however calculated, is in my opinion nothing more than part of the price which Edison was willing to pay PowerGen for the power stations. It is not, from Edison's point of view, a payment of rates.

**[57]** For these reasons I consider that the 1994 order was not ultra vires, either as a matter of construction of para 3(2) or because, as Edison has submitted, the Secretary of State acted irrationally or contrary to Edison's rights of property under art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

**[58]** There are two matters to be mentioned in conclusion. The first is the decision of the Court of Appeal in *Milford Haven Conservancy Board v IRC* [1976] 3 All ER 263, [1976] 1 WLR 817, on which both sides placed some reliance. The

1967 Act, as I have said, consolidated the provisions for the formula rating of a number of public utilities including electricity boards, for which the formula was contained in Sch 7. In the case of mines and quarries, statutory dock and harbour undertakings and broadcasting, however, the particular circumstances were thought likely to be so varied that no formula was included in the primary legislation. Instead, the minister was given power in s 35(1) to make provision by order for determining rateable values 'by such method as may be so specified'. The formula prescribed by the minister for dock undertakings was based on 4% of their receipts, including receipts from some parts of their property which had been let and on which the occupiers were therefore paying rates in the ordinary way. The Milford Haven Conservancy Board complained that the order was ultra vires because it involved double taxation. But the Court of Appeal rejected this submission. Cairns LJ said ([1976] 3 All ER 263 at 269–270, [1976] 1 WLR 817 at 824–825):

> 'In my view the language of [the statute] is sufficiently clear to entitle the Secretary of State to prescribe any method of valuation, however far it departs from previously established principles ... [R]ateable value, whenever it departs from net annual value, either by being related to net annual value in some specific way, or by being assessed without reference to net annual value, is an artificial concept. The profits basis of valuation was a means of estimating the rent that the hypothetical tenant would pay (see *Kingston Union v Metropolitan Water Board* ([1926] AC 331 at 339, [1926] All ER Rep 1 at 7)). But none of the methods of assessment under ss 31 to 35 has that character. Water, gas and electricity undertakings are dealt with on the basis of supply. Mines and quarries ... are given a rateable value ascertained by applying a fraction ... to the rateable value previously assessed.'

**[59]** This reasoning seems to me to apply equally to the formula adopted by the Secretary of State in the 1994 order. The other matter on which I should comment is the closely reasoned and, on its own terms, persuasive dissenting judgment of Dyson LJ in the Court of Appeal. He first characterised the 1994 order as giving rise to a possibility of double rating and then analysed the provisions of the 1988 Act to see whether it disclosed a clear intention to allow such a consequence. His conclusion was that it did not.

**[60]** If one looks no further than the scheme of the 1988 Act, I would be inclined to agree. The Act is, as I have said, based on the assumption that conventional valuation will be the norm, and the formula rating applied by the 1994 order is so violent a departure from that norm as to make one doubt whether it could have been authorised by Parliament. But once one looks, as Lord Oliver in *Woolwich Equitable Building Society v IRC* [1991] 4 All ER 92 at 104, [1990] 1 WLR 1400 at 1412 said one should do, at the 'circumstances surrounding the enactment of the ... legislation', the meaning of the statute becomes plain. The background of formula rating over the previous thirty to forty years provides the key to understanding both the purpose of the powers conferred upon the Secretary of State by para 3 of Sch 6 to the 1988 Act and the way in which he used them. For these reasons and those given by my noble and learned friends Lord Millett and Lord Scott of Foscote, I would dismiss the appeal.

**LORD MILLETT.**

[61] My Lords, this is a very curious case. The appellant Edison First Power Ltd (Edison) claims that an assessment to central rates in respect of two electricity power stations amounted to double taxation and was unlawful. The Secretary of State for the Environment, Transport and the Regions denies that the assessment was unlawful but has agreed to reimburse Edison if its claim is upheld. Yet Edison has never been assessed to central rates in respect of the power stations and has never paid them. They were assessed on and paid by PowerGen (UK) plc (PowerGen). If there was a victim of double taxation it was PowerGen. But PowerGen makes no complaint about the assessment and although it is not directly affected by the outcome of the present appeal it has intervened to support the Secretary of State's contention that the assessment was validly made.

[62] While this may make one sceptical about Edison's claim that anything as oppressive as double taxation is involved, it is not determinative. The case does not turn on Edison's locus standi to challenge the assessment on PowerGen. If it was unlawful, Edison has sufficient interest to entitle it to a declaration to that effect.

THE FACTS

[63] PowerGen was created when the Central Electricity Generating Board (the CEGB) was privatised in 1990. Its business was subsequently diversified and now extends to a wide range of activities but continues to include the generation of electricity. Along with other public utilities it was a designated person for the purposes of central non-domestic rating and the hereditaments which it occupied for the purposes of generating electricity were entered on a central rating list. They were rated under a special statutory scheme established by Pt III of the Electricity Supply Industry (Rateable Values) Order 1994, SI 1994/3282 made by the Secretary of State pursuant to powers conferred by para 3(2) of Sch 6 to the Local Government Finance Act 1988.

[64] In 1998 PowerGen was required to dispose of a proportion of its coal-fired generating capacity. In compliance with this requirement PowerGen put two electricity power stations, Fiddlers Ferry and Ferrybridge C, up for sale. Edison agreed to acquire them on long leases from PowerGen.

[65] On 19 July 1999 Edison completed its acquisition of the two power stations and went into rateable occupation. PowerGen remained liable to central rates in respect of the hereditaments which it occupied for the purpose of generating electricity. These no longer included the two power stations which it had sold to Edison, but owing to the way the rateable value of its properties was calculated by reference to its total declared net capacity for generating electricity (DNC) at the beginning of each rating year a change in the hereditaments which it occupied during the year did not affect its liability to rates until the following year and did not do so even then if it did not affect its total DNC. Accordingly for the remainder of the 1999–2000 rating year PowerGen continued to be liable to central rates in an amount which reflected the DNC of the two power stations even though it had disposed of them and Edison was in rateable occupation and liable to local rates in respect of them.

[66] The agreement for sale provided for PowerGen's liability to central rates in respect of the two power stations to be apportioned. PowerGen estimated that they would contribute some £13·5m to its total liability for central rates for the

rest of the current rating year. Edison duly paid this sum to PowerGen, though it subsequently contested its liability to do so in arbitration proceedings.

[67] Following its acquisition Edison was assessed to local rates in respect of the two power stations. The assessments were made by the rating authorities for the areas in which the power stations were situated. They were in an identical sum and were made in accordance with a special scheme for the industry established by Pt II of the 1994 order made by the Secretary of State pursuant to powers conferred by para 3(1) of Sch 6 to the 1988 Act. Edison paid under protest but accepts that it had no ground for withholding payment. Being unable to recover its payment of local rates, Edison has turned its attention to the recovery of the central rates paid by PowerGen for the period when Edison was in occupation. If PowerGen was unlawfully assessed to them, they could not properly be apportioned to Edison.

[68] The central valuation officer has refused to make any amendment to the central rating list with effect from the change of occupation in July 1999. He says that he can do so only with effect from the beginning of the following rating year on 1 April 2000. Edison accepts this as correct, and identifies this limitation on his powers as the aspect of the scheme of central rating which is unlawful.

THE RIVAL CONTENTIONS

[69] Edison's case is as follows. (i) It was properly assessed to local rates in respect of its occupation of the two power stations for the period from 19 July 1999–31 March 2000. The assessment was based on the DNC of the power stations. This is common ground. (ii) The DNC of the two power stations also continued to be taken into account in determining the amount of central rates payable by PowerGen for the same period even though Edison was in rateable occupation of the power stations and PowerGen was not. This too is common ground. (iii) The assessment on PowerGen was inconsistent with two basic principles of rating law: (a) that rates are payable in respect of the occupation of a hereditament (save in the case of vacant property when they may be payable by the owner); and (b) that (save in the case of joint occupiers) only one person can be in rateable occupation of a hereditament at any one time (see *Smith & Son v Lambeth Assessment Committee* (1882) 9 QBD 585 at 595; *Westminster City Council v Southern Rly Co* [1936] 2 All ER 322 at 352, [1936] AC 511 at 565; *Brook (Valuation Officer) v National Coal Board* [1975] RA 367 at 371. (iv) The assessment on PowerGen was ultra vires: (a) because on the true construction of the enabling provisions of the 1988 Act they did not authorise such a radical departure from the basic principles of rating; or alternatively (b) because the assessment infringed the presumption against double taxation or double recovery and was not required by the Act whether as a matter of express language or as a matter of necessary implication. (v) In particular the 1994 order was ultra vires the 1988 Act in so far as it provided for the recalculation of the rateable value of the hereditaments shown on a central list only at yearly intervals and did not provide for recalculation during the course of a rating year when a hereditament ceased to be occupied by a designated person and became subject to local rates.

[70] The Secretary of State acknowledges that the general principles of rating law are as Edison describes them. But he says that the 1988 Act authorised him to establish a scheme for central rating which departed from those principles and that the scheme which he adopted was neither irrational nor unfair. He accepts

that the 1988 Act did not require him to make a scheme which provided for annual recalculation only but says that it authorised him to do so and that annual recalculation was a long-accepted practice in the industry and represented a pragmatic solution to a practical problem. He denies that strictly speaking the scheme which he established involved any element of double taxation, and to the extent that it involved an element of double recovery he says that, taken as a whole, it was not oppressive or objectionable and did not need to be authorised by express words or necessary implication in the enabling Act.

THE RATING OF PUBLIC UTILITIES

[71] My noble and learned friend Lord Hoffmann has described the various methods which have been adopted from time to time to determine the rateable value of hereditaments occupied by public utilities and situated in numerous rating districts. As he has shown, it has been found necessary for practical reasons for Parliament to authorise departures, and often radical departures, from conventional rating principles. The Local Government Act 1948 introduced a system known as 'formula rating' based on the method formerly employed for the railways under the Railways Act 1921. This system, however, was not extended to the electricity industry until the Local Government Act 1958. In the meantime the industry was exempted from rates and required instead to pay to central government a fixed sum in lieu of rates which was then distributed by central government to local authorities.

[72] By the time of the 1988 Act the large majority of statutory undertakers, as well as some private enterprises, were rated by statutory formula. It is not necessary to describe the system in any detail, but two of its features may be briefly remarked upon. First, the liability of an undertaking for rates had only a tenuous connection with the hereditaments which it actually occupied. Notional hereditaments were created in each rating district and the liability of the undertaking was based on the initial aggregate (or 'cumulo') rateable value of the hereditaments which it was deemed to occupy when the valuation list came into force. This was adjusted annually to reflect changes during the life of the list. The formula differed from industry to industry. In the case of the CEGB the initial cumulo figure represented a pre-determined proportion of the payment which it had made to central government in lieu of rates in the last year of the old system, and this figure was adjusted periodically to reflect changes in its output of electricity. Accordingly while changes in the hereditaments which the CEGB occupied from time to time affected the distribution of its payments among local rating authorities they did not affect the amount of its overall liability unless they affected its total output. Secondly, in common with other undertakings subject to this form of rating, the CEGB's output was revised at the beginning of each year, so that changes during the year did not affect the amount of its liability until the following year.

[73] These two features were retained in the scheme of central non-domestic rating which the Secretary of State established for the industry under Pt III of the 1994 order.

THE 1988 ACT

*Non-domestic rating*

[74] The long title to the 1988 Act describes it as an Act (inter alia) 'to create new rating systems'. Part III of the 1988 Act introduced a new system of rating

for non-domestic property. This differs from the familiar system of domestic rating in two ways. First, the rate or poundage is not set by individual local rating authorities. Instead a single national rate is set for the whole of England by the Secretary of State. Secondly, the proceeds are not retained by the rating authorities in the areas where the relevant hereditaments are situated. Instead they are paid into a central pool which is administered by the Secretary of State and distributed among local authorities on a basis which is independent of the location of the hereditaments in question.

**[75]** The 1988 Act established two forms of non-domestic rating, one by means of local lists (see ss 41–51) and one by means of central lists (see ss 52–54). Some classes of property are exempt from rates altogether, but all rateable non-domestic property must be rated by inclusion in one list or the other. The two lists are mutually exclusive; it is not possible for the same property to appear in both lists at the same time.

**[76]** A unit of rateable property is known as a hereditament (see s 64(1)). For the purposes of non-domestic rating the financial year runs from 1 April (see s 145(3)). Both local and central lists were to be compiled on 1 April 1990 and on 1 April in every fifth year thereafter (see s 41(1)(2) (local lists) and s 52(1)(2) (central lists)). Lists remain in force for a period of five years (see s 41(3) (local lists) and s 52(3) (central lists)). The present case is concerned with the local and central rating lists compiled for the period of five years beginning on 1 April 1995.

*Local list rating*

**[77]** Local non-domestic rating lists are maintained by local rating authorities. They continue to be responsible for the valuation of hereditaments in their areas and for the assessment and collection of the rates. Hereditaments are individually assessed by local valuation officers, and the rateable value of a hereditament is ordinarily determined on a conventional basis. This is not, however, so in all cases. In the case of the electricity generating industry and some (but by no means all) other utilities the conventional basis of valuation has been disapplied and special schemes of valuation by statutory formula have been substituted.

**[78]** Sections 42–44 are the key provisions. Section 42 governs the contents of local lists. A local rating list must show every relevant non-domestic hereditament which is situated in the authority's area and which is not a hereditament which must be shown for the day in a central non-domestic rating list. It is this last requirement which prevents a hereditament from being shown for the same day in both a local and a central list. The local list must also show the rateable value of the hereditament for each day on which it is shown in the list.

**[79]** Sections 43–44 are concerned with liability to local list rates. This is based on rateable occupation for a chargeable day. A ratepayer is subject to local non-domestic rates in respect of a chargeable financial year if on any day in the year (a) he is in occupation of all or part of the hereditament and (b) the hereditament is shown for the day in a local list (see s 43(1)). The chargeable amount for a chargeable day is ascertained by multiplying the rateable value shown for the day by the non-domestic multiplier for the financial year and dividing the product by the number of days in the financial year (see ss 43(2)–(4) and 44).

*Central list rating*

[80] Central list rating was designed to accommodate those public utilities which were to continue to be dealt with on a global basis and rated undertaking by undertaking rather than locally and hereditament by hereditament, though not necessarily by use of a formula. As one might expect, therefore, the statutory provisions relating to central lists are closely modelled on those for local lists with only such variations as are necessary to reflect the aggregate and undifferentiated nature of the hereditaments shown in the list.

[81] Central non-domestic rating lists are maintained by the central valuation officer. Sections 53–55 are the key provisions. Section 53(1) is the enabling section. It explains the statutory purpose and gives the Secretary of State power to designate the undertakings and hereditaments to be shown in a central list. It provides:

> 'With a view to securing the central rating en bloc of certain hereditaments, the Secretary of State may by regulations designate a person and prescribe in relation to him one or more descriptions of relevant non-domestic hereditament.'

[82] Section 53 governs the contents of central lists. It provides that, where the regulations so require (as they do), a central non-domestic rating list must show, for each day in each chargeable year for which it is in force, the name of the designated person and, against it, each hereditament (wherever situated) which on the day concerned (a) is occupied or (if unoccupied) owned by him and (b) falls within any description prescribed in relation to him. It must also show for each such day against the name of the designated person the rateable value (as a whole) of the hereditaments so shown, i e the hereditaments occupied, or if not occupied, owned by the designated person on that day.

[83] This is amplified by s 67(9) which provides that a hereditament is to be treated as shown in a central list for a day if on that day it falls within a class of hereditament shown for that day in the list; and by s 67(9A) a class may be expressed by reference to whether hereditaments are occupied or owned by a designated person and fall within any description prescribed in relation to him.

[84] These provisions make it unnecessary for every hereditament occupied or owned by a designated person to be identified individually and entered separately in the central list. In PowerGen's case the central list contained against its name the description: 'The electricity supply hereditaments as described in Part 2 of the Schedule to the Central Rating Lists Regulations 1994.' The description referred to (see the Schedule to the Central Rating List Regulations 1994, SI 1994/3121, Pt 2, para I) is:

> 'Hereditaments (other than excepted hereditaments) wholly or mainly used for the purposes of the generation of electrical power, or for ancillary purposes.'

[85] This is a generic description of a fluctuating body of hereditaments. To come within the description on any particular day a hereditament must on that day (i) be occupied or (if unoccupied) owned by the designated person and (ii) be wholly or mainly used for the generation of electrical power or for ancillary purposes. On the disposal of the two power stations to Edison they failed to meet the first condition and automatically ceased to come within the description. It

followed that they ceased to be treated as shown in the central list and qualified for inclusion in local lists instead.

[86] Section 54 deals with liability to central list rates. A ratepayer is subject to central non-domestic rates in respect of a chargeable financial year if for any day in the year his name is shown in a central non-domestic rating list in force for the year. There is naturally no requirement that he should be in occupation of the hereditaments shown in the list, because the hereditaments are already defined by reference to his occupation or ownership. The chargeable amount for a chargeable day is ascertained in a similar manner to that required by ss 44–45 in relation to hereditaments in the local lists (see s 54(4)).

FORMULA RATING: THE CONSULTATION PAPER

[87] As I have already mentioned, most statutory undertakers were subject to formula rating in 1988. The 1987 consultation paper *Paying for Local Government: Non-domestic Rates* (the consultation paper) which preceded the 1988 Act stated that the existing formulae would require extensive recasting, and that the government would be reviewing them, in consultation with the industries concerned, with the intention of bringing them up to date at the same time as the general non-domestic revaluation in 1990. The review could not be completed in time to be included in the main legislation, and accordingly the government had it in mind to replace the existing statutory provisions relating to formula rating with a simple enabling power. The consultation paper stated that there was no intention of substantially extending the scope of formula rating, and that indeed in some cases it might be possible to revert to conventional methods of valuation. In the meantime it was proposed that the rateable value of hereditaments subject to formula rating should be determined as a specified sum or be calculated in a specified manner and for the value to be adjusted for changes in occupation.

[88] Eventually, it seems, it was hoped that formula rating could be phased out altogether; though in the event this was not achieved for the electricity generating industry until the next quinquennial revaluation in 2000. This objective could be the more easily achieved the more closely assessments produced by formula rating approximated to those which would be produced by conventional methods of valuation. Accordingly the consultation paper stated (para 7.5) that the object would be—

> 'to replicate, *in very broad terms*, the rate burden a hereditament or industry might have borne had it been capable of being conventionally rated' (my emphasis).

(The reference to 'hereditament' was a reference to local rating and the reference to 'industry' to central rating.) It was envisaged that different provision would be made for determining rateable values for different industries, and that the Secretary of State would consult representatives of each industry before varying the existing formula or applying formula rating for the first time or ceasing to apply it.

VALUATION UNDER THE 1988 ACT

[89] As foreshadowed by the consultation paper, the 1988 Act takes the form of an enabling Act with power for the Secretary of State to make provision by statutory instrument for particular classes of hereditaments to be rated by formula. Whether because it was recognised that formula rating was a departure

from the norm and was not appropriate for all public utilities, or because it was intended to phase it out eventually, the 1988 Act makes general provision for hereditaments, whether in local or central lists, to be valued by conventional methods, while giving the Secretary of State power to disapply those methods in particular cases and substitute formula rating in such form as he may prescribe.

**[90]** Section 56(1) of the 1988 Act gives effect to Sch 6, which contains detailed rules for determining the rateable value of non-domestic hereditaments, whether shown in local or in central lists. Paragraph 2(1) of Sch 6 sets out the conventional method of valuation. So far as material it provides:

> 'The rateable value of a non-domestic hereditament shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command that rent.'

**[91]** Paragraph 3 of Sch 6, however, gives the Secretary of State power to disapply this paragraph and substitute valuation by such method as he may prescribe. Subparagraph (1) of para 3 applies to local lists and sub-para (2) to central lists. The paragraph provides:

> '(1) The Secretary of State may by order provide that in the case of a non-domestic hereditament of such class as may be prescribed—(a) paragraphs 2 to 2B above shall not apply, and (b) its rateable value shall be such as is determined in accordance with prescribed rules.
>
> (2) The Secretary of State may by order provide that in the case of non-domestic hereditaments to be shown in a central non-domestic rating list by virtue of regulations under section 53(2) above—(a) paragraphs 2 to 2B above shall not apply, and (b) their rateable value shall be such as is specified in the order or determined in accordance with prescribed rules.'

In each case the order required an affirmative resolution of each House of Parliament (see s 143(8)).

**[92]** By the 1994 order the Secretary of State exercised these powers in relation to hereditaments used or available for use for the purpose of generating electricity. The order was made on 20 December 1994 following extensive consultations with the industry and came into force on the following day. Part II of the 1994 order applies to hereditaments shown on local lists and Pt III to hereditaments treated as shown on central lists. In relation to a hereditament shown on a local list art 6(1) disapplies paras 2–2B of Sch 6 and stipulates that its rateable value in any year beginning on or after 1 April 1995 shall be £11,620 per megawatt of its DNC (or, where the primary source of energy is wind or tidal power, half that figure). This formed the basis on which the rateable value of each of the two power stations acquired by Edison was determined when it was entered in the relevant local list with effect from 19 July 1999.

**[93]** In relation to each class of hereditaments shown on a central list art 8(1) of the 1994 order similarly disapplies paras 2–2B of Sch 6. For each designated person the rateable value of its centrally listed hereditaments as a whole is specified as a single figure. In the case of PowerGen the figure for its hereditaments in England as at 1 April 1995 is stated to be £178·8823m (Pt I, para A of the Schedule to the 1994 order).

[94] The basis of this figure is not explained in the 1994 order but is agreed by the parties to have been as follows. It represented the net book value of PowerGen's rateable assets as shown in its current cost accounts. Allowance was made for particular disabilities of the hereditaments to leave the effective capital value of the assets, and this was then converted into an annual rateable value by the application of a 6% decapitalisation rate. This corresponds to the conventional 'contractor's basis' of valuation. The resulting figure embraced all non-excepted property in England within the specified description. Items such as offices and other property not on operational land were excepted from the specified description. But the figure included both productive and non-productive property, the latter being property which did not contribute directly to PowerGen's total DNC. An example of non-productive property canvassed in argument would be a car park for the use of staff employed at a power station; but many other examples could be given.

[95] The figure was calculated in December 1994 and was adjusted to take account of changes between then and 1 April 1995 when it took effect, but nothing turns on this in the present appeal.

[96] For subsequent years the figure was adjusted annually by means of a specified 'recalculation factor' to reflect changes in the total DNC of generating plant within PowerGen's prescribed class of hereditaments, taken at 31 March in the immediately preceding year, compared with 31 March 1995. In PowerGen's case art 9(1) of the 1994 order specifies the figure of £11,620 as the recalculation factor.

[97] The basis of this figure is also not explained in the 1994 order, but the evidence shows that it was calculated by adding together the rateable values of the hereditaments occupied by PowerGen and National Power (the other former publicly owned non-nuclear electricity generator in the central list) and dividing the total by their combined DNC in megawatts at the same date. The resulting figure was taken to represent the average value to a designated person of the occupation of its power stations in terms of pounds per megawatt of generating capacity. It was applied to the DNC of each of the independent generators to arrive at the rateable value of their hereditaments.

[98] The basic scheme of Pt III of the 1994 order is common to all centrally listed hereditaments in relation to which the Secretary of State exercised his powers under para 3(2) of Sch 6 to the 1988 Act. These included gas and water undertakings and the railways. In each case the ordinary basis of determining rateable values is expressly disapplied and instead a single global or cumulo figure is prescribed as the rateable value of the relevant class of hereditaments for the year beginning on 1 April 1995. For each subsequent year the figure is subject to annual adjustment by means of a specified recalculation factor to reflect changes in the proxy selected for the utility in question. As envisaged in the consultation paper, some utilities were centrally rated but were conventionally valued under paras 2–2B of Sch 6. These included telecommunications, canals and long-distance pipelines.

THE CONSEQUENCES OF THE SALE TO EDISON

[99] On the acquisition of the two power stations by Edison they ceased to come within the generic description of the hereditaments treated as shown against PowerGen's name in the central list and qualified instead for inclusion in the relevant local lists. PowerGen ceased to be subject to central rates in respect

of them and Edison became liable to local rates in its place. But since PowerGen's liability was determined by its total DNC at the beginning of each rating year, the reduction in its DNC was not reflected in the amount of its liability to central rates until the beginning of the following year.

**[100]** Although the power stations transferred from central to local listing, they did not cease to be subject to formula rating. Their rateable value was now determined under Pt II of the 1994 order instead of Pt III, but in all essential respects it was determined by the same formula as before. It continued to be based on DNC, so that the acquisition or disposal by Edison of non-productive property would not affect its rateable value while the current lists remained in force. Moreover the conversion (or 'recalculation') factor of £11,620 per megawatt was unaffected. Given the way this figure was calculated the rateable value of the two power stations continued to reflect an element of value derived from the rateable value of non-productive property formerly occupied by PowerGen (or National Power for that matter) and not included in the sale to Edison. Each of these features represents a marked departure from conventional rating principles, but neither is challenged by Edison.

**[101]** The transfer of the power stations from central to local listing had two consequences. First, each of them was now rated individually as a separate hereditament and not as an unidentified and undifferentiated part of a larger whole. Secondly, changes in its DNC would now be taken into account with immediate effect and not merely with effect from the beginning of the following rating year. The two features are interrelated; for annual adjustment of the total is (and has always been) a feature of global or cumulo rating. It is not a necessary concomitant of formula rating, as is evidenced by the treatment of the power stations after they transferred to local lists.

IS THE 1994 ORDER AUTHORISED BY THE 1988 ACT?

**[102]** It is convenient to deal with this question in two stages, first by disregarding any element of double taxation and considering the question as a pure matter of construction of the language of the 1988 Act. The question is whether, on its true construction, para 3(2) of Sch 6 to the 1988 Act authorises so radical a departure from the conventional principles of rating as that which Pt III of the 1994 order established.

**[103]** I would unhesitatingly answer this question in the affirmative. Indeed, but for the opinion of my noble and learned friend Lord Bingham of Cornhill, which I have had the advantage of reading in draft, I would have regarded the contrary as unarguable. Paragraph 3(2) of Sch 6 to the 1988 Act gives the Secretary of State express power to disapply the conventional method of valuation and substitute a different, and it follows an unconventional, one. It expressly authorises him to specify the rateable value of PowerGen's centrally rated hereditaments as a single global sum, and that is what he did for the 1995–96 rating year. There are no restrictions on the methods which he may employ in arriving at the specified figure, save no doubt that they must not be unreasonable or irrational; and Edison does not challenge them. The 1988 Act also authorises the Secretary of State to prescribe rules for determining the rateable value of such hereditaments, and that is what he did for each of the following years. There are no restrictions on the nature of the rules which he may prescribe, and save in one respect Edison does not challenge them either. It confines its challenge to the

frequency with which the global figure is to be adjusted to reflect changes in PowerGen's total DNC. a

[**104**] This makes it necessary to examine the reason why the Secretary of State chose to prescribe rules which require the global figure shown in the central lists to be adjusted annually while leaving changes to the rateable value of hereditaments shown on local lists to be made on a daily basis if necessary. In approaching this question it should be borne in mind that annual adjustment was b a feature of the cumulo system under which public utilities had been rated ever since 1948 and continued to be rated under provisions contained in the General Rating Act 1967. There had never been a mechanism for altering the global or cumulo rateable value of their hereditaments during the course of a rating year. This is some indication, to say the least, that it had a rational basis and was adopted with the approval of Parliament. c

[**105**] In my opinion its rationale is obvious. When an operational unit such as a power station is rated as an individual hereditament and by reference to a proxy such as its generating capacity, effect must be given to changes in its capacity as soon as they occur if its rateable value is not to become seriously distorted. But when a large number of such hereditaments are taken together d and rated as a single whole, changes in the capacity of individual units (in both directions) are likely to be both far more frequent and much less significant. There is not the same need to take individual account of every such change as soon as it occurs; and changes in total capacity can reasonably be given effect less frequently.

[**106**] In the case of some utilities more frequent adjustments would be quite e impractical. British Gas plc, for example, owned or occupied many thousands of miles of gas supply pipeline which were embraced in the specified global valuation figure at the date of the relevant statutory instrument. There will have been a great many variations in the extent of its operational holdings during the course of a rating year. The specification of a global figure avoids the need for f every such variation to be individually assessed for its significance as and when it occurs, a process which would be required under conventional rating methods. But it is inherent in a system of en bloc or cumulo rating that the amount of a ratepayer's liability will not necessarily have to change from day to day in order to reflect every change in the individual hereditaments which it occupies.

[**107**] While abandonment of the system of annual adjustment which had g previously obtained would not have been completely impractical in the case of PowerGen, it would have meant a large number of adjustments (in each direction) being made each year and would have been productive of much administrative inconvenience without any significant countervailing advantage in accuracy. The 1994 order followed extensive consultations with the industry h in which the principle of annual recalculation of rateable values was specifically drawn to its attention and accepted by an industry working party. Moreover it was manifest on the face of the 1994 order when it was laid before Parliament and affirmed by resolution of each House.

[**108**] These considerations would not, of course, prevail if the terms of the j 1988 Act did not permit annual adjustment. Edison places much reliance on the fact that s 54(4) of the 1988 Act requires the chargeable amount of hereditaments treated as shown in a central list to be ascertained for each chargeable day. This is necessary in the case of local list rating, which is based on rateable occupation for the day. But it serves no useful purpose under the form of central rating

which the Secretary of State prescribed by Pt III of the 1994 order. This, Edison says, shows that in so far as it does not make provision for daily revision the 1994 order is ultra vires.

**[109]** But this consequence simply does not follow. The presence of s 54(4) is sufficiently explained by the fact that, as foreshadowed in the consultation paper, the Secretary of State is authorised to make different schemes for different industries and is not required to disapply conventional rating for every industry subject to central list rating. Provision needed to be made for the rateable value of property entered on a central list to be determined in a conventional way and by reference to rateable occupation for the day. On any view s 54(4) cannot be said to be otiose. Edison might have had a point if the 1994 order made it impossible to do the calculation; but it merely made it unnecessary. The calculation can still be done; it merely produces the same result despite changes in the composition of the hereditaments which are treated as shown in the list.

**[110]** Edison also relies on s 67(9A) of the 1988 Act, which it says indicates that a designated person is not to remain liable for rates assessed by reference to the value of hereditaments which he does not own or occupy. But s 67(9) and (9A) are concerned with the *contents* of central lists. They indicate that the designated person is not to remain liable for rates in respect of hereditaments which he does not own or occupy. They say nothing about the method by which the global rateable value of the hereditaments which he does occupy is to be determined.

**[111]** In my opinion the language of the enabling provision of the 1988 Act is sufficiently wide to entitle the Secretary of State to prescribe any method of valuation however far it departs from conventional principles, provided only that it is not unreasonable or irrational. There is certainly nothing in the 1988 Act to indicate that he must depart from long-established practice and require the global or cumulo figure in a central list to be adjusted more frequently than once a year.

**[112]** I must now turn to the second stage of the inquiry and consider whether I should modify my opinion because of the element of double taxation to which Pt III of the 1994 order is said to give rise.

IS THERE AN ELEMENT OF DOUBLE TAXATION?

**[113]** Carnwath J held ([2001] RA 1) that there clearly was an element of double assessment. From 19 July 1999 and for the remainder of the rating year the Secretary of State received payments of rates based on the DNC of the two power stations from both PowerGen and Edison. Simon Brown LJ observed ([2001] EWCA Civ 1096 at [45], [2001] RA 229 at [45]) that the situation was not that PowerGen was continuing to pay central rates on power stations no longer in its occupation. Once they were disposed of they ceased to be treated as shown in the central list. It was rather that PowerGen was not entitled to a revaluation of its remaining hereditaments until the beginning of the following year. May LJ, who agreed with him, took the view (at [67]) that this did not amount to 'straightforward double taxation'. Dyson LJ considered that it amounted to double assessment in substance if not in form. In an impressive dissenting judgment he said (at [71]):

> 'As a matter of form, it may be said that after the date of transfer Powergen was no longer liable to pay rates in respect of the power stations, because they had ceased to be treated as shown on the central list. This is because s 53(3) provides that the central list must show the rateable value of the hereditaments that are shown on the list. But in reality, the position was

otherwise. After the transfer, the rateable value of the remaining hereditaments remained unchanged; it continued to reflect the previous value ascribed to the two power stations, and Powergen continued to be liable (on a daily basis) for rates as before the transfer. The method of calculation and the amount payable were unaffected by the transfer. In reality, therefore, PowerGen continued to be liable to pay rates in respect of the two power stations notwithstanding the transfer in respect of a period during which Edison was also liable to pay rates calculated in more or less the same way in respect of the same two power stations.'

**[114]** My Lords, I have no doubt, and the Secretary of State concedes, that Dyson LJ's analysis of the effect of the legislation is correct, and that the question has to be addressed as a matter of substance and not as a matter of form. I also have no doubt that it is generally regarded as oppressive for the same person to be taxed twice over in respect of the same matter (see *IRC v Clifforia Investments Ltd* [1963] 1 All ER 159, [1963] 1 WLR 396; *IRC v FS Securities Ltd* [1964] 2 All ER 691 at 695, [1965] AC 631 at 644). The present, however, is not such a case.

**[115]** There is not, in my opinion, necessarily the same objection to double recovery where two different persons are taxed in respect of the same matter. In *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530 at 542, [1984] AC 474 at 525 Lord Brightman observed that there was an element of double taxation whenever a shareholder sells at a profit his shares in a company that has itself realised a capital asset at a profit, but that he did not see any undesirable element of double taxation in such cases.

**[116]** This shows that the presumption against double taxation is not a strong presumption which gives effect to a high constitutional norm, like the presumptions against the abrogation of the privilege against self-incrimination or legal professional privilege. It is rather a species of a wider genus, viz the presumption that Parliament intends to act reasonably (see *IRC v Hinchy* [1960] 1 All ER 505 at 512, [1960] AC 748 at 767 per Lord Reid). The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.

**[117]** But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it (see (in a contractual context) *L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39 at 45, [1974] AC 235 at 251 per Lord Reid). I do not, therefore, find it profitable to discuss whether the effect of the 1994 order amounts to 'double taxation' or 'double assessment' (whether straightforward or not) or the rather less objectionable 'double recovery'. I would prefer to go straight to the real question: whether the scheme established by the 1994 order is so oppressive, objectionable or unfair that it could only be authorised by Parliament by express words or necessary implication.

**[118]** My Lords, as I said at the outset, Edison is not the victim of double taxation. It has been chargeable to one set of rates and one set only, namely local rates; and these were levied on Edison in an appropriate amount and for an appropriate period. It has never been subject to central rates, and was not charged to the central rates which are in issue in the present case. It undertook a contractual obligation to pay an apportioned part of PowerGen's liability to

central rates for the 1999–2000 rating year, but this was a voluntary assumption of liability on its part as part of a larger commercial transaction. There is no reason to suppose that it paid more in total than it was willing to pay, or than PowerGen was content to receive, as the price of the power stations.

**[119]** If anyone was treated unfairly it was PowerGen. It was liable to central rates in respect of an element of value, namely the DNC of the two power stations, which it no longer possessed. Yet it does not complain. It has explained its consent to the 1994 order by saying that it accepted the Secretary of State's view that in the case of the central list the administrative burden in making changes to rateable values during the course of the rating year outweighed any potential disadvantage to the ratepayer in not doing so. For the ratepayer there were advantages as well as disadvantages in annual adjustment. Although plant taken out of commission or disposed of during the year was not reflected in a change in rateable value until the beginning of the following year, neither was the commissioning of new plant. 'Swings and roundabouts' were inherent in the scheme; and it seems that there were more 'swings' than 'roundabouts', since PowerGen was able to work the system to its own advantage, bringing forward the commissioning of new plant to the beginning of the rating year and delaying the decommissioning of existing plant until nearer the end.

**[120]** Dyson LJ found ([2001] RA 229 at [79]) any analogy between disposal and decommissioning of plant to be unconvincing. On a disposal, he observed, a power station ceases to be occupied by one ratepayer and is transferred into the occupation of another. In the case of decommissioning, the position is different. Ownership remains vested in the first ratepayer, and there is no double assessment to rates.

**[121]** This is true, of course; but I think that it makes the case for the Secretary of State, not against him. It shows that any potential unfairness to the ratepayer has nothing to do with double assessment. It arises on decommissioning, when the ratepayer ceases to enjoy the element of value by reference to which his liability is calculated. It does not arise on subsequent disposal when for the first time another ratepayer becomes liable to rates in respect of the same element of value. In itself this has no effect on the first ratepayer's liability.

**[122]** Both parties have placed reliance on the decision of the Court of Appeal in *Milford Haven Conservancy Board v IRC* [1976] 3 All ER 263, [1976] 1 WLR 817. The case bears a strong resemblance to the present. It concerned the validity of a statutory instrument which prescribed a system of formula rating of the hereditaments of a statutory dock or harbour board. The terms of the enabling Act, which were very wide, included power to repeal or amend enactments relating to valuation. The relevant statutory instrument based the valuation on the board's receipts; but these were not limited to receipts of the hereditaments in question and this, the board said, was not a method of valuing the hereditaments at all. Moreover, the receipts in question included the rents from a cottage let to a tenant who was himself in rateable occupation. This was a straightforward case of double recovery.

**[123]** The board claimed that the statutory instrument was ultra vires. It said that it was contrary to fundamental principles of rating and, under the guise of prescribing a method of valuation, imposed a form of tax which Parliament cannot have intended.

**[124]** Bridge J dismissed the board's claim, and his judgment was unanimously upheld by the Court of Appeal. The court held that the language of the enabling

Act was sufficiently wide to entitle the Secretary of State to prescribe any method of valuation, however far it departed from established principles, and notwithstanding that it appeared to countenance double taxation. Scarman LJ was troubled by the question of double taxation. He said that it appeared wrong that rates should be paid twice, once by the tenant and once by the landlord. But this did not avail the board because the statutory instrument was concerned only with the method of valuation and not with the identity of the hereditament.

**[125]** My Lords, that is equally true in the present case. But whether that decision was right or wrong, I am with respect not impressed by the reasoning of the Court of Appeal. If the question of double taxation is to be approached as a matter of substance and not form, as I consider that it is, then the distinction is without a difference. What matters is the result, not the means by which it is achieved. I agree with Dyson LJ in the present case that there was an element of double recovery in that the Secretary of State received payments by reference to the same element of value during the same period from both PowerGen and Edison. But for the reasons I have given, I do not consider that this was unfair or unreasonable. It is not just a question of swings and roundabouts, though this goes a long way to alleviate any unfairness. It is rather that the element of double recovery arose as a result of the provision for annual adjustment, which was an appropriate and long-established feature common to the various global or cumulo systems under which public utilities, including the electricity generating industry, were rated for many years before 1988. It cannot possibly be said that it was beyond the contemplation of Parliament that it would be retained for central non-domestic rating where the Secretary of State, after consultation with the relevant industry, might think it appropriate.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

**[126]** Both Carnwath J and the Court of Appeal considered that the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) do not add anything of value to the basis of Edison's challenge to the validity of the 1994 order. Subject to one point in its printed case which it has subsequently abandoned, Edison accepts that they were correct on this point.

CONCLUSION

**[127]** Accordingly, in agreement with my noble and learned friends Lord Hoffmann and Lord Scott of Foscote, I would dismiss the appeal.

**LORD SCOTT OF FOSCOTE.**

**[128]** My Lords, I have had the advantage of reading in advance the opinions prepared by my noble and learned friends Lord Hoffmann and Lord Millett and gratefully adopt their exposition of the circumstances and statutory context in which the issue in this case has arisen.

**[129]** Statutory provisions made pursuant to the Local Government Finance Act 1988 established a regime for the assessment, collection and payment of rates on most, but not all, non-domestic hereditaments that is relatively easy to comprehend. Liability was based on occupation of the hereditament in question. The occupier was liable to pay the rate for each day that he was in occupation. Each local authority was required to maintain a list of the non-domestic hereditaments in its area showing the rateable value of each hereditament. The

valuations were to be carried out by local valuation officers. The lists were called 'local non-domestic rating' lists.

[130] But the 1988 Act also contained provisions under which a different rating regime could be applied to some non-domestic hereditaments. Section 52 of the 1988 Act created a 'central' non-domestic rating list. The Secretary of State was given power to designate the persons to be placed on the central list and the non-domestic hereditaments in respect of which they were to be centrally rated (see s 53(1) of the 1988 Act and the Central Ratings Lists Regulations 1994, SI 1994/3121 (the Central Rating Regulations)). The purpose of this was (see s 53(1)) 'to [secure] the *central rating en bloc* of certain hereditaments' (my emphasis). The designation of the hereditaments to which central rating would apply did not have to specify them individually but could specify them as a class (see s 67(9)).

[131] The Secretary of State placed PowerGen on the central list and designated all its hereditaments 'wholly or mainly used for the purpose of the generation of electrical power, or for ancillary purposes' (see the Schedule to the Central Rating Regulations, Pt 2, para 1, as the non-domestic hereditaments in respect of which PowerGen would be centrally rated. Hereditaments of PowerGen falling within this class could not be and were not, therefore, included in any local non-domestic rating list.

[132] Paragraph 3 of Sch 6 to the 1988 Act gave express power to the Secretary of State by order to disapply the normal method of establishing the rateable value of a non-domestic hereditament (see para 2(1) of Sch 6) and instead to provide that, in the case of non-domestic hereditaments on local lists, '[their] rateable value shall be such as is determined in accordance with prescribed rules' (see sub-para 1(b)) and, in the case of non-domestic hereditaments on a central list, 'their rateable value shall be such as is specified in the order or determined in accordance with prescribed rules' (see sub-para 2(b)).

[133] By the Electricity Supply Industry (Rateable Values) Order 1994, SI 1994/3282 the Secretary of State made 'prescribed rules' in relation to hereditaments used for the purpose of generating electricity. Part II of the 1994 order applied to hereditaments on local lists. The rateable value of each of these hereditaments was to be assessed by reference to its declared net capacity (DNC) in respect of electricity generation. Part III applied to hereditaments on the central list. Here, a rateable value was not attributed to each hereditament. Instead the designated hereditaments of each designated person, eg PowerGen, were to be given an en bloc rateable value based upon their en bloc DNC. My noble and learned friend Lord Millett has described at [94], above how the en bloc rateable value was calculated. It suffices for present purposes to say that the original en bloc valuation was varied on 1 April of each rating year by a complex formula that reflected any changes in PowerGen's DNC during the past year. PowerGen's rating liability for the next rating year was then calculated accordingly. If, for example, a new power station were acquired by PowerGen and began generating electricity, its capacity would be built into PowerGen's DNC at the beginning of the next rating year and would affect the amount of PowerGen's rating liability for that year. But for the remainder of the rating year in which the new power station had been acquired, PowerGen's rating liability would not be affected. Conversely, if PowerGen were to sell or decommission a power station the consequence of this would have no impact on PowerGen's rating liability for the remainder of the rating

year in question. But the loss of capacity would be taken into the DNC calculation at the end of the rating year and thus affect the rating liability for the next year. In relation to ancillary premises, such as car parks, garages, facilities for employees etc, which fell within the designated class but did not themselves generate electricity, PowerGen's ownership, occupation, sale or purchase of them during a particular rating year would have no effect whatever on its rating liability for that year or thereafter.

**[134]** The rating scheme as applied to PowerGen and its central list designated hereditaments was fundamentally different from the ordinary scheme applied to ordinary non-domestic hereditaments, including those of electricity generating companies not on the central list. Under the latter scheme, rating liability was, and is, based on occupation. When occupation ceases, liability ceases. When occupation commences, liability commences. And the amount of the liability was dependent on the rateable value of each individual property of which the ratepayer was in occupation and in respect of which he was liable to pay rates. Under the former scheme, rating liability was not based on occupation of any particular property and the amount of the liability was based on the total rateable value of all the ratepayer's designated hereditaments calculated as at the beginning of the rating year. The payment of rates by PowerGen, calculated accordingly, would discharge its rates liability in respect of all its hereditaments falling within the designated class during the rating year in question, regardless of its occupation of them during that year.

**[135]** It is the contrast between the two schemes that has produced the complaint by the appellant, Edison, in the present case. Edison completed its purchase from PowerGen of the two power stations on 19 July 1999. It was entered in the local non-domestic rating list as liable for rates in respect of those hereditaments as from 19 July 1999. Edison does not challenge this liability. As from the same date, 19 July 1999, the power stations ceased to fall within the class of designated properties in respect of which PowerGen was liable to be centrally rated. But PowerGen's rating liability for the year 1999–2000 had been fixed as at 1 April 1999. PowerGen's ownership of the two power stations and their contribution to PowerGen's total DNC had, of course, contributed to the amount of that liability. The rating consequences of the contribution continued for the rest of the rating year notwithstanding that during the year PowerGen had divested itself of the two power stations.

**[136]** The continuing and unreduced rating liability of PowerGen after its sale of the power stations to Edison might be thought an insecure basis for a complaint by Edison. Edison's complaint is, however, attributable to PowerGen's success in obtaining, as a term of the contract of sale between itself and Edison, a provision under which Edison agreed to pay an apportionment of the rates payable by PowerGen in relation to the power stations in the rating year 1999–2000. The amount of PowerGen's rating liability for the year 1999–2000 attributable to the two power stations was a sum in excess of £13·5m. Edison has accepted its contractual liability to pay PowerGen this sum and has duly paid it. Edison protests, however, that in relation to the two power stations the central rating scheme produced by the Secretary of State in purported reliance on his statutory power under the 1988 Act has led to double recovery, from PowerGen on the one hand and from Edison on the other, in respect of the same properties (the power stations) and in respect of the same period (19 July 1999–31 March 2000). Edison contends that the statutory power under which the Secretary of State purported to

act ought not to be construed as permitting such a result. There is, it is contended, a presumption that Parliament does not intend double taxation or, in the context of rates, double recovery in respect of the same property or properties. General words in a statute, such as those in para 3 of Sch 6 to the 1988 Act, are not, it is submitted, sufficient to displace this presumption. And if the central rating scheme is ultra vires, as contended, then PowerGen was not liable to pay the £13·5m; Edison was not liable to pay that sum to PowerGen and is entitled to repayment. So the argument goes.

**[137]** My Lords, as an aid to construction of statutes, presumptions are from time to time invoked. This is particularly so where rights of citizens regarded as of fundamental importance appear to be encroached upon by a particular application of a statute. In such a case it is presumed that Parliament, if it intended the statute to encroach upon the important fundamental right, would have expressly said so. If Parliament has not expressly said so, and if the statute is capable of being given sensible effect without encroaching upon the fundamental right, a construction of the statutory language may be adopted that would leave unimpeded the right in question. As Lord Hoffmann put it in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131:

> 'Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'

**[138]** A very good recent example of this is the decision of the House in *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21, [2002] 3 All ER 1, [2002] 2 WLR 1299. The case concerned legal professional privilege. It raised the question whether the statutory power of the Revenue to require production of documents extended to documents covered by legal professional privilege. The statutory provision relied on by the Revenue was in general terms and apt to cover all and any relevant documents. But the right of citizens, or companies, to seek and receive legal advice in the knowledge that the communications between them and their lawyers cannot be the subject of compulsory disclosure is of such fundamental importance in a society governed by the rule of law as to require express statutory language or an unavoidable implication if it is to be overruled by statute. General words in a statute will not suffice. So the House held.

**[139]** There are no doubt other rights whose fundamental importance may justify similar reverence but I need not try and identify them for it is surely clear that the so-called presumption against double taxation or double recovery does not derive from a fundamental right of that character. There is no fundamental right not to be taxed, or not to be taxed in a particular way or at a particular time. The so-called presumption against double taxation is in reality no more, and no less, than the formulation in a taxation context of the broader interpretative presumption that Parliament does not intend that legislation should bring about results that are unreasonable or unfair or arbitrary.

**[140]** As Lord Reid said in *IRC v Hinchy* [1960] 1 All ER 505 at 512, [1960] AC 748 at 768:

'One is entitled and, indeed, bound to assume that Parliament intends to act reasonably and, therefore, to prefer a reasonable interpretation of a statutory provision if there is any choice.'

In *IRC v Clifforia Investments Ltd* [1963] 1 All ER 159 at 163, [1963] 1 WLR 396 at 402, where the Inland Revenue were proposing an interpretation of a taxing Act that would result in double taxation, Ungoed-Thomas J referred to the double taxation result as 'patently unjust'.

**[141]** In *Vestey v IRC (Nos 1 and 2)* [1979] 3 All ER 976 at 986, [1980] AC 1148 at 1174 Lord Wilberforce declined to accept a construction of a taxing Act that led to a result that was 'arbitrary, unjust, and in [his] opinion unconstitutional' and explained that 'it is a well accepted principle that if one interpretation of an Act of Parliament produces such a result, but another avoids it, the latter is to be preferred'. It was the unfairness of a tax regime that subjected a number of discretionary beneficiaries to the burden of paying tax on income that they might never receive that prompted those remarks. The statutory provision in question had been enacted in order to combat a particular type of tax avoidance scheme, but it was not the beneficiaries who were the tax avoiders. They had not participated in setting up the scheme. They were simply named as beneficiaries. The House did not accept that Parliament could have intended to impose on each of the discretionary beneficiaries a liability to pay tax on the income generated by the funds in the scheme. Such a result would have been, in Ungoed-Thomas J's words, 'patently unjust' and the House construed the taxing provision in question so as to avoid that result.

**[142]** By way of contrast, in *R v Dimsey (No 2)* [2001] UKHL 46, [2001] 4 All ER 786, [2002] 1 AC 509 it was the tax avoider himself who was liable to tax on income that he might never receive. The actual recipient of the income was the corporate tax avoidance vehicle that the tax avoider had used. For reasons that it is unnecessary to explain the tax avoider contended that his own liability to tax ought to lead to a construction of the relevant taxing statute that relieved the tax avoidance vehicle from liability to tax on the same income. The presumption that Parliament did not intend the same income to be taxed twice was invoked. The House declined to accept these submissions. For the tax avoider to be liable to tax did not seem in the least unjust and there was no practical likelihood of the Revenue, even if they had wanted to do so, being able to recover tax from the tax avoidance vehicle, an overseas company incorporated in a tax haven.

**[143]** These cases, my Lords, are some distance removed from the rating issue that is before the House on this appeal. But they are relevant to the approach that the House should adopt. It is said that the House should presume that Parliament did not intend the 1988 Act to bring about a result under which more than one ratepayer was liable to pay rates in respect of the same hereditament and for the same period. My Lords, I do not doubt that in general such a presumption would arise. If it were contended, for example, in relation to a house in joint ownership that each owner/occupier of the house was liable to pay the full amount of rates on the house whether or not some other joint owner had already paid, the courts would rightly look for express statutory words mandating such an unjust result before acceding to the contention. It would be the unfairness and the unreasonableness of the result contended for that would justify the assumption that Parliament did not intend that result and would justify the insistence on express words or unavoidable implication. It would not be the compressing of

the facts of the case into a box labelled 'no double taxation' or 'no double recovery' that would do so.

**[144]** The present case is not a case of double taxation at all. It might, arguably, be described as a case of double recovery. It might, therefore, be said to justify an initial assumption that the general statutory words in para 3 of Sch 6 to the 1988 Act were not intended by Parliament to allow the Secretary of State to produce that result. But, as Lord Oliver of Aylmerton observed in *Woolwich Equitable Building Society v IRC* [1991] 4 All ER 92 at 103–104, [1990] 1 WLR 1400 at 1412–1413, such a presumption is no more than a presumption. He said:

> 'But these are only presumptions. They are clearly rebuttable if sufficiently clear express words are used. But they can also be rebutted, as it seems to me, by circumstances surrounding the enactment of the particular legislation which lead to an inevitable inference that Parliament intended, in using the words that it did, that these presumptions or principles should not apply.'

**[145]** The circumstances surrounding the enactment of the 1988 Act include the history of the rating of non-domestic hereditaments, and the history of 'formula rating' in particular, set out in the opinions of Lord Hoffmann and Lord Millett. This history rebuts, in my opinion, any inference that Parliament could not have intended the Secretary of State to be able to prescribe an en bloc rating system with yearly changes based on changes in electricity generating capacity for designated electricity generators such as PowerGen. And I can see no room for any compelling inference that would debar the Secretary of State from prescribing a system under which for a period within a particular rating year he might, on the one hand, receive rates under the en bloc system in respect of a hereditament which for the same period was attracting for its occupier a rating liability under the local occupation-based system or, on the other hand, receive no rates under the en bloc system in respect of a hereditament which had become rateable under the central list and which, therefore, for the same period did not attract rates under the local system.

**[146]** The result produced by the system prescribed by the Secretary of State cannot, in my opinion, be described as unfair, unreasonable or arbitrary. Edison was liable under the 1988 Act for rates in respect of the two power stations for the period 19 July 1999–31 March 2000. Its liability was based on its occupation of the power stations for that period. PowerGen's rating liability for the year 1999–2000 derived in part from its ownership of the two power stations on 1 April 1999 and on their contribution to its DNC on that date.

**[147]** My Lords, this is not double taxation or double recovery in the sense in which those expressions are normally used. It is true that it was because the two power stations were owned and occupied by PowerGen at the commencement of the 1999–2000 rating year that PowerGen's rating liability for that year was in part attributable to the two stations. And it is true that the Secretary of State may, in consequence of their sale during that year and consequent entry on the local non-domestic rating list, be regarded as having made in a sense double recovery for the period 19 July 1999–31 March 2000. But this analysis does not take into account the distinctly different bases on which the respective liabilities of PowerGen and Edison arose.

**[148]** In any event, however, I do not regard the wielding of a double taxation or double recovery banner as apt to provide a sound answer to the appellant's

contentions on this appeal. The critical issue is whether the statutory power given to the Secretary of State by para 3 of Sch 6 to the 1988 Act, correctly construed, authorised him to prescribe the rating system for PowerGen and other electricity generating companies that has produced the result now challenged by Edison. The language of the paragraph is in my opinion, plainly wide enough to frank the system and unless the result can be shown to be unfair, unreasonable or arbitrary the challenge, based on the presumed intention of Parliament, must fail. *a* *b*

**[149]** Neither PowerGen nor, so far as your Lordships have been told, any other electricity generating company has complained of the unfairness of the central rating scheme. PowerGen, indeed, has intervened in these proceedings and expressly disavowed any such complaint. The burden on Edison has been caused not by the imposition on Edison of an unfair statutory rating liability but by Edison's agreement in a freely negotiated contract of sale to pay PowerGen an additional sum calculated by reference to PowerGen's rating liability derived from the two power stations. The liability of PowerGen that Edison agreed to pay did not arise from PowerGen's occupation of the power stations for the period, 19 July 1999–31 March 2000, during which Edison were in rateable occupation. It derived from a quite different base. I can find nothing unreasonable or unfair or arbitrary in the central list formula rating system prescribed by the Secretary of State. *c* *d*

**[150]** For these reasons and for those expressed by Lord Hoffmann and Lord Millett with which I am in full agreement, I would dismiss this appeal.

*Appeal dismissed.* *e*

Dilys Tausz Barrister.

# European Roma Rights Centre and others v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)

[2003] EWCA Civ 666

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, MANTELL AND LAWS LJJ

10–12 MARCH, 20 MAY 2003

*Immigration – Leave to enter – Refugee – Scheme enabling immigration rules to be operated extra-territorially – Pre-entry clearance system at Prague Airport – Claimants Czech Roma – Whether system contrary to international refugee convention – Whether system discriminating against Czech Roma – Race Relations Act 1976 – Convention Relating to the Status of Refugees 1951, art 33.*

The claimants, who were organisations devoted to the protection of the rights of Romani people in Europe and six Czech Roma who had been refused leave to enter, challenged the pre-entry clearance immigration control operated intermittently at Prague Airport from July 2001 pursuant to the Secretary of State for the Home Department's scheme, introduced in 1999, whereby immigration rules were operated extra-territorially rather than simply at UK ports of entry. On an application for judicial review they argued, inter alia, that the Scheme violated the United Kingdom's international obligations under the Geneva Convention relating to the Status of Refugees 1951 and under customary international law; as the United Kingdom was not permitted to take such active steps to prevent those seeking refuge from persecution from leaving their own state. Article 33[a] of the convention provided: 'No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The judge dismissed the application. The claimants appealed. In the course of argument the Court of Appeal itself raised the issue of whether the Roma were to be regarded as subject to unlawful racial discrimination contrary to the Race Relations Act 1976 in that they were less favourably treated on racial grounds than a relevant comparator when processing their applications for leave to enter for non-asylum purposes as they were regarded as more likely to lie about their intentions in visiting the United Kingdom and therefore were subjected to longer and more intensive questioning.

**Held** – (1) On its true construction art 33 of the convention did not give a right of access to any country to claim asylum. Moreover, the convention as a whole was concerned not with permitting access to asylum seekers but rather with the non return of those who had already left their own state. The convention could have, but chose not to concern itself with enabling people to escape from their own country by providing for a right to admission to another country to allow

a Article 33, so far as material, is set out at [22], below

them to do so. The Secretary of State was therefore under no obligation to facilitate the arrival of asylum seekers, indeed he was entitled to take steps to prevent their arrival (see [37], [89], and [93], below); *T v Secretary of State for the Home Dept* [1996] 2 All ER 865 and *R v Secretary of State for the Home Dept, ex p Hoverspeed* [1999] Eu LR 595 considered.

(2) (Laws LJ dissenting) Clearly it was unacceptable for someone to be treated less favourably because of his race whatever the motives underlying such treatment and whether or not it resulted from the discriminator making stereotyped assumptions. It was true that Roma were questioned more intensively and with a greater degree of scepticism than non-Roma, but that did not mean that such an examination had necessarily to be unlawful. Having regard to authority which held that each application had to be investigated individually, there could be no objection to the more rigorous questioning of some than others. The policy at Prague airport was manifestly not to refuse Roma as Roma; rather it was to refuse prospective asylum seekers, or those who could not satisfy the immigration office to the requisite standard that they would not claim asylum on arrival. It followed that the Roma applicants were not being treated less favourably than others, all that was being applied was a requirement or condition which applied equally to others, namely that they had to satisfy the immigration office they were not travelling to the United Kingdom with a view to claiming asylum. Accordingly the claimants' appeal failed (see [81], [84], [87], and [92], below); *Hurley v Mustoe* [1981] IRLR 208 and *James v Eastleigh BC* [1990] 2 All ER 607 considered.

Decision of Burton J [2002] All ER (D) 127 (Oct) affirmed.

**Notes**

For the powers and duties of the Secretary of State, immigration officers etc and for asylum, refugees, and consideration of asylum claims, see 4(2) *Halsbury's Laws* (4th edn) (2002 reissue), paras 140 and 238–240 respectively.

**Cases referred to in judgments**

*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, Aust HC.
*Bain v Bowles* [1991] IRLR 356, CA.
*Behluli v Secretary of State for the Home Dept* [1998] Imm AR 407, CA.
*Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, sub nom *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 AC 696, [1991] 2 WLR 588, HL.
*Cameroon v Nigeria* (1998) ICJ Rep 275, ICJ.
*Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161, CA.
*Equal Opportunities Commission v Director of Education* (22 June 2001, unreported), Hong Kong HC.
*Equal Opportunities Commission, Re (No 1)* [1998] NI 223.
*Glasgow City Council v Zafar* [1998] 2 All ER 953, [1997] 1 WLR 1659, HL.
*Golder v UK* (1975) 1 EHRR 524, [1975] ECHR 4451/70, ECt HR.
*Hurley v Mustoe* [1981] IRLR 208, EAT.
*International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA Civ 158, [2003] QB 728, [2002] 3 WLR 344.
*James v Eastleigh BC* [1990] 2 All ER 607, [1990] 2 AC 751, [1990] 3 WLR 55, HL; *rvsg* [1989] 2 All ER 914, [1990] 1 QB 61, [1989] 3 WLR 123, CA.
*King v Great Britain-China Centre* [1992] ICR 516, CA.
*Maclaine Watson & Co Ltd v Dept of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523, sub nom *Rayner (JH) (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418, [1989] 3 WLR 969, HL.

*Minister for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273, Aust HC.
*Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 175 ALR 585, Aust HC.
*Nagarajan v London Regional Transport* [1999] 4 All ER 65, [2000] 1 AC 501, [1999] 3 WLR 425, HL.
*Nguyen Tuan Cuong v Director of Immigration* [1997] 1 WLR 68, PC.
*R v Commission for Racial Equality, ex p Westminster City Council* [1985] ICR 827, CA.
*R v Secretary of State for the Home Dept, ex p Ahmed* [1998] INLR 570, CA.
*R v Secretary of State for the Home Dept, ex p Hoverspeed* [1999] Eu LR 595, DC.
*R v Secretary of State for the Home Dept, ex p Sivakumaran (UN High Comr for Refugees intervening)* [1988] 1 All ER 193, [1988] AC 958, [1988] 2 WLR 92, HL.
*R v Uxbridge Magistrates' Court, ex p Adimi, R v Secretary of State for the Home Dept, ex p Sorani, R v Crown Prosecution Service, ex p Sorani, R v Secretary of State for the Home Dept, ex p Kaziu* [1999] 4 All ER 520, [2001] QB 667, [2000] 3 WLR 434, DC.
*Saad v Secretary of State for the Home Dept, Diriye v Secretary of State for the Home Dept, Osorio v Secretary of State for the Home Dept* [2001] EWCA Civ 2008, [2001] All ER (D) 307 (Dec), CA.
*Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* (1993) 509 US 155, US SC.
*Skyrail Oceanic Ltd v Coleman* [1981] ICR 864, CA.
*T v Secretary of State for the Home Dept* [1996] 2 All ER 865, [1996] AC 742, [1996] 2 WLR 766, HL.
*West Midlands Passenger Executive v Singh* [1988] 2 All ER 873, [1988] 1 WLR 730, CA.

**Cases referred to in skeleton arguments**

*Aerial Incident of 10 August 1999 (Pakistan v India)* (2000) ICJ Rep 12, ICJ.
*Anguelova v Bulgaria* [2002] ECHR 38361/97, ECt HR.
*Anya v University of Oxford* [2001] EWCA Civ 405, [2001] ICR 847.
*Bankovic v Belgium* (2001) 11 BHRC 435, ECt HR.
*Barclays Bank v Kapur (No 2)* [1995] IRLR 87, CA.
*Border and Transborder Armed Actions (Nicaragua v Honduras)* (1988) ICJ Rep 105, ICJ.
*Certain Norwegian Loans (France v Norway)* (1957) ICJ Rep 9, ICJ.
*Chassagnou v France* (1999) 7 BHRC 151, ECt HR.
*Conka v Belgium* (2002) 11 BHRC 55, ECt HR.
*East African Asians v UK* (1973) 3 EHRR 76, ECt HR.
*Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (1973) ICJ Rep 49, ICJ.
*Freda v Italy* (1980) 21 DR 250, E Com HR.
*Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Rep 7, ICJ.
*Harakel v Secretary of State for the Home Dept* [2001] EWCA Civ 884, (2001) 98(28) LSG 44.
*Illich Sanchez Ramirez v France* [1996] 86 DR 155, E Com HR.
*Khan v Chief Constable of West Yorkshire Police* [2001] UKHL 48, [2001] 4 All ER 834, [2001] 1 WLR 1947.
*Ministry of Home Affairs v Fisher* [1980] AC 319, PC.
*Nuclear Tests Australia v France* case (1974) ICJ Rep 253, ICJ.
*Ocalan v Turkey* [2003] ECHR 46221/99, ECt HR.
*Prinz Hans-Adam II of Liechtenstein v Germany* [2001] ECHR 42527/98, ECt HR.
*R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21, [2002] 3 All ER 1, [2000] 2 AC 115, [2002] 2 WLR 1299.
*R (on the application of Sivakumar) v Secretary of State for the Home Dept* [2003] UKHL 14, [2003] 2 All ER 1097, [2003] 1 WLR 840.

*R v Bernard* (1858) 8 State Tr NS 887.
*R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850, [2001] QB 213, [2000] 2 WLR 622, CA.
*R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
*Reyes v R* [2002] UKPC 11, [2002] 2 AC 235, [2002] 2 WLR 1034.
*Rights of Nationals of the United States of America in Morocco* (1952) ICJ Rep 176, ICJ.
*Sepet v Secretary of State for the Home Dept* [2003] UKHL 15, [2003] 3 All ER 304, [2003] 1 WLR 856.
*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] 2 All ER 26.
*Sidhu v Aerospace Composite Technology Ltd* [2001] ICR 167, CA.
*Smith v Safeway plc* [1996] ICR 868, CA.
*Z v UK* (2001) 10 BHRC 384, ECt HR.

**Appeal**

The claimants, the European Roma Rights Centre and six Czech Roma appealed with permission of Burton J from his decision on 8 October 2002 ([2002] EWHC 1989, [2002] All ER (D) 127 (Oct)), dismissing the claimants' application for judicial review to challenge the decision of the Secretary of State for the Home Department to introduce pre-entry clearance immigration control at Prague Airport to operate from 18 July 2001. The United Nations High Commissioner for Refugees intervened in the proceedings. The facts are set out in the judgment of Simon Brown LJ.

*Lord Lester of Herne Hill QC* and *Dinah Rose* (instructed by *Liberty*) for the claimants.
*John Howell QC, Michael Fordham* and *Claire Weir* (instructed by the *Treasury Solicitor*) for the respondents.
*Guy Goodwin-Gill* (instructed by *SJ Berwin*) for the intervener.

*Cur adv vult*

20 May 2003. The following judgments were delivered.

**SIMON BROWN LJ.**

[1] The increasing flow of asylum seekers to the United Kingdom over recent years is well known. It is well known too that it occasions great public concern. For the most part it is sought to control the problem (called in these proceedings 'asylum overload') by imposing visa regimes upon those states from which most asylum seekers come. Linked to these visa regimes is carriers' liability without which, as the Divisional Court pointed out in *R v Secretary of State for the Home Dept, ex p Hoverspeed* [1999] Eu LR 595, the requirement for prior entry clearance would have little effect. The object of these controls, of course, so far as asylum seekers are concerned, is to prevent them reaching these shores. 'Their very arrival here otherwise entitles them to apply for asylum and thus defeats the visa regime': see my judgment in *Ex p Hoverspeed* (at 599).

[2] There are difficulties, however, of a political nature in imposing visa regimes on certain friendly states and so Parliament in 1999 authorised the Home Secretary to introduce in addition a scheme enabling the immigration rules to be operated extra-territorially rather than simply at United Kingdom ports of entry. Intending asylum seekers would in this way be refused leave to enter the United

Kingdom by immigration officers operating abroad and so be unable to travel to the United Kingdom to claim asylum here.

[3] Such a scheme was duly introduced and under it, by agreement with the Czech Republic, pre-entry clearance immigration control has been operated at Prague Airport since 18 July 2001. It is aimed principally at stemming the flow of asylum seekers from the Czech Republic, the vast majority of these being of Romani ethnic origin (Roma), and in this it has plainly had some considerable success; whereas in the three weeks before the operation began there were over 200 asylum claims (including dependants) at United Kingdom ports from the Czech Republic, only some 20 such claims were made in the first three weeks following its introduction, over 110 intending travellers from Prague being refused leave to enter the United Kingdom during that period. The pre-clearance procedure at Prague has been operated irregularly but sufficiently frequently and unpredictably that intending asylum seekers continue to be deterred.

[4] These proceedings challenge the Prague operation on two central grounds. First it is said to violate the United Kingdom's international obligations both under the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) (as amended by the 1967 Protocol (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) (the 1951 convention) and under customary international law: the United Kingdom is not permitted to take such active steps to prevent those seeking refuge from persecution from leaving their own state. Secondly, and independently, it is said to contravene s 19B of the Race Relations Act 1976 and to constitute direct racial discrimination against those Czech Roma who are seeking to come to the United Kingdom not as asylum seekers but for some other purpose provided for under the immigration rules. A third and subsidiary ground of challenge is that the claiming of asylum itself is said to be a purpose covered by the rules so that the immigration officers were therefore breaching the rules in refusing leave to enter to Roma coming for that purpose. A fourth ground of challenge was advanced below, namely that the Secretary of State had fettered his discretion in refusing in the case of the individual appellants to consider exercising his extra-statutory discretion to grant them entry clearance to come to the United Kingdom as refugees.

[5] In a reserved judgment given on 8 October 2002 ([2002] EWHC 1989 (Admin), [2002] All ER (D) 127 (Oct), [2003] ACD 53), following a three-day hearing in July 2002, Burton J rejected all four grounds of challenge and so dismissed the application. He gave permission to appeal, however, with regard to the convention ground of challenge and also the alleged breach of the immigration rules. This court (Ward and Laws LJJ) on 24 January 2003 ([2003] EWCA Civ 60, [2003] ACD 47) gave permission to appeal with regard to the race discrimination challenge. Permission to appeal on the fourth ground of challenge was refused; there was nothing in it: the appellants remain able to invite the Secretary of State's exercise of his extra-statutory discretion.

[6] The appellants are respectively the European Roma Rights Centre (ERRC), a non-governmental organisation based in Budapest devoted to the protection of the rights of Romani people in Europe (some nine million in all), and six Czech Roma who were refused leave to enter the United Kingdom by immigration officers at Prague Airport. Five of the six were in fact intending to claim asylum in the United Kingdom, three having candidly stated that intention, the other two having initially sought to conceal it, falsely stating that they were intending only a short visit to the United Kingdom. The sixth (HM) asserts that she was

genuinely intending only a short visit to her granddaughter and grandson-in-law although the immigration officer who interviewed her was not satisfied of this. *a*

**[7]** Before turning to the individual grounds of challenge I must first outline the main parts of the domestic legislation governing the Prague operation.

**[8]** Apart from EEA nationals and British citizens, a person may not enter the United Kingdom 'unless given leave to do so in accordance with the provisions of, or made under, [the Immigration Act 1971]' (see s 3(1)(a) of the 1971 Act). The power to give or refuse leave to enter is generally exercised by immigration officers (see s 4(1)), the Secretary of State only being able to do so in prescribed circumstances (see s 3A(7)). Section 3(2) permits the Secretary of State to make rules as to the practice to be followed in the administration of the 1971 Act and immigration officers are required to act in accordance with these rules and such instructions as may be given to them by the Secretary of State which are not inconsistent with such rules (see para 1(3) of Sch 2 to the 1971 Act). *b c*

**[9]** The relevant immigration rules made under s 3(2) are contained in the Statement of Changes in Immigration Rules ((1994) HC 395) and set out at length the various grounds upon which entry clearance (advance leave to enter either by way of visa or entry certificate) or leave to enter (on arrival at the United Kingdom port) can be sought and obtained. Stringent conditions apply to each category of applicant and in each case the rules specify the matters of which the applicant must satisfy the immigration officer. Rule 320 provides that entry clearance or leave to enter 'is to be refused' if, amongst other things, 'entry is being sought for a purpose not covered by these Rules'. *d e*

**[10]** With regard to asylum the rules provide as follows:

> '327. Under these Rules an asylum applicant is a person who claims that it would be contrary to the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees [the Geneva Convention] for him to be removed from or required to leave the United Kingdom. All such cases are referred to in these Rules as asylum applications. *f*
>
> 328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the [Geneva Convention]. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules. *g*
>
> 329. Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate ... no action will be taken to require the departure of the asylum applicant or his dependants from the United Kingdom. *h*
>
> 330. If the Secretary of State decides to grant asylum and the person has not yet been given leave to enter, the Immigration Officer will grant limited leave to enter ...
>
> 334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that: (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and (ii) he is a refugee, as defined by the [Geneva Convention]; and (iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the [Geneva Convention], to a country in which his life or freedom would be threatened *j*

on account of his race, religion, nationality, political opinion or membership of a particular social group ...

336. An application which does not meet the criteria set out in paragraph 334 will be refused.'

[11] As those rules make plain, all claims for asylum, whether made at the point of entry or following the grant of leave to enter on some other basis, have to be referred to the Secretary of State. Many asylum seekers, of course, are subsequently found to have no proper claim but meanwhile will have remained in the United Kingdom, whether in detention or in the community, for months and often for years, and, according to published statistics, a substantial number of those eventually refused are never in fact removed. As Burton J observed below (at [10]), '[t]his is the administrative, financial and indeed social burden borne as a result of failed asylum seekers'. Asylum overload, however, refers not only to asylum seekers who fail in their claims, but also to those who succeed.

[12] Asylum overload has led both to an increase in visa control and also, as stated, to legislation to allow immigration officers to be stationed and to operate the rules abroad. Section 1 of the Immigration and Asylum Act 1999 introduced a new s 3A into the 1971 Act:

'(1) The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom.

(2) An order under subsection (1) may, in particular, provide for—(a) leave to be given or refused before the person concerned arrives in the United Kingdom ...'

[13] This was given effect to by art 7 of the Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161, whereby:

'(1) An immigration officer, whether or not in the United Kingdom, may give or refuse a person leave to enter the United Kingdom at any time before his departure for, or in the course of his journey to, the United Kingdom.

(2) In order to determine whether or not to give leave to enter under this article (and, if so, for what period and subject to what conditions), an immigration officer may seek such information, and the production of such documents or copy documents, as an immigration officer would be entitled to obtain in an examination under ... the Act ...'

[14] By HC 704 a new r 17A was introduced into the rules whereby:

'Where a person is outside the United Kingdom but wishes to travel to the United Kingdom an Immigration Officer may give or refuse him leave to enter ...'

[15] Following an agreement negotiated with the Czech government, this new power to operate the rules extra-territorially was implemented at Prague Airport on 18 July 2001. As Mr James Munro, assistant director of the United Kingdom Immigration Service and the person responsible for operating the pre-clearance scheme, has stated in these proceedings, the Czech Republic had produced an unusually large proportion of failed asylum seekers:

'Asylum applications received in the United Kingdom from nationals of the Czech Republic, excluding dependants, had reached some 515 per annum in the year 1998. By 2000 it had reached 1200 per annum. Of the 1800 asylum

decisions made in 2000 (which will have included applications made previously) there were ten decisions by the Secretary of State granting asylum. A further ten cases were granted exceptional leave to remain outside the asylum rules. The success rate of asylum appeals by Czech nationals was, at the beginning of 2001, only around 6%.'

[16] As already indicated, the vast majority of asylum applicants from the Czech Republic are Roma. The Home Office's own Country Assessment for August 2001 records:

'[T]here are approximately 300,000 members of the Roma ethnic group, i.e. about 3% of the country's population ... Roma may face discrimination from elements within Czech society in employment, education, housing and access to services ... Sporadic acts of violence by "skinheads" against members of the Roma minority have continued to occur ... [D]iscrimination and harassment experienced by Roma will, in most cases, not amount to persecution within the terms of the Convention. The threshold may however be passed in individual cases.'

[17] The ERRC executive director paints an altogether bleaker picture:

'... daily human rights abuse [of Roma] often motivated by, linked with or exacerbated by extreme levels of discrimination, notably in the fields of education, housing, employment and the provision of health and social services, as well as in the administration of justice ... high levels of racially-motivated violence including racially-motivated violent acts by neo-Nazi skinheads, members of the wider public and even members of law enforcement agencies.'

[18] It is no part of the court's task on this appeal to reach any view as between those differing positions, still less as to whether any of these appellants would have a valid claim for asylum. Rather our task on the first part of the case is to decide whether a scheme designed to prevent any such asylum claims (whether genuine or otherwise) being made in the United Kingdom is consistent with the United Kingdom's obligations in international law, in particular under the 1951 convention.

[19] With those few introductory paragraphs I turn now to this first issue, pausing only to observe that a substantially fuller account of the background to these proceedings is to be found in Burton J's admirably clear and comprehensive judgment below.

THE CONVENTION CHALLENGE

[20] Section 2 of the Asylum and Immigration Appeals Act 1993 provides: 'Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.'

[21] The convention, of course, is concerned with refugees. The term is defined in art 1A of the 1951 convention:

'For the purposes of the present Convention, the term "refugee" shall apply to any person who ... (2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.'

[22] Article 33, entitled 'Prohibition of expulsion or return ("refoulement")', lies at the heart of this appeal:

'1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion ...'

[23] It is convenient at this stage to set out two articles of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) (which has been incorporated into domestic law) and two further provisions in international treaties (which have not been so incorporated).

[24] Articles 26 and 31(1) of the Vienna Convention provide respectively:

'26. Every treaty in force is binding upon the parties to it and must be performed by them in good faith ...

31(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[25] Article 14(1) of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226) provides: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'

[26] Article 12(2) of the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) provides: 'Everyone shall be free to leave any country, including his own.'

[27] The appellants' central submission was recorded below as follows:

'A good faith obligation, interpreted in the light of the object and purpose of the Convention, must include an obligation, not necessarily to facilitate an asylum seeker to leave his own country and/or to reach one's border, but not to take steps to prevent him from doing so (at least unless the refugee is already in a safe third country). Thus, it is submitted, where, as here, such state is in practice extending its frontier out to Prague, it must not turn away an intending asylum seeker albeit that that person is not (yet) a refugee.'

[28] In support of their argument below the appellants prayed in aid the views expressed in a lengthy letter from the United Nations High Commissioner for Refugees (UNHCR) dated 19 July 2002:

'4. We acknowledge that the primary questions in this legal action do not turn on the text of the [Geneva] Convention. Rather, they turn on understanding the international protection regime as a complex of international practice and precepts drawn from refugee law, human rights law and general principles of international law. The [Geneva] Convention is the cornerstone of this complex. Where, as in the present case, issues arise that strictly do not fall within the Convention's textual scope, its objectives and purposes should act as a reliable guide. UNHCR's reservations to the pre-screening procedures are best understood in this light ...

8. The [Geneva] Convention's objects and purposes are important in ensuring that States' approach to illegal migration is consistent with their Convention obligations. UNHCR acknowledges that States have a

legitimate interest in controlling illegal migration. Such controls should not, however, be introduced in a manner which makes it difficult or impossible for refugees to access international protection. The pre-clearance procedures at Prague Airport have precisely the effect of preventing persons from boarding a flight to the UK when they express an intent to seek asylum. This means that persons at risk of persecution will be prevented from gaining access to international protection.

9. The international refugee protection regime would be significantly jeopardised if States which have agreed to provide protection for refugees were free to cut off all reasonable modalities of access to its territory for refugees [the letter should perhaps say 'potential refugees'] in the name of migration control ...

13. Although the decision to grant asylum to a particular refugee remains the prerogative of the State, there is an implicit responsibility on States to refrain from preventing asylum seekers from finding safety or from obtaining access to asylum procedures. Without such an implied responsibility the right to seek asylum might be rendered illusory.

14. It should be noted that denial of access to asylum procedures carries with it a significant amount of risk to the safety of the individual. Clearly the potential risks are heightened where—as is the case with the procedures at Prague Airport—access to procedures is denied in co-operation with the very country from which international protection is sought.'

**[29]** The office of the UNHCR now intervenes in the appeal by permission of Laws LJ and we have been helpfully provided with a number of written arguments prepared on its behalf by Mr Guy Goodwin-Gill (nowadays disavowing professorial rank) extending in all to some 70 pages and supported by four volumes of texts and authorities in addition to the 50 or 60 authorities cited by the other parties. It will not, I fear, be possible to do justice to many of the arguments placed before us. Let me, however, record at this stage the essence of Mr Goodwin-Gill's final written submissions. (i) The pre-entry clearance practice as operated is contrary to international law and the international obligations accepted by the United Kingdom both under treaty and under customary international law. (ii) The practice frustrates the object and purpose of the 1951 convention contrary to the international legal principle of good faith. (iii) It constitutes a revision of a multilateral treaty (increasing the burden on others), implemented without reference to the other parties. (iv) It is incompatible with the United Kingdom's other obligations under international law, including the obligation to exercise rights in good faith. It renders the 1951 convention nugatory and prevents provisions such as arts 31 or 33 ever being engaged. (v) Given that the practice of pre-clearance 'extends' the United Kingdom's frontiers beyond the territory of the United Kingdom, the United Kingdom's international legal responsibilities go with it. (vi) A state lacks good faith in the application of a treaty, not only when it openly refuses to implement its undertakings, but equally when it seeks to avoid or to 'divert' the obligation which it has accepted or to do indirectly that which it is not permitted to do directly.

**[30]** The convention challenge, it must be recognised, raises two quite distinct issues: one is the substantive question as to the United Kingdom's obligations under international law having regard to the terms of the 1951 convention; the other, the justiciability of this question given the limited extent to which these

obligations have been incorporated into domestic law. Although logically, no doubt, justiciability may be thought the prior issue, I have preferred to address first the substantive questions of international law arising as to the true nature of the United Kingdom's obligations under the 1951 convention, in particular under the non-refoulement provision in art 33, construed in conformity with art 31(1) of the Vienna Convention.

[31] That art 33 of the 1951 convention has no direct application to the Prague operation is plain: as Mr Howell QC for the respondents points out, it applies in terms only to refugees, and a refugee is defined by art 1A(2) as someone necessarily 'outside the country of his nationality' (or, in the case of a stateless person, 'former habitual residence'). For good measure art 33 forbids 'refoulement' to 'frontiers' and, whatever precise meaning is given to the former term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier.

[32] I have already indicated the broad outline of Mr Goodwin-Gill's argument on behalf of the UNHCR. Lord Lester of Herne Hill QC for the appellants puts the argument a little differently. It is his submission that the Prague operation constitutes 'a form of constructive refoulement', alternatively that—

> 'in the absence of an express obligation on a state not to act so as deliberately to prevent those alleging that they are suffering convention persecution from leaving their country of nationality so as to acquire refugee status under the 1951 convention, such an obligation is to be implied into the convention so as not to defeat or frustrate its purpose and as part of the obligation of good faith.'

[33] One of the respondents' contentions accepted below as a reason for rejecting Lord Lester's argument centred on the decision of the United States Supreme Court in *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* (1993) 509 US 155. The court there was concerned with a boatload of refugees from Haiti intercepted by the American Immigration Services in international waters and returned under agreement with the Haitian government to Haiti. The court held by a majority of 8:1 that the action was lawful on the ground that art 33 was not intended to govern a state's conduct outside its national borders or territorial waters. Burton J below commented (at [44]) on the decision as follows:

> 'It may be thought that the conclusion that the action of returning those already refugees to their country of origin was not in contravention of the 1951 convention is a fortiori to the question as to whether any obligation is owed to those who are still in their country of origin and not yet refugees.'

[34] Before us the appellants were to my mind able to demolish that particular argument by reference to the report of the Inter-American Commission on Human Rights (No 51/96) which was fiercely critical of the majority decision of the Supreme Court and preferred the dissenting judgment of Blackmun J, the approach which has subsequently been followed. For present purposes I propose to regard *Sale*'s case as wrongly decided; it certainly offends one's sense of fairness.

[35] Where, however, does that leave the present case? Lord Lester submits that there is only the narrowest distinction between the two cases: narrow in both the territorial and the jurisprudential sense. If it is impermissible to return refugees from the high seas to their country of origin, why should it be

permissible to prevent their leaving in the first place? How can the legality of the putative receiving state's action be determined simply by reference to which side of the frontier (perhaps a land frontier) the prospective asylum seeker is standing?

**[36]** Lord Lester further submits that a generous and purposive interpretation should be given to convention provisions concerned, as clearly these are, to further human rights, and in this regard he prays in aid the decision of the European Court of Human Rights in what he contends is the closely analogous case of *Golder v UK* (1975) 1 EHRR 524. Golder was a prisoner refused permission by the Home Secretary to consult a solicitor with a view to bringing libel proceedings against a prison officer. The court construed art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), which provides that '[i]n the determination of his civil rights ... everyone is entitled to a fair ... hearing', as requiring a right of access to a solicitor. So too here, submits Lord Lester, the court should construe art 33 of the 1951 convention as implying a right of access to a prospective refugee so that his claim for asylum may be fairly determined.

**[37]** Skilfully and powerfully though these arguments were advanced, they cannot to my mind prevail over the many and compelling arguments to the contrary. To start with *Golder v UK*, it provides in my judgment no real analogy with the present case at all. The decision there turned on the true construction of art 6. The English text was ambiguous. The French text was ultimately found by the majority decisive. It cannot be suggested that on any construction of art 33, however generous, a right of access to this or any other country to claim asylum can be found within it. So far, indeed, from this being so, not merely art 33 itself but the 1951 convention as a whole can be seen to be concerned not with permitting access to asylum seekers but rather with the non-return of those who have managed to gain such access. Having defined as refugees solely those who have already left their own state, the 1951 convention then imposes on member states a series of obligations with regard to them. Article 33 itself, as already explained, is concerned only with where a person must not be sent, not with where he is trying to escape from. The 1951 convention could have, but chose not to, concern itself also with enabling people to escape from their own country by providing for a right of admission to another country to allow them to do so. The legal position is correctly stated in *Oppenheim's International Law* (9th edn, 1991) vol 1, pp 901–902 (para 402) as follows:

> 'The so-called right of asylum is not a right possessed by the alien to demand that the state into whose territory he has entered should grant protection and asylum. For such state need not grant such demands. The constitutions of a number of countries expressly grant the right of asylum to persons persecuted for political reasons, but it cannot be said that such a right has become a "general principle of law" recognised by civilised states and as such forming part of international law. Neither is any such right conferred by Art 14 of the Universal Declaration of Human Rights ... The Declaration, which in any case is not a legally binding instrument, does not confer a right to *receive* asylum ...'

**[38]** To the same essential effect are passages in Hathaway *The Law of Refugee Status* (1991) and the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, September 1979), both quoted in the judgment below:

'The first element of Convention refugee status is that the claimant must be outside his country of origin. There is nothing intuitively obvious about this requirement: many if not most of the persons forced to flee their homes in search of safety remain within the boundaries of their state. Their plight may be every bit as serious as that of individuals who cross borders, yet the Convention definition of refugee status excludes internal refugees from the scope of global protection.' (See *Hathaway* p 29.)

'It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.' (See the *UNHCR Handbook* p 21 (para 88).)

Such an approach is supported also by the authorities, domestic and foreign. I shall content myself with brief citations only.

**[39]** Lord Mustill in *T v Secretary of State for the Home Dept* [1996] 2 All ER 865 at 868, [1996] AC 742 at 754 put it thus:

'... although it is easy to assume that the appellant invokes a "right of asylum", no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge.'

He continued ([1996] 2 All ER 865 at 873, [1996] AC 742 at 758):

'The [domestic] legislation must be viewed against the background of a complete absence of any common law right, either national or international, for a refugee to insist on being admitted to a foreign country.'

**[40]** To similar effect, Lord Goff of Chieveley and Lord Hoffmann in their joint dissenting opinion in the Privy Council in *Nguyen Tuan Cuong v Director of Immigration* [1997] 1 WLR 68 at 78–79 said:

'A person who satisfies [the convention] definition is said to have refugee status. The rest of the Convention imposes upon the contracting states certain obligations towards persons having refugee status. For the purposes of immigration control, the most important are contained in articles 31 and 33 ... [art 31 forbids the imposition of penalties on refugees arriving in another country without authorisation—unlike art 33, it is derogable under art 42]. Refugee status is thus far from being an international passport which entitles the bearer to demand entry without let or hindrance into the territory of any contracting state. It is always a status relative to a particular country or countries. And the only obligations of contracting states are, first, not to punish a refugee who has entered directly from the country in which his life or freedom was threatened for a Convention reason and secondly, not to return him across the frontier of that country. In all other questions of immigration control: for example, punishment for illegal entry from a third country, or expulsion to a third country from which there is no danger of refoulement to a country falling within article 33, the question of whether a person has refugee status is simply irrelevant.'

**[41]** Of the many foreign authorities I shall refer to only one, the judgment of the High Court of Australia in *Minister for Immigration and Multicultural Affairs v*

*Ibrahim* (2000) 175 ALR 585, and cite but a single passage from Gummow J's leading judgment on behalf of the majority:

> **'The scope of the 1951 convention**
>
> [136] The remaining issues also turn on the meaning to be given to the [1951 convention] definition, but they involve more fundamental considerations respecting the scope and purpose of the [1951 convention] itself. The provisions of the [1951 convention] "assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in the territory of the contracting State" ...
>
> [137] First, it has long been recognised that, according to customary international law, the right of asylum is a right of states, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a state of which that individual is not a national ...
>
> [138] Secondly, as Professor Sir Hersch Lauterpacht pointed out at the time, the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226), adopted in 1948, that is to say, shortly before the formation of the [1951 convention], was accompanied by a general repudiation by member states of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed. Article 14 declared that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution". But this right "to seek" asylum was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member states to regulate immigration by conferring privileges upon individuals. Over the last 50 years, other provisions of the Declaration have, as Professor Brownlie puts it, come to "constitute general principles of law or [to] represent elementary considerations of humanity" and have been invoked by the European Court of Human Rights and the International Court of Justice. But it is not suggested that Art 14 goes beyond its calculated limitation. Nor was the matter taken any further by the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) (the ICCPR). This entered into force for Australia on 13 November 1980. Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one's own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate.'

**[42]** As Mr Howell has pointed out, only two provisions in the 1951 convention apply to admissions and they are of the most limited scope. Article 11 applies to refugee seamen and requires no more than that a state under whose flag they are serving 'shall give sympathetic consideration to ... their temporary admission in its territory'. Article 28(1) requires states to issue 'to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory' and by para 13(1) of the Schedule to the 1951 convention the state undertakes that the holder of such a document 'shall be re-admitted to its territory at any time during the period of its validity'. The very limitations upon these obligations serve to illustrate the distinction between, on the one hand, the obligations owed to those already within a state's territory and, on the other, the lack of any obligation to admit those (perhaps simply across a land frontier) aspiring to become refugees.

[43] It is, indeed, *accepted* by the appellants that a state is under no obligation to admit refugees. How then can there be an obligation not to impede but rather to admit someone so that he can *become* a refugee? For my part I remain of the view I expressed in *R v Secretary of State for the Home Dept, ex p Hoverspeed* [1999] Eu LR 595, namely that not merely is the Home Secretary under no obligation to facilitate the arrival of asylum seekers but rather he is entitled to take steps to prevent their arrival. I referred there (at 603) to the 'tension [which] undoubtedly arises from our obligation to asylum seekers under the 1951 Convention on the one hand, and our entitlement to impede their arrival on the other'. In the later case of *R v Uxbridge Magistrates' Court, ex p Adimi* [1999] 4 All ER 520 at 524, [2001] QB 667 at 674, in the context of art 31, I noted that states strive increasingly to prevent the arrival of asylum seekers and observed that '[t]he combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents'. None of this, I readily acknowledge, is entirely satisfactory. In an ideal world there would no doubt be provision for states to facilitate the escape of persecuted minorities by allowing entry to their own country. I am satisfied, however, that on no view of the 1951 convention is this within its scope. The distinction between on the one hand a state preventing an aspiring asylum seeker from gaining access from his own country to its territory and on the other hand returning such a person to his own country (the distinction, in short, between this case and *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* (1993) 509 US 155) can be made to seem a narrow and unsatisfactory one. In my judgment, however, it is a crucial distinction to make and it is supported both by the text of the 1951 convention and by the authorities dictating its scope.

[44] It is supported too, as Mr Howell points out, by reference to the 1977 draft UN convention on territorial asylum which ultimately failed to achieve approval but which would otherwise have provided by art 3 that no person eligible for the benefits of asylum—

> 'who is at the frontier seeking asylum ... shall be subjected [by a contracting state] to measures such as rejection at the frontier ... which would compel him to remain in ... a territory with respect to which he has a well-founded fear of persecution.'

What need for such further convention if the law is already as the appellants submit?

[45] It seems to me important to recognise that in entering into international treaties states are undertaking limited obligations only and that the courts must recognise and respect such limitations. The good faith allegation upon which Mr Goodwin-Gill lays such stress should be approached with this in mind. As the International Court of Justice stated in *Cameroon v Nigeria* (1998) ICJ Rep 275 at 297 (para 39):

> '[A]lthough the principle of good faith is "one of the basic principles governing the creation and performance of legal obligations ... it is not in itself a source of obligation where none would otherwise exist" ...'

[46] It is pertinent in this connection to refer also to the judgments of the High Court of Australia in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. Dawson J there, having graphically described (at 248) the limits on the extent to which the 1951 convention attempts to translate into practical

reality the concern expressed in its preamble that persons enjoy the 'widest possible exercise of ... fundamental rights and freedoms', continued:

> 'In that respect, the Convention, like many international and municipal instruments, does not necessarily pursue its primary purpose at all costs. The purpose of an instrument may instead be pursued in a limited way, reflecting the accommodation of differing viewpoints, the desire for limited achievement of objectives, or the constraints imposed by limited resources ... It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.'

[47] Included within Mr Goodwin-Gill's final submissions is the suggestion that the Prague scheme 'renders the 1951 convention nugatory and prevents provisions such as arts 31 or 33 ever being engaged' (see [29](iv), above). This surely overstates the argument. Of course, if those intending refugees who are affected by the Prague scheme are unable on that account ever to leave the Czech Republic, they can never benefit from arts 31 or 33. But many others benefit and will continue to do so. In the end, as it seems to me, all Mr Goodwin-Gill's submissions rest on this: that no individual state can impede the flow of prospective asylum seekers to its shores. To do so, it is said, either precludes their becoming refugees and thereby benefiting from arts 31 and 33 in the first place (if they have to remain in their country of origin), or at least 'avoids' or 'diverts' onto other states the burden of processing their claims and providing them with sanctuary where appropriate. For the reasons already given these are not arguments I feel able to accept.

[48] Let me at this stage address the distinctions which the appellants seek to draw between visa regimes and the Prague scheme, distinctions which they suggest make the latter the more objectionable of the two types of control. Lord Lester criticises in particular the fact that the decision to refuse leave is made at the airport, after the intending asylum seeker has already committed himself to purchasing a ticket and to effecting an escape, and in such a way as to increase the risk of persecution. He contrasts this with the more discreet process involved in making an advance visa application in writing. He complains too that the pre-clearance scheme operates only on a sporadic basis which is accordingly arbitrary and unfair as between asylum seekers. Mr Goodwin-Gill too submits that there is a distinction to be made between 'the active interdiction or interception of persons seeking refuge from persecution' on the one hand and 'passive regimes, such as visa and carrier sanctions' on the other.

[49] In my judgment there is nothing in these criticisms and indeed the Prague scheme seems to me to constitute if anything a less, rather than more, serious problem for would-be asylum seekers than visa control. The fact that it operates only sporadically means that sometimes the intending asylum seeker will be free to travel. In any event it applies only to travel to the United Kingdom: the intending asylum seeker can travel anywhere else he pleases and, indeed, if he does so, there is nothing in the scheme which precludes his then travelling on to the United Kingdom. There is no stamping of his travel document or any permanent record of his having been refused leave. Rather the immigration officer when refusing leave merely issues a document recording such refusal which he faxes to the airline. Although in practice the airline will be unwilling to carry the passenger and will immediately refund the ticket price, it is not in fact

prohibited from carrying the passenger to the United Kingdom. Nor indeed would it incur carrier's liability (as it would if a visa regime were imposed) although it might be liable to some lesser financial sanction pursuant to paras 8 or 20 of Sch 2 to the 1971 Act. Whilst in certain countries the operation of the scheme might perhaps expose a refused asylum seeker to the risk of further persecution for having sought to escape, that certainly cannot be said of the Prague operation: persecuted Czech Roma ordinarily suffer at the hands of non-state agents; they are not subject to persecution by the state itself.

**[50]** In short, it seems to me impossible to draw any principled distinction in international law between the legality of the Prague operation and visa controls. Both Lord Lester and Mr Goodwin-Gill, I should note at this point, take exception also to visa controls, at any rate in so far as they are designed to impede the escape of prospective asylum seekers. In this regard Mr Goodwin-Gill puts before us a letter from the UNHCR to the Home Secretary dated 13 December 2002 objecting to the then proposed visa restrictions on Zimbabwean nationals. In my judgment, however, these objections do not sound in international law. Rather one must hope that when in truth acute humanitarian concerns arise states will respond beyond the strict call of their international obligations. This, I believe, is the only answer the court is entitled to give when Lord Lester conjures up the spectre of a fresh Holocaust. Visa controls are, in short, clearly not outlawed under the 1951 convention or under international law generally. EU law, indeed, not merely sanctions them but requires for certain countries both visa controls and carriers' liability with stipulated minimum penalties attaching—as to which see *International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA Civ 158 at [56], [2003] QB 728 at [56], [2002] 3 WLR 344.

JUSTICIABILITY

**[51]** Had I reached a different conclusion on the substantive issue of international law here arising it would have been necessary to consider at length the question whether that issue is strictly justiciable under domestic law. As it is, however, I propose to leave this question, difficult and complex as it is, for another day. For present purposes I wish to say no more than that, in the light of the extensive arguments developed before us both orally and in writing, I now recognise that the views I expressed in the Divisional Court in *R v Uxbridge Magistrates' Court, ex p Adimi* [1999] 4 All ER 520 at 533–534, [2001] QB 667 at 685–686 (in particular in reliance on *R v Secretary of State for the Home Dept, ex p Ahmed* [1998] INLR 570), are to be regarded as at best superficial, and that the conclusion I reached there, with regard to the legitimate expectations of asylum seekers to the benefits of art 31, is suspect. Mr Howell has mounted a formidable argument against that conclusion, based not least on this court's decisions in *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161 and *Behluli v Secretary of State for the Home Dept* [1998] Imm AR 407, neither of which was referred to in *Ex p Ahmed* (a rather special case under the prerogative) nor cited to us in *Ex p Adimi*. Whether in the light of s 2 of the Asylum and Immigration Appeals Act 1993 (see [20], above) or by reference to the principle of legality in the context of customary international law Lord Lester would have persuaded us that we have the right to quash the Prague scheme had we in the event thought it incompatible with the United Kingdom's obligations under the 1951 convention, I cannot say. I prefer to leave this important issue undecided.

THE ALLEGED BREACH OF THE RULES

**[52]** This complaint is advanced on behalf of those appellants who were expressly seeking to come to the United Kingdom as asylum seekers. I can deal with it quite briefly. Rule 320 (see [9], above) provides that 'leave to enter the United Kingdom is to be refused [if] entry is being sought for a purpose not covered by these Rules'. The appellants argue that asylum—either the making of the application or the gaining of refugee status—*is* a purpose covered by the rules so that the immigration officer in Prague, faced with these applications, should not have refused leave to enter but rather should have allowed the applicants to travel, neither granting nor refusing leave to enter and thus enabling them to make their application for asylum on arrival at Heathrow, applications which would then have been referred to the Secretary of State under r 328 (see [10], above). When an asylum application is made to the immigration officer on arrival in the United Kingdom and then referred to the Secretary of State, leave to enter is initially neither given nor refused. If the Secretary of State later grants asylum, limited leave to enter will then be given (see r 330). Meantime the applicant is either detained or granted temporary admission.

**[53]** In my judgment the argument fails. Of course the rules make provision for what is to happen if an asylum application is made in the United Kingdom. (That the rules apply only to applications made in the United Kingdom is apparent both from r 327, which defines an asylum applicant as someone complaining that it would be contrary to the 1951 convention to remove him *from* the United Kingdom, and indeed from r 328 which refers only to applications made 'at a port or airport in the United Kingdom'.) That is not to say, however, that asylum seeking is 'a purpose covered by [the] Rules'. In my judgment it is not. Those purposes are rather confined to the particular categories of entrant provided for by the rules, for example, visitors, students, spouses, ministers of religion and so forth. For each category the rules specify the matters of which the applicant must satisfy the immigration officer. Neither the seeking of asylum nor the enjoyment of refugee status constitutes such a category and, of course, it is the Secretary of State, not an immigration officer, who must be satisfied of the matters stipulated by r 334 before asylum will be granted.

**[54]** On this part of the case I add only this: were the challenge to succeed on this basis and no other the victory would be pyrrhic and short-lived—the Secretary of State could immediately counter it by a simple change in the rules.

RACE DISCRIMINATION

**[55]** The statutory framework within which this issue arises is as follows. Section 1(1) of the Race Relations Act 1976 provides that a person discriminates against another if in any relevant circumstances—

> '(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but—(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it.'

[56] Section 3(4) provides:

> 'A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.'

[57] Pursuant to a recommendation in the Macpherson Report, the 1976 Act was amended so that its provisions applied (as previously they had not) to public authorities, albeit subject to certain exceptions. Section 1 of the Race Relations (Amendment) Act 2000 introduced into the 1976 Act further provisions as follows:

> '19B.—(1) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination ...
>
> 19D.—(1) Section 19B does not make it unlawful for a relevant person to discriminate against another person on grounds of nationality or ethnic or national origins in carrying out immigration and nationality functions.
>
> (2) For the purposes of subsection (1), "relevant person" means—(a) a Minister of the Crown acting personally; or (b) any other person acting in accordance with a relevant authorisation ...
>
> 27(1A) In its application in relation to granting entry clearance (within the meaning of the Immigration Act 1971) section 19B applies in relation to acts done outside the United Kingdom, as well as those done within Great Britain.'

[58] A relevant authorisation under s 19D(2)(b) was in fact given by the minister on 23 April 2001. By para 2, under the heading '*Examination of passengers*', it provided:

> 'Where a person falls within a category listed in the Schedule and is liable to be examined by an immigration officer under paragraph 2 of Schedule 2 to the Immigration Act 1971 the immigration officer may, by reason of that person's ethnic or national origin—(a) subject the person to a more rigorous examination than other persons in the same circumstances ...'

[59] Paragraph 3 of the authorisation, under the heading '*Persons wishing to travel to the United Kingdom*', provided:

> 'Where a person falls within a category listed in the Schedule and is outside the United Kingdom but wishes to travel to the United Kingdom, an immigration officer or, as the case may be, the Secretary of State may, by reason of that person's ethnic or national origin—(a) decline to give or refuse the person leave to enter before he arrives in the United Kingdom ...'

The schedule there referred to contains a list of persons of seven ethnic or national origins including '(b) Roma'.

[60] It is Mr Munro's evidence that the authorisation, which in any event was revoked on 11 June 2002, was never adopted or made use of with regard to the pre-clearance scheme at Prague Airport. The respondents accept rather that the Prague operation had to be operated consistently with the 1976 Act and it is their assertion that it was. The appellants submit to the contrary that the scheme operated in a systematically discriminatory fashion. As noted at the outset, the allegation here is not of discrimination against Roma asylum seekers but rather against those Roma who were applying to come to the United Kingdom for reasons *other than* to claim asylum.

**[61]** What was alleged below was direct discrimination contrary to s 1(1)(a) of the 1976 Act in the following two respects:

> '(a) Longer and more intrusive questioning in the case of Roma than non-Roma, and the treatment of the former with greater suspicion and a requirement for a higher standard of proof.
>
> (b) In the event the decision-making was such that Roma were refused while comparable non-Roma were not.'

In those respects it was said that the defendants in operating the pre-clearance scheme have treated Roma less favourably than non-Roma. The appellants relied not least on some striking figures compiled between late January and late April 2002 based on observations made by a Czech Roma citizen working as a consultant for ERRC which were accepted for the purposes of the argument below. These showed that, during that three-month period, out of 6,170 passengers recorded as Czech nationals but not Roma, only 14 (0·2%) were refused entry while, of 78 who were apparently Roma (Roma being for the most part visually identifiable) 68 (87%) were refused. The case below rested in part on those statistics; in part on the very existence of the authorisation even though the respondents asserted that it had in no way influenced the approach to the Prague operation; and in part on evidence as to what had in fact occurred in relation to the six claimants and to five other people who were not claimants. Two of the non-claimants (one Czech Roma, Mr Samko; one Czech non-Roma, Ms Novakova) were journalists whose applications were the subject matter of a Czech television programme. Three (two Czech Roma, Ms Grundzova and Ms Polakova; one Czech non-Roma, Ms Dedicova) were the subject of the ERRC's own test. All five (whose expenses had been paid respectively by the television station and by ERRC) were ostensibly seeking leave to enter as visitors. Leave to enter was, in the event, given to Ms Novakova, Ms Polakova and Ms Dedicova, but not to Mr Samko or to Ms Grundzova. In other words, of the five whose applications were staged, both the non-Roma applicants were granted leave but only one of the three Roma. Even in the case of that one, moreover, Ms Polakova who had a well-paid job, it was contended that she was subjected to longer and more intrusive questioning than would have been the case had she been a non-Roma.

**[62]** The argument below turned entirely on the facts. The parties were in full agreement on the applicable principles of law which were stated by the judge as follows ([2002] All ER (D) 127 (Oct) at [50]):

> '(i) A complainant must prove his or her case on the balance of probabilities (see *King v Great Britain-China Centre* [1992] ICR 516 at 528–529 approved in *Glasgow City Council v Zafar* [1998] 2 All ER 953 at 958, [1997] 1 WLR 1659 at 1664–1665). (ii) Claims brought under the race and sex discrimination legislation present special problems of proof for complainants, since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them (see *Zafar*'s case [1998] 2 All ER 953 at 958, [1997] 1 WLR 1659 at 1664). (iii) It is unusual to find direct evidence of racial discrimination. The outcome of the case will therefore usually depend on what inferences it is proper to draw from the facts (see *King*'s case [1992] ICR 516 at 528–529 approved in *Zafar*'s case [1998] 2 All ER 953 at 958, [1997] 1 WLR 1659 at 1664). (iv) If a claimant can show that he has been less favourably treated

a than comparable individuals from a different racial group, the court will look to the alleged discriminator for an explanation. If no explanation is put forward or if such explanation is inadequate or unsatisfactory it will be legitimate to infer that the discrimination was on racial grounds (see *King*'s case [1992] ICR 516 at 528–529 approved in *Zafar*'s case [1998] 2 All ER 953 at 958, [1997] 1 WLR 1659 at 1664).'

b **[63]** It is convenient to cite also the next two paragraphs from Burton J's judgment which similarly set out undisputed matters of law:

'[51] The claimants draw attention to the danger of stereotyping, which does not need to be deliberate, and to guidance to be obtained from Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [1999] 4 All ER 65 at 71, 72, c [2000] 1 AC 501 at 511–512: "All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices ... Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination."

d [52] Balcombe LJ in *West Midlands Passenger Executive v Singh* [1988] 2 All ER 873 at 877, [1988] 1 WLR 730 at 736 referred to "a conscious or unconscious racial attitude which involves stereotyped assumptions", and there was helpful reference to the Court of Appeal decision in *Skyrail Oceanic Ltd v Coleman* [1981] ICR 864 (itself cited in a recent Hong Kong case in which Lord Lester QC was involved).'

e

**[64]** The judge then dealt in very considerable detail with the many arguments based on the facts of the case before finally stating his conclusion as follows:

'[74] The conclusion that is sought to be drawn is that the Prague operation was discriminatory against Roma. I am wholly unpersuaded that f such a proposition is supported or furthered by the refusal of leave of entry to HM [claimant] or by the television programme. Is the apparently differential treatment of the Roma in the ERRC test enough, coupled with the statistics, to draw a conclusion that the operation was targeted against Roma and was discriminatory? I am satisfied that this is not established. g (i) The ERRC test is in my judgment insufficient to draw any conclusion as to the nature of the whole operation, not least given the fact that all three were acting out a part. (ii) The evidence as to the individual claimants cannot be ignored. I have already concluded that I do not draw support for a case for discrimination from the case of HM, and obviously the same goes for the three claimants who simply claimed asylum and do not allege h discrimination. But the evidence in respect of the other two claimants must plainly be taken into account. RG and AKu [claimants] both now admit that they lied by concealing their intentions to claim asylum, and no longer claim discrimination. The contemporaneous notes in respect of RG show his interrogation, and the carefully developing thought processes of the officer, j whereby, notwithstanding the then assertion by RG of an intention of a short-term visit, by reference to questioning as to the wife's cousin whom he alleged that he was to visit, and his own financial circumstances, the officer concluded that the expenditure of a trip "was wholly out of proportion to the likely resultant benefits for someone of modest economic background" and that he "could not be satisfied that the passenger and his family were genuinely seeking entry as visitors for the period stated". When Ms Rose

talks of a "bulls eye" in relation to the ERRC test, it is in the context that none of the evidence in relation to the claimants, or the other non-claimant, supports the case of discrimination. (iii) Mr Munro makes clear in his evidence that different officers have different techniques and different methods. Not always are the same questions asked, and certainly interrogations will vary in length, depending upon whether early answers are satisfactory or not. I am not persuaded that the evidence of Mr Munro is displaced; namely that the authorisation was neither in place nor in mind, and that the operation in Prague was to be and was carried out non-discriminatorily. Whatever might be the position if Ms Grundzova or indeed Ms Polakova were a claimant in respect of their own individual circumstances (whether in s 57 proceedings, if permitted, or otherwise), I am wholly unpersuaded that, even taken with anything that could be made of the statistics, this limited evidence shows that the operation in Prague was carried out discriminatorily, or a fortiori that the six claimants are entitled to relief in respect of discrimination, or in particular that any of the claimants can establish, as asserted in Lord Lester's skeleton argument, that the practice of pre-clearance is being operated in a way that discriminates against Roma on racial grounds. In those circumstances I express no view either way as to the desirability of the introduction, either in the United Kingdom or in Prague, of any system of recording by immigration officials of ethnicity.'

**[65]** Ms Rose (who argued this part of the case on behalf of the appellants) seeks to attack those conclusions by reference to a number of detailed criticisms of the judge's many findings of fact which underlay them. By way of example only, she criticises the judge's earlier finding that there was nothing surprising in 68 out of 78 Roma being refused leave to enter since this was 'a not dissimilar ratio' to the five out of six claimants whom it was conceded were in fact asylum seekers and thus properly refused. Ms Rose submits that the judge should have taken, for the purposes of the comparison, not the five out of six who failed to get leave, but rather the four out of nine (the nine being the six claimants together with the three Roma who were involved in the television and ERRC trials) who she says should have been granted leave (HM, Mr Samko, Ms Grundzova and Ms Polakova) whereas only one, Ms Polakova, was. I would reject this criticism which seems to me founded on the false premise that the Roma applicants involved in the television and ERRC trials were properly to be regarded as typical of the ordinary run of Roma applicants seeking leave to enter the United Kingdom. To examine within this judgment all of Ms Rose's many criticisms of the judge's factual conclusions would be a lengthy process indeed. I decline to embark on it and would say only that I reject almost all of them and conclude that even those few which are made good do not in my judgment seriously undermine the judge's final conclusions.

**[66]** That, however, is not the end of the case on discrimination. Rather the court itself raised in the course of argument, and later sought additional written submissions upon, what seems to me the all-important question arising on the race discrimination challenge. The question is this: what is the position in law if, as seems to the court wholly inevitable, immigration officers, aware of the fact that the overwhelming majority of those seeking asylum from the Czech Republic are Roma (it may be doubted, indeed, whether any such are non-Roma), bring a greater degree of scepticism to bear on a Roma's application

for leave to enter for some permitted purpose than upon an apparently comparable application by a Czech non-Roma? Mr Howell for the respondents, I should at once record, does not accept the premise of the question. None the less, at our invitation, he addressed the court's concern in this regard.

**[67]** Let me state the problem as clearly as I can. What we are postulating is this.

(i) The immigration officers at Prague have treated all passengers in the same way irrespective of race in the sense that they have genuinely tried their utmost not to discriminate against Roma but rather to give Roma and non-Roma alike a fair and equal opportunity to satisfy them on the balance of probabilities that they are coming for a permitted purpose and will not apply for asylum on arrival. So the judge below has found and so to my mind he was entitled to find.

(ii) Being aware, however, that Roma alone as a group suffer discrimination (whether or not amounting to persecution) in the Czech Republic and so in general have a much greater incentive than others to seek asylum and therefore, when being questioned at Prague Airport, to lie about their intentions in visiting the United Kingdom, immigration officers on that account are inevitably more sceptical of a Roma applicant's true intentions than those of a non-Roma, and are less easily persuaded that the Roma is genuinely intending to come only for a permitted purpose.

(iii) Generally, therefore, Roma are questioned for longer and more intensively than non-Roma and are more likely to be refused leave to enter than non-Roma.

**[68]** Are Roma in these circumstances properly to be regarded as subject to unlawful direct discrimination? Are they in short to be regarded as being less favourably treated on racial grounds than a relevant comparator? Lord Lester submits so; Mr Howell submits not.

**[69]** When I first raised with Ms Rose what seemed to me the obvious point that immigration officers at Prague could not fail to be more sceptical of Roma than non-Roma applicants in processing their applications for leave to enter for non-asylum purposes—they would surely not otherwise be doing their duty which is to refuse leave unless satisfied that applicants are genuinely coming for a permitted purpose—I had thought the point fatal to her argument. Once one predicates, as for this purpose one must, the lawfulness of the policy of excluding prospective asylum seekers from the United Kingdom, immigration officers are surely entitled to act logically in its implementation. Her response was that on the contrary it makes good her argument. Having initially found this perplexing I very soon came to regard it as the most troubling part of the case. Indeed, I confess to having changed my mind upon it more than once.

**[70]** The first point made by the appellants is that an assumption that the effective implementation of the Prague scheme requires a racially discriminatory approach on the part of the immigration officers involved underlies the very authorisation granted by the minister just ten weeks before the operation began (see [58], [59], above). The authorisation expressly provided for such discrimination. True, the Home Office for whatever reason chose not to make use of it. Its grant, however, is not without significance; rather it emphasises the need for such an exception to justify the practice.

**[71]** As for why the operation is to be regarded as directly discriminatory, all the appellants' arguments seem to me to depend ultimately on two central principles of discrimination law: the irrelevance of motive and the impermissibility of stereotyping. First it is said that the immigration officers' *motive* in treating Roma applicants differently is irrelevant: it matters not that they perceive Roma as being in a materially different position from non-Roma

applicants on the basis that they have a greater incentive to lie. The fact, therefore, that the immigration officers are honestly concerned simply to enforce the immigration rules cannot avail them. Secondly the appellants submit that the Prague operation involves stereotyping—treating Roma less favourably because of the group's assumed characteristics: those of a race subject to discrimination who therefore have an incentive to seek asylum and a propensity to lie to achieve it. Let me briefly refer to the main authorities relied on in support of each argument.

(I) MOTIVE

**[72]** The authorities principally relied upon by the appellants under this head are *R v Commission for Racial Equality, ex p Westminster City Council* [1985] ICR 827, *Bain v Bowles* [1991] IRLR 356 and *James v Eastleigh BC* [1990] 2 All ER 607, [1990] 2 AC 751.

**[73]** In the *Westminster City Council* case the council had dismissed a black road sweeper to whose appointment the trade union objected on racial grounds. That the council's motive for doing so was to avert industrial action could not avail them.

**[74]** Similarly in *Bain v Bowles*, The Lady magazine had no defence to a complaint by a man whose advertisement for a housekeeper in Tuscany they had refused to accept. Following past complaints of sexual harassment, the magazine's policy was to accept such advertisements only where the employer was a woman. As Beldam LJ said (at 358 (para 25)):

> 'In my judgment the perception of the risk of harm to those who answer the advertisement was not a relevant circumstance for the purpose of the [Sex Discrimination Act 1975]. Essentially, it comes within the category, as [Dillon LJ] has said, of motive for the discrimination and for the policy adopted by the defendants.'

**[75]** In *James'* case the council allowed free entry to its swimming pools to those of pensionable age (ie women of 60 and men of 65). A 61-year-old man successfully complained of sexual discrimination. The House of Lords by a majority of 3:2 overturned the Court of Appeal's decision ([1989] 2 All ER 914, [1990] 1 QB 61) that the policy was not discriminatory 'on the ground of his sex'. As Lord Bridge of Harwich said ([1990] 2 All ER 607 at 611, [1990] 2 AC 751 at 763, 764):

> 'The fallacy, with all respect, which underlies and vitiates [the Court of Appeal's reasoning] is a failure to recognise that the statutory pensionable age, being fixed at 60 for women and 65 for men, is itself a criterion which directly discriminates between men and women in that it treats women more favourably than men "on the ground of their sex" ... The expression "pensionable age" is no more than a convenient shorthand expression which refers to the age of 60 in a woman and the age of 65 in a man. In considering whether there has been discrimination against a man "on the ground of his sex" it cannot possibly make any difference whether the alleged discriminator uses the shorthand expression or spells out its full meaning.'

(II) STEREOTYPING

**[76]** The appellants' two main authorities under this head are *Hurley v Mustoe* [1981] IRLR 208 and *Equal Opportunities Commission v Director of Education* (22 June 2001, unreported) in the High Court of Hong Kong (in which Hartmann J's very full judgment considers a number of the earlier cases).

[77] In *Hurley*'s case the Employment Appeal Tribunal was concerned with an employer's refusal to employ women with small children because he regarded them as unreliable employees and needed to have reliable staff for his small business. As Browne-Wilkinson J (as he then was) put it (at 210):

> '... [W]e are not deciding whether or not women with children (as a class) are less reliable employees. Parliament has legislated that they are not to be treated as a class but as individuals. No employer is bound to employ unreliable employees, whether men or women. But he must investigate each case, and not simply apply what some would call a rule of convenience and others a prejudice to exclude a whole class of women or married persons because some members of that class are not suitable employees.'

[78] The Hong Kong case resulted in the striking down of the director of education's policy of weighting children's exam results so as to neutralise a perceived advantage enjoyed by girls over boys at that stage of their development. As Hartmann J explained:

> 'It is not disputed that the right to equal treatment free of sex discrimination is in our society a fundamental right; as Lord Lester expressed it, a right of high constitutional importance. As an individual right ... it ... cannot be undermined or negatived by broad assumptions or generalisations. What may be true of a group may not be true of a significant number of individuals within that group.'

[79] Amongst the earlier authorities considered in that case was Hutton J's judgment in *Re Equal Opportunities Commission (No 1)* [1998] NI 223 in which the court struck down a policy under which non-fee paying school places were awarded to an equal percentage of boys and girls (in each case the top 27%) notwithstanding that some of the girls not thereby qualifying obtained higher marks than some of the boys who did.

[80] Under this head of argument the appellants submit further that the treatment of Roma at Prague Airport is directly analogous to other such obviously objectionable discriminatory practices as police officers stopping and searching black youths more frequently than white youths on the assumption that they are more likely to have been engaged in criminal activity, or tax inspectors more frequently or more rigorously investigating Jews than non-Jews on the assumption that Jews are more prone to financial crime. They argue that it is not open to the discriminators to say that the appropriate comparators in these cases are respectively other recognisable groups of asylum seekers (this being one of Mr Howell's arguments) or drivers of white vans (like black youths, frequently stopped and searched by the police) or self-employed plumbers (whose tax returns, we are told, are often found unreliable).

[81] Both arguments, I readily acknowledge, appear to have considerable force. Clearly it is unacceptable for someone to be treated less favourably because of his race whatever the motives underlying such treatment and whether or not it results from the discriminator making stereotyped assumptions. My difficulty, however, is in recognising in the practice followed at Prague Airport anything that can realistically be regarded as less favourable treatment of Roma qua Roma. True, as we ourselves have postulated, Roma are questioned more intensively and with a greater degree of scepticism that non-Roma (although I reject the appellants' contention—see [61](a), above—that they are subjected to a higher standard of proof). True too, para 2 of the s 19D(2)(b) authorisation

provided in terms for 'a more rigorous examination [for, amongst others, Roma] than other persons in the same circumstances'. I reject, however, the contended-for implication that such an examination must necessarily otherwise be unlawful. How, I ask rhetorically, is an objection to the more rigorous questioning of some than others reconcilable with the exhortation repeatedly to be found throughout the case law that applications must be investigated individually, each applicant being given the opportunity to establish that he or she can satisfy whatever may be the legitimate requirements of the questioner? How can it be said that the Prague operation falls foul, for example, of the principle established in *Hurley v Mustoe*? On the contrary, what Browne-Wilkinson J surely was advocating there, in place of the wholesale rejection of women with children as an unreliable class of employees, was the questioning individually of women in that position, questioning logically likely to be more intensive in their case than in the case of other applicants for the same job. Consider similarly an employer interviewing for a job involving heavy lifting. He may not be entitled to refuse to interview women at all, but is he not permitted to question a female applicant for the job more sceptically and rigorously than her male counterpart?

**[82]** Nor do I see the operation of the Prague scheme as being in any way inconsistent with the majority decision of the House of Lords in *James v Eastleigh BC* [1990] 2 All ER 607, [1990] 2 AC 751. Once it was recognised that the council there might just as well have said that entry was free to women, but not men, in the 60–65 age group, the direct discrimination involved against men became indisputable. The condition of pensionability was itself patently gender-based. The position would in my judgment have been very different had the policy been instead to admit free, say, those who were in fact retired, or who could otherwise establish that they were of limited means; that would not have involved direct discrimination and, if challenged as indirect discrimination, would surely have been capable of justification.

**[83]** The gender-based discrimination so plainly evident in *James'* case was, of course, itself unlawful. The appellants appear to suggest that that is mirrored here by the discrimination against Roma in the Czech Republic which, of course, is what underlies the inevitable scepticism surrounding Roma applications for leave. I readily accept that the race discrimination against Roma in the Czech Republic is no less objectionable than sex discrimination in the United Kingdom. But it does not follow that the fact that Roma are discriminated against must be ignored and so cannot properly found the basis of otherwise legitimate concerns felt by immigration officers at Prague about Roma applicants seeking to enter the United Kingdom. On the contrary, once it is recognised as lawful to operate in Prague a policy designed to keep asylum seekers away from the United Kingdom, that policy must inevitably focus on those suffering discrimination abroad and for this purpose it cannot sensibly matter whether such discrimination is by reason of race, sex, politics, or whatever else may found a claim of persecution on convention grounds.

**[84]** The policy at Prague Airport is manifestly not to refuse Roma as Roma; rather it is to refuse prospective asylum seekers, or rather those who cannot satisfy the immigration officer to the requisite standard that they will not claim asylum on arrival. (That the policy is designed also to prevent travel to the United Kingdom even for one of the permitted purposes if the applicant cannot satisfy the immigration officer of a relevant condition for entering, seems to me for present purposes immaterial.) It is, it must be noted, a very different policy from that which could properly have been adopted pursuant to para 3 of the s 19D(2)(b)

authorisation, namely a refusal of leave to any and all Roma qua Roma, irrespective of their purpose in travelling. That, of course, would have involved direct discrimination and been unlawful save under an express statutory authorisation.

**[85]** Nor to my mind can the Prague operation be said to fall foul of the principle established in *Equal Opportunities Commission v Director of Education* (22 June 2001, unreported) (see [76], above) or *Re Equal Opportunities Commission (No 1)* [1998] NI 223 (see [79], above). In both those cases a general policy was being adopted which necessarily depended for its validity upon assumed characteristics as between the respective sexes and which inevitably, therefore, disadvantaged a number of girls without their being given an opportunity to qualify for the relevant benefit on individual merit.

**[86]** I have already recognised that, because of the greater degree of scepticism with which Roma applicants will inevitably be treated, they are more likely to be refused leave to enter than non-Roma applicants. But this is because they are less well placed to persuade the immigration officer that they are not lying in order to seek asylum. That is not to say, however, that they are being stereotyped. Rather it is to acknowledge the undoubtedly disadvantaged position of many Roma in the Czech Republic. Of course it would be wrong in any individual case to assume that the Roma applicant is lying, but I decline to hold that the immigration officer cannot properly be warier of that possibility in a Roma's case than in the case of a non-Roma applicant. If a terrorist outrage were committed on our streets today, would the police not be entitled to question more suspiciously those in the vicinity appearing to come from an Islamic background? Similarly in the case of sectarian violence in Northern Ireland. These seem to me the relevant analogies here, not the now defunct practice of repeatedly stopping and searching black youths, clearly an unjustifiable interference with their liberty unless reasonable grounds exist for suspecting those actually stopped.

**[87]** There are, it seems to me, various jurisprudential paths by which to reach what I conceive to be the commonsense result in this case. I would hold either that the Roma applicants are not being treated less favourably than others in the respects alleged, alternatively, if they are, that this is not 'on racial grounds'. If necessary I would hold that there are no relevant comparators against whom to judge the treatment of Roma applicants. I believe that the true analysis of this case is that, so far from Roma applicants being treated less favourably than others in a comparable position, in reality there is being applied to them a requirement or condition which is applied equally to others: the requirement that they satisfy the immigration officer that they are not travelling to the United Kingdom with a view to claiming asylum. True, a considerably smaller proportion of Roma applicants than others are able to satisfy that requirement, but it is none the less justifiable. In other words, this appears to me to be a case of justifiable indirect discrimination. No case of indirect discrimination, however, has ever been advanced here, or is now sought to be advanced. The appellants' claim stands or falls as one of direct discrimination. For the reasons already given, I take the view that it falls.

**[88]** It follows from all this that in my judgment none of the appellants' arguments is sustainable and in the result the appeal fails and should be dismissed.

**MANTELL LJ.**

**[89]** I entirely agree with Simon Brown LJ that this appeal should be dismissed and for the reasons he gives. It is only because I am aware that Laws LJ does not that I add a few thoughts of my own and then, simply, on the area of disagreement.

[90] Applying Lord Steyn's test in *Nagarajan v London Regional Transport* [1999] 4 All ER 65 at 80, [2000] 1 AC 501 at 521–522 the question becomes: why did the immigration officer treat the Roma less favourably than the non-Roma? Surely the answer must be: because the Roma is more likely than the non-Roma to wish to claim asylum. It may be and almost certainly is the case that the wish to claim asylum comes about because the Roma has suffered discrimination from being Roma but that is not to answer the question posed. To turn the facts on their heads, suppose the object was to allow genuine asylum seekers to travel and to prevent those without genuine reasons from doing so: could it be said that the more intensive questioning of non-Roma amounted to discrimination against them? Another analogy might be where it is known that a dangerous virus is epidemic in, say, China and stringent medical examinations are imposed on all incoming travellers from that country. They are all Chinese. The same is not required of incomers from elsewhere. It cannot be disputed that the Chinese in such a case suffer different and discriminatory treatment, but not on racial grounds. The reason for the different treatment is that they are coming from a place where they might have been exposed to the virus: it just so happens that they are all Chinese. In that case a true comparator might be a non-Chinese travelling from China on the same plane, as in the present it would be a non-Roma believed likely to have been a victim of discrimination or persecution.

[91] The difference between the present case, the chosen analogues and the example put forward in argument is that, in the latter, generalised assumptions are being made about the character or proclivities of black youths by reason of their colour or race, whereas in the former the only assumption is about the possible effect on an individual of influences from outside.

[92] If, as I believe, that analysis is correct, it would follow that the practice at Prague Airport does not amount to direct racial discrimination which is all the Secretary of State has to meet, a satisfactory outcome since any other would be an affront to common sense. If it were to amount to indirect discrimination I would hold it to be justifiable for the reasons given by Simon Brown LJ.

**LAWS LJ.**

[93] I adopt with gratitude the description of the facts, the account of the material legislation and treaty provisions, and the learning given in the judgment of Simon Brown LJ whose judgment I have had the opportunity to read in draft. I agree entirely with his conclusions on what he has called the convention challenge, and the challenge based on the alleged breach of the immigration rules; and with his reasons for concluding on these points as he does. In light of the importance of the convention challenge and the depth of the arguments about it which were presented to us, I will add some observations of my own relating to what has been called the 'justiciability' aspect of this part of the case.

[94] However before doing so I have to say that as regards the appellants' claim of direct race discrimination I am unable to agree with the conclusions arrived at by Simon Brown LJ, and shared by Mantell LJ; and I will of course explain why not.

THE CONVENTION CHALLENGE: JUSTICIABILITY

[95] The genesis of an international treaty is quite different from the genesis of an Act of the United Kingdom Parliament. An international treaty is forged by debate, compromise and negotiation between the governments of sovereign nation states. Simon Brown LJ has referred (at [46], above) to the observation of

Dawson J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248 that '[t]he purpose of an instrument may ... be pursued in a limited way, *reflecting the accommodation of differing viewpoints* ...' (my emphasis). And there is generally no legal tribunal or political assembly before whom the outcome of this process may overall be called to account. Treaties are, to adopt a phrase from an altogether different discipline, free radicals.

**[96]** By contrast an Act of the United Kingdom Parliament is, as everyone knows, made by a national assembly answerable to the citizens at elections. There may be negotiations between parties; between factions within parties; between the two Houses of Parliament. But every party to any such negotiation is subject only to our law and constitution, and the outcome of the process may very firmly be called to account: for the legality of what is done in its name, to the courts of law; for its wisdom, to the people at the ballot box.

**[97]** There is no analogue to these procedures in the case of an international treaty. Treaties are, under our constitution, made by the Executive and not by the legislature. Saving certain arcane exceptions, the Executive is not a source of law in England. Hence the rule that no treaty comes within the body of the law of the land unless it is specifically incorporated by Act of Parliament. The rule is a benign one: no one is to be subjected to any burden or requirement imposed by the state, unless it is given by the common law or by or under statute. The rule applies no less where the treaty under consideration confers advantages, advantages here are burdens there. I think it salutary to repeat the well-known words of Lord Oliver of Aylmerton in *Maclaine Watson & Co Ltd v Dept of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523 at 544–545, [1990] 2 AC 418 at 500:

> '... as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.'

**[98]** For these reasons it is important to be precise as to the extent to which any given international treaty has by municipal legislation become part of our law. It is commonplace to suppose that the 1951 convention has been 'incorporated' in domestic law. But this is in context a loose expression. The exact position is given, first, by s 2 of the Asylum and Immigration Appeals Act 1993 which provides: 'Nothing in the immigration rules (within the meaning of the [Immigration Act 1971]) shall lay down any practice which would be contrary to the Convention.' Secondly, the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) (as amended by the 1967 Protocol (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) (the 1951 convention) is engaged in our domestic law by the statutory provisions which confer rights of appeal to the immigration appellate authorities on individuals who claim that their removal or deportation from the United

Kingdom would contravene their convention rights. These provisions have been revised from time to time. It is unnecessary to enter into the detail. It is true that in *R v Secretary of State for the Home Dept, ex p Sivakumaran (UN High Comr for Refugees intervening)* [1988] 1 All ER 193 at 195, [1988] AC 958 at 990 Lord Keith of Kinkel observed that the 1951 convention had 'for all practical purposes been incorporated into United Kingdom law'. But with respect it is clear in context that he was referring, and only referring, to the obligations which the Secretary of State had undertaken by force of the immigration rules then in force. I would of course accept without cavil that in a case where and to the extent that the 1951 convention *is* engaged, the Secretary of State's duty is to be loyal to it with all that that entails, and the court will insist that the duty is observed. So much is given, but in the context of the present case with respect no *more* is given, by the judgment of this court presided over by Lord Phillips of Worth Matravers MR in *Saad v Secretary of State for the Home Department, Diriye v Secretary of State for the Home Department, Osorio v Secretary of State for the Home Department* [2001] EWCA Civ 2008, [2001] All ER (D) 307 (Dec).

**[99]** In my judgment the convention challenge is concluded against the appellants on these following short grounds. There is nothing in the immigration rules which lays down any practice which would be contrary to the 1951 convention. There is thus no contravention of s 2 of the 1993 Act. I do not understand this proposition to be seriously contested. No submission has been made to us that anything in the rules is ultra vires s 2. Nor has any argument been advanced to the effect that any statutory right of appeal has been frustrated or undermined by the pre-clearance scheme at Prague Airport. Indeed (as I understand is accepted) no question as to the statutory appeal rights arises, since on the facts there is no person facing removal or deportation from the United Kingdom who is thereby in a position to assert that his convention rights would or might be violated. The appellants are therefore, as I see the matter, driven to assert that the 1951 convention has distinct and enforceable effects in the domestic law of England which transcend the reach of its incorporation by Parliament. But that is a constitutional solecism.

**[100]** In my judgment it is important that the convention point should be dismissed on this short ground. Nothing, surely, is more elementary than the certainty required for the identification of what is and is not law in our modern constitution; and we must not be seduced by humanitarian claims to a spurious acceptance of a false source of law. I should say that these considerations have led me to feel, with great respect, some unease in relation to a particular line of authority relied on by Lord Lester of Herne Hill QC for the appellants, which is to be found in *R v Secretary of State for the Home Dept, ex p Ahmed* [1998] INLR 570 and *R v Uxbridge Magistrates' Court, ex p Adimi* [1999] 4 All ER 520, [2001] QB 667. In the former case Lord Woolf MR ([1998] INLR 570 at 583–584) and Hobhouse LJ (at 591–592) indicated, obiter, that the Crown's ratification of, or entry into, a treaty might be capable of giving rise to a legitimate expectation upon which the public in general would be entitled to rely. Reference was made to the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh (Human Rights and Equal Opportunities Commission intervening)* [1995] 183 CLR 273 at 291 (per Mason CJ and Deane J). In *Ex p Adimi* the Divisional Court had to consider art 31 of the 1951 convention. Simon Brown LJ referred to *Ex p Ahmed*, and accepted what Lord Woolf MR had said obiter; he continued ([1999] 4 All ER 520 at 535, [2001] QB 667 at 686):

> 'By the time of these applicants' prosecutions, at latest, it seems to me that refugees generally had become entitled to the benefit of art 31 in accordance with the developing doctrine of legitimate expectations ...'

**[101]** The proposition that the act of ratifying a treaty could *without more* give rise to enforceable legitimate expectations seems to me to amount, pragmatically, to a means of incorporating the substance of obligations undertaken on the international plane into our domestic law without the authority of Parliament. In *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161 this court held that ratification of the European Convention on Human Rights created no justiciable legitimate expectation that the convention's provisions would be complied with. In *Behluli v Secretary of State for the Home Dept* [1998] Imm AR 407 a like conclusion was arrived at in this court in relation to the Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin; TS 72 (1997); Cm 3806 (the Dublin Convention). Beldam LJ said (at 415):

> 'In ... *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 3 LRC 1 ... it was said that in that jurisdiction ratification of a Convention was to be regarded as a positive statement by the executive Government and its agencies that they would act in accordance with the Convention and that that positive statement was an adequate foundation for a legitimate expectation in the absence of statutory or executive indications to the contrary. But as is clear from [*Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, [1991] 1 AC 696], that is not the law in this country.'

We are of course bound by *Chundawadra*'s case and *Behluli*'s case, which were not referred to in the judgments in *Ex p Ahmed* and *Ex p Adimi*; and the report shows that they were not cited to the Divisional Court in the latter case.

RACE DISCRIMINATION

**[102]** Simon Brown LJ states (at [67], above) the premises of this part of the appeal in three propositions. The last of them, which with respect is plainly true on the facts of the case, is put thus: '... Roma are questioned for longer and more intensively than non-Roma and are more likely to be refused leave to enter than non-Roma'. It seems to me inescapable that this fact constitutes less favourable treatment to the Roma in comparison with the treatment of non-Roma, within the meaning of s 1(1)(a) of the Race Relations Act 1976. I have heard no sensible argument to the contrary. The question is whether such treatment is on racial grounds; if it is, direct discrimination is established.

**[103]** Clearly, whether A's less favourable treatment of B is on racial grounds or not is a question of fact, though it is constrained by certain matters of law which the tribunal deciding the question has to get right. Of these one of the most important is that it does not have to be shown that the putative discriminator was actuated by a conscious or unconscious racial motivation. Simon Brown LJ has referred to the principal authorities (at [72] ff, above). In any given case the motivation may have nothing whatever to do with race. As Simon Brown LJ has said (at [67](ii), above) it is inevitable on the facts here that an immigration officer, involved in the scheme at Prague Airport, will be more sceptical of the true intentions of a Roma who asserts a desire to travel to the United Kingdom for a non-asylum reason than in the case of a non-Roma who asserts the same. Indeed it is in particular the *conscientious* immigration officer

who will thus be more sceptical. And like Simon Brown LJ I would accept without cavil that the immigration officers operating the scheme are not in the least motivated by any desire to discriminate against Roma as Roma.

**[104]** The factual inquiry which the tribunal, faced with a complaint of direct discrimination, has to make was shortly expressed by Lord Steyn in *Nagarajan v London Regional Transport* [1999] 4 All ER 65 at 80, [2000] 1 AC 501 at 521–522 as follows:

> '... in s 1(1)(a) cases the tribunal simply has to pose the question: why did the defendant treat the employee less favourably? They do not have to consider whether a defendant was consciously motivated in his unequal treatment of an employee. That is a straightforward way of carrying out its task in a s 1(1)(a) case.'

**[105]** Simon Brown LJ has also cited (at [76] ff, above) authority which demonstrates the imperative of avoiding what has been called 'stereotyping'. I think it convenient to repeat two judicial observations which were cited by Burton J below ([2002] EWHC 1989 at [51], [52], [2002] All ER (D) 127 (Oct) at [51], [52], [2003] ACD 53), though they have already been recalled by Simon Brown LJ (at [63], above). First there is what was said by Lord Nicholls of Birkenhead in *Nagarajan's* case [1999] 4 All ER 65 at 71, 72, [2000] 1 AC 501 at 511–512:

> 'All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices ... Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination.'

Secondly, there is Balcombe LJ's reference in *West Midlands Passenger Executive v Singh* [1988] 2 All ER 873 at 877, [1988] 1 WLR 730 at 736, to 'a conscious or unconscious racial attitude which involves stereotyped assumptions'.

**[106]** In my judgment the irrelevance of motive, and the impermissibility of stereotyping, have to be considered with some care. Each involves a risk of confusion. As for the first, what is irrelevant is the discriminator's *motive*, or *reason*, for acting on racial grounds. He may discriminate against a person or persons of a particular race even though he possesses no animus whatever, conscious or unconscious, against persons of that race. *R v Commission for Racial Equality, ex p Westminster City Council* [1985] ICR 827, cited by Simon Brown LJ (at [72], [73], above), is a good example. The irrelevance of motive does not prohibit the tribunal from investigating the discriminator's state of mind; indeed, very obviously, that is where his grounds for acting as he did are to be ascertained. The risk of confusion here is that motive's being out of bounds might lead one to suppose that the exercise of adjudication in a direct discrimination case is merely one of ascertaining an *objective cause* of the actor's conduct, as distinct from his thought processes; but that would in truth be a meaningless exercise. Lord Browne-Wilkinson's reasoning in *Nagarajan's* case [1999] 4 All ER 65 at 68–70, [2000] 1 AC 501 at 508–509, which with respect I need not set out, bears on this part of the case.

**[107]** The law then is clear: once it is shown that the discriminator's act was taken on racial grounds, the *reason why* he acted on such grounds is neither here nor there. I would wish respectfully to repeat these observations of Lord Nicholls in *Nagarajan's* case [1999] 4 All ER 65 at 71, [2000] 1 AC 501 at 511:

> '... a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination ... the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds.'

[**108**] The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is *untrue*. But that cannot be right. If it were, it would imply that direct discrimination can be justified; whereas it is entirely plain that the legislature has advisedly chosen to allow justification of indirect, but not direct, discrimination.

[**109**] A consideration of all these factors provides, in my judgment, the answer to this part of the case. As Ms Rose submitted at para 2 of her written reply, when a Roma and non-Roma both present themselves at the desk at Prague Airport and state they wish to visit London for the weekend, the immigration officer at that stage knows nothing of their personal circumstances. He has not seen what evidence they have to support their applications for leave to enter as visitors. All he knows, from their appearance, is that one is Roma and the other is not. He treats the Roma less favourably, by subjecting him or her to a more intrusive inquiry with a lesser prospect of leave to enter being granted. One asks Lord Steyn's question: why did he treat the Roma less favourably? It may be said there are two possible answers: (1) because he is Roma; or (2) because he is more likely to be advancing a false application for leave to enter as a visitor. But it seems to me inescapable that the reality is that the officer treated the Roma less favourably *because* Roma are (for very well understood reasons) more likely to wish to seek asylum and thus more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible. More pointedly, he has an entirely proper reason (or motive) for treating the Roma less favourably on racial grounds: his duty to refuse those without a claim under the rules, manifestly including covert asylum seekers, and his knowledge that the Roma is more likely to be a covert asylum seeker. But that is irrelevant to the claim under s 1(1)(a) of the 1976 Act.

[**110**] For these reasons I am driven to disagree with Simon Brown and Mantell LJJ on this part of the case. I do so with no satisfaction. The Prague scheme is entirely unobjectionable vis-à-vis the United Kingdom's international obligations. The government is perfectly entitled to form the political judgment that it is a desirable initiative in the public interest. And my view on the discrimination issue, had it prevailed, might have had surprising ramifications well beyond the four corners of this case. But elementarily, we are not concerned with such things.

[**111**] I would allow the appeal.

*The appeal would be dismissed. Permission to appeal to the House of Lords granted.*

Dilys Tausz Barrister.

# R (on the application of B) v Merton London Borough Council

[2003] EWHC 1689 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
STANLEY BURNTON J
6 JUNE, 14 JULY 2003

*Immigration – Asylum seeker – Unaccompanied asylum seeker claiming to be under 18 years old – Local authority assessing whether asylum seeker child in need – Determination of age – Guidance – Children Act 1989.*

The claimant was an unaccompanied asylum seeker with no means of support in the United Kingdom. He claimed to be 17 years old. The Home Office did not consider him to be a minor and treated him as an adult. As a person aged under 18, and in need, he would have been owed a duty under Pt III of the Children Act 1989 by the local authority in whose area he was, including a duty to provide him with accommodation. The defendant local authority interviewed him in order to assess whether he was a child in need. The interview was conducted by a social worker in person, with an interpreter available on the telephone. The social worker considered there were a number of inconsistencies in the claimant's account of his history which led her to doubt his credibility, but she did not put those inconsistencies to the claimant. She determined that, while in need, the claimant was aged at least 18. He sought judicial review of that determination. The court was asked to give guidance as to the requirements of a lawful assessment under Pt III of the 1989 Act by a local authority of the age of a young asylum seeker claiming to be under the age of 18 years.

**Held** – The assessment of age in borderline cases was a difficult matter, but not a complex one. It was not an issue which required anything approaching a trial, and judicialisation of the process was to be avoided. It was a matter which could be determined informally, provided safeguards of minimum standards of inquiry and of fairness were adhered to. Except in clear cases, the decision-maker could not determine age solely on the basis of the appearance of the applicant. In general, the decision-maker had to seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information might also be important. If there were reason to doubt the applicant's statement as to his age, the decision-maker would have to make an assessment of his credibility, and ask questions designed to test credibility. There was no onus of proof on the applicant, the authority had to make its assessment on the material available to and obtained by it. There should be no predisposition, divorced from the information and evidence available to an authority, to assume that an applicant was an adult, or conversely that he was a child. A local authority could not simply adopt a decision made by the Home Office on an application for asylum. It might take into account information obtained by the Home Office, but it had to make its own decision, and for that purpose had to have available to it adequate information. Medical reports were not likely to be helpful; for someone close to the age of 18 there was no reliable

a medical or other scientific test to determine whether he was over or under that age. It was not necessary for an authority to provide support for a period of some weeks to give the opportunity for others to observe the applicant, if the information available was sufficient for a decision to be made. Where an interpreter was required, it was greatly preferable for him to be present during the interview to avoid a risk of misunderstandings. Although it was not necessary b as a matter of law for there to be verbatim notes of the interview, such a note would enable the court to be more confident of its accuracy and to address any suggestion that the interviewer had put words into the mouth of the applicant by asking leading questions. If the decision-maker formed the provisional view that an applicant was lying as to his age then the applicant had to be given the opportunity to address the matters that had led to that view, so that he could c explain himself if he were able to. Following an interview and any other inquiries, an authority was obliged to give adequate reasons for its decision refusing support under the 1989 Act. The consequences of such a decision might be drastic for the applicant, and he was entitled to know the basis for it, and to consider whether the decision was a lawful one. Nevertheless, the reasons did d not need to be long or elaborate. It would be sufficient to state that the decision was based on the appearance and behaviour, or demeanour, of the applicant and the matters which led the authority to conclude that the applicant was not truthful. In the instant case, the possibility that the claimant might have been able to rectify any misunderstanding, if the matters relied upon by the defendant in coming to its decision had been put to him, meant that the defendant had not e satisfied the onus of establishing that, even if, they had been put to the claimant, the same decision would inevitably have been made. There was no evidence that there had been a suitable alternative complaint or review procedure available to the claimant to challenge the defendant's decision. Accordingly, the defendant's decision would be set aside. The defendant was to reconsider the age of the f claimant using the information presently available to it (see [22], [36]–[39], [45], [48], [52], [54]–[58], below).

**Notes**

For a local authority's duty to provide accommodation for children in need g within its area and the application and scope of the duty to act fairly, see 5(3) *Halsbury's Laws* (4th edn reissue) para 1319 and 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 96, respectively.

**Cases referred to in judgment**

h *Nash v Chelsea College of Art and Design* [2001] EWHC 538 (Admin), [2001] All ER (D) 133 (Jul), (2001) Times, 25 July.

*R v Northamptonshire CC, ex p W* [1998] ELR 291.

*R (on the application of Ashworth Mental Hospital) v Mental Health Review Tribunal for West Midlands and North West Region* [2001] EWHC 901 (Admin), (2002) 5 CCL j Rep 78; *affd in part* [2002] EWCA Civ 923, [2003] 1 WLR 127.

*R (on the application of Q) v Secretary of State for the Home Department* [2003] EWHC 195 (Admin), [2003] All ER (D) 251 (Feb), (2003) 100(15) LSG 26; *affd* [2003] EWCA Civ 364, [2003] 2 All ER 905, [2003] 3 WLR 365.

*R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302, CA.

*Wallworth v Balmer* [1965] 3 All ER 721, [1966] 1 WLR 16, DC.

**Cases referred to in skeleton arguments**

*Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92, [1994] 1 AC 531, [1993] 3 WLR 154, HL.

*Lavender (H) and Son Ltd v Minister of Housing and Local Government* [1970] 3 All ER 871, [1970] 1 WLR 1231.

*R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, [1992] ICR 816, CA.

*R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651, [1994] 1 WLR 242, DC.

**Application**

The claimant, B, applied for judicial review of the determination of the defendant, Merton London Borough Council, on 13 February 2003, that the claimant was at least 18 years old and was accordingly owed no duty by the defendant under Pt III of the Children Act 1989. The facts are set out in the judgment.

*Robert Latham* (instructed by *Shelter Legal Services*) for the claimant.

*Nicholas O'Brien* (instructed by *Julie Belvir*) for the defendant.

*Cur adv vult*

14 July 2003. The following judgment was delivered.

**STANLEY BURNTON J.**

INTRODUCTION

**[1]** The claimant is an asylum seeker. He has no means of support in this country. He claims to be aged 17. If so, he is not an asylum seeker within the meaning of the Nationality, Immigration and Asylum Act 2002, which does not apply to those who are not aged at least 18 years (see s 18(1)(a)), and the Secretary of State for the Home Department has no responsibility for his support under that Act. But, if he is under 18, and is in need, he is owed a duty under Pt III of the Children Act 1989 by the local authority in whose area he is, including a duty under s 20 of that Act to provide him with accommodation.

**[2]** However, on 13 February 2003 the defendant determined that he was aged at least 18. On that basis, he was not a child and the local authority owed him no duty under the 1989 Act.

**[3]** In these proceedings the claimant seeks the judicial review of that determination.

**[4]** Both parties have asked the court to give guidance as to the requirements of a lawful assessment by a local authority of the age of a young asylum seeker claiming to be under the age of 18 years. There are significant numbers of unaccompanied children entering the United Kingdom and claiming asylum. An acronym has come into use: UASC (unaccompanied asylum-seeking child).

THE FACTS

**[5]** The claimant's case is as follows. He was born in the Ivory Coast on 6 February 1986. His father was a Catholic; his mother a Muslim. She was Senegalese. He was educated in part in Catholic schools and confirmed into the Catholic faith in 2000. His mother died in 2001 and was buried in Senegal. His

father and he went to Senegal for the funeral, and while there his father was murdered. He then spent a year living on the streets in Senegal. He speaks French, but not English.

[6] The claimant states that he arrived in the United Kingdom from Senegal on 1 February 2003. On 7 February 2003 he was taken to the Refugee Council, which secured accommodation for him for the weekend.

[7] On Monday 10 February 2003 he applied for asylum at Croydon. He could not name the airport where he had arrived in this country. The National Asylum Support Service (NASS) decided that he was not a minor and should be treated as an adult; they refused him support on the ground that they were not satisfied that he had made his asylum claim as soon as reasonably practicable after his arrival in the United Kingdom.

[8] On 12 February 2003 the Refugee Council referred the claimant to the defendant borough for assistance under s 17 of the 1989 Act. The defendant did not assess him immediately, and asked him to return on 13 February 2003.

[9] On that day, he was interviewed by Christine Rodney, a social worker of the defendant's Department of Housing and Social Services. He had with him the NASS letter of 10 February 2003 stating that the Home Secretary did not consider him to be a minor and refusing him support, and he produced it to Ms Rodney. The duration of the interview is in issue, the claimant estimating it at 25–30 minutes and Ms Rodney at 45 minutes, but it is accepted by both sides that my decision cannot turn on this issue. Ms Rodney does not speak French. The interview was conducted through an interpreter on the other end of a telephone: Miss Rodney would give the interpreter the question, the telephone was then passed to the claimant for him to hear the French translation and to give his answer, and the telephone would then be passed to Ms Rodney for her to hear the translation of the claimant's answer and to ask the next question.

[10] Ms Rodney did not keep a verbatim record of the interview. She used a pro forma document, the Framework of Assessment for Children in Need and their Families, and completed it following the interview. She noted that he had gone to a Catholic school, but also that he identified with the Islamic faith and its culture. She took a family history, which included the murder of his father. She noted:

> 'Both (B's) parents are dead. His father was slayed by masked men. (B) was able to escape. (B) spent a year in Senegal on the streets before being assisted in coming to the UK.'

[11] Under the heading of 'Ethnicity', Ms Rodney noted: '(B) is a Black African, he is of the Catholic faith ...' Under the heading 'Summary', she noted:

> '(B) is a young man who claims to be 17 years old. (B's) appearance is that of a much older man. My calculated guess (is that) he is in his late teens. Unfortunately, (B's) history is that of ... experiencing loss and violence and this alone will affect him emotionally.'

[12] The original manuscript of the form shows that the number 17 was written over another number. The typescript made from the manuscript has the figure 16. Ms Rodney does not deal with this discrepancy in her witness statement. The most likely explanation is that the figure of 16 was originally written on the form, on the basis of her calculation of his age from the date of birth he had given and which she had written on p 1 of the form.

[13] Ms Rodney concluded that although the claimant was in need, he was not a child. Her assessment was as follows:

> '(B) is not a child in need. I am not disputing that he is in need in his own right. I have followed the procedure by undertaking an assessment and from this assessment I am taking the stance of the Home Office.'

[14] In her witness statement, Ms Rodney stated:

> '(B) has the physical appearance of a person older than 17. He does not have a youthful appearance and in my view is at least 18–20 years old. Throughout the interview (B) was very mature and confident. I am of the view that (B's) level of confidence is unusual for an unaccompanied minor.'

Mr Latham relied upon the difference between this statement and that in the form that he was 'in his late teens', and said that this part of her witness statement was an ex post facto attempt to justify her decision.

[15] Ms Rodney also referred in her witness statement to inconsistencies in the claimant's account of his history. She stated:

> 'There were a number of inconsistencies in (B's) account of his history which made (me) doubt his credibility as follows: (a) (B) did not remember what one of his educational diplomas was for. I am of the view that this is unusual for a 17-year-old. (b) (B) indicated that he was in school until four months ago but later in the interview said that he had been on the streets in Senegal for a year. (c) (B) said that four months ago he had to stop school because his parents could no longer afford the fees, yet he said that his father had died a year ago and his mother before that. (d) (B) said that he had been befriended by two strangers (one in the United Kingdom who took him to the Refugee Council and one in Senegal who took him to this country). (B) was unable to identify these people. I am of the view that this account was a little far-fetched.'

[16] At the end of the interview, Ms Rodney gave the claimant a decision letter, dated 13 February 2003, signed by her team manager. It stated:

> 'This Department has taken the stance of the Home Office. The Secretary of State does not accept that you are a minor and is satisfied that you should be treated as an adult. Accordingly, you will need to return to the Refugee Council and request that they advocate on your behalf with the Home Office.'

THE PARTIES' CONTENTIONS IN SUMMARY

[17] The claimant contends: (i) The inquiries made by the defendant were inadequate. It is not possible to determine age on the basis of appearance only, and the defendant should have arranged for a medical examination before making its decision. (ii) There was procedural unfairness, in that he should have been given an adequate opportunity to answer the points that the defendant was minded to hold against him. (iii) The defendant did not itself make a determination of the claimant's age, but simply adopted the conclusion of the Home Secretary.

[18] The defendant contends that the assessment process was rational, adequate and lawful; the decision made by it was a reasonable decision on a question of fact; and therefore that it cannot be impugned.

[19] Mr Latham also submitted that the determination of the age of the claimant was a determination of his civil rights within the meaning of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). If it is, clearly the decision of the defendant's social worker is not that of an independent and impartial tribunal. However, Mr Latham also accepted that judicial review of the defendant's decision would render the process as a whole convention compliant.

THE BACKGROUND

[20] In a case such as the present, the applicant does not produce any reliable documentary evidence of his date of birth or age. In such circumstances, the determination of the age of the applicant will depend on the history he gives, on his physical appearance and on his behaviour.

[21] There is no statutory procedure or guidance issued to local authorities as to how to conduct an assessment of the age of a person claiming to be under 18 for the purpose of deciding on the applicability of Pt III of the 1989 Act.

[22] The determination of an applicant's age is rendered difficult by the absence of any reliable anthropometric test: for someone who is close to the age of 18, there is no reliable medical or other scientific test to determine whether he or she is over or under 18. The *Health of Refugee Children—Guidelines for Paediatricians* published in November 1999 by the Royal College of Paediatrics and Child Health states (p 13 (para 5.6)):

> 'In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15–18, it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be a much as 5 years either side ... Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted. Any assessments that are made should also take into account relevant factors from the child's medical, family and social history.'

[23] Different people living in the same country, with the same culture and diet, mature physically and psychologically at different rates. It is difficult for a layman to determine the age of someone born in this country with any accuracy. A general practitioner is very unlikely to have the knowledge or experience to improve on the accuracy of an intelligent layman. To obtain any reliable medical opinion, one has to go to one of the few paediatricians who have experience in this area. Even they can be of limited help, as in the instant case and is referred to below.

[24] The difficulties are compounded when the young person in question is of an ethnicity, culture, education and background that are foreign, and unfamiliar, to the decision-maker.

[25] Shelter obtained a report on the claimant from Dr Colin Michie, a consultant paediatrician with a particular interest in investigating physiological changes with age who had conducted over 300 examinations in order to estimate age in the last year alone. He stated:

> 'It is possible that (B) has provided a correct birth date. His social history supports this year of birth with some accuracy. Further his height and weight, skin fold thickness, the skin signs seen in young adults and his dental examination were consistent with a chronological age of 18 ± 2 years when compared with published charts of these measures (see references). This observation is supported by non-objective assessment of the psychological maturity of the client during the interview. A more narrow error margin is not possible using these methods. The birth date given to me today by (B) falls within these wide error limits.'

[26] Mr Latham relied on Dr Michie's report as supporting the claimant's case. But it equally supports the defendant's: his range of 18 plus or minus two years is also consistent with Ms Rodney's assessment. Indeed, it is more supportive of Ms Rodney's assessment than the claimant's case, since the median age given by Dr Michie is 18.

[27] Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases.

[28] Given the impossibility of any decision-maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16–20, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the decision-maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin. Furthermore, physical appearance and behaviour cannot be isolated from the question of the veracity of the applicant: appearance, behaviour and the credibility of his account are all matters that reflect on each other.

[29] In this context, as in others, it would be naïve to assume that the applicant is unaware of the advantages of being thought to be a child. Draft *Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers* (issued by the London Boroughs of Hillingdon and Croydon) state:

> 'Assessment of age is a complex task, which is a process and not an exact science. This is further complicated by many of the young people attempting to portray a different age from their true age.'

It advises the decision-maker/interviewer: 'It is also important to be mindful of the "coaching" that the asylum seeker may have had prior to arrival, in how to behave and what to say.'

[30] The lack of a passport or other travel document may itself justify suspicion, as it did in the present case, particularly if the applicant claims to have entered this country overtly, for example through an airport, in circumstances in which a passport must be produced.

DECISIONS IN OTHER CONTEXTS

[31] This is not the only context in which decisions may have to be made as to whether a person is over 18. Where the person is not brought before the court to give evidence, s 99 of the Children and Young Persons Act 1933 applies. It does not expressly stipulate what inquiries are appropriate where there is a material dispute as to age. Section 152 of the Magistrates' Courts Act 1980 provides that where a person's age is material for the purposes of the provisions of that Act regulating the powers of a magistrates' court, his age at the material time shall be deemed to be or to have been 'that which appears to the court after considering any available evidence to be or to have been his age at that time'. Part I of the Criminal Justice Act 1982 is concerned with the treatment of young offenders, and s 1(6) of that Act makes similar provision in relation to the determination of a person's age by the court or the Home Secretary for the purposes of that Act. The wording of these provisions is indicative of the difficulty of precise and objective determination of age in the absence of reliable documentary evidence.

[32] Mr O'Brien sought to rely on the decision of the Divisional Court in *Wallworth v Balmer* [1965] 3 All ER 721, [1966] 1 WLR 16, in which, on a prosecution for knowingly selling liquor to a person under 18, the only evidence before the magistrate had been the appearance of the boys, who were present in court, to whom the liquor had been sold. Neither the prosecution nor the defence had sought to question the boys, and no evidence had been called as to their age. It was held that the magistrate, who was satisfied as to their age, had rightly convicted the defendant. I do not find that case of assistance. In the first place, the youth of the boys appears to have been obvious. Secondly, the defendant had the opportunity to question the boys or to call evidence as to their true age. He having failed to do so, the magistrate was entitled, indeed bound, to decide the case on the evidence before him. There could have been no complaint of lack of due process or of an unfair procedure.

OTHER GUIDANCE AS TO THE APPROPRIATE PROCEDURE

[33] A draft document entitled *Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers*, issued by the London Boroughs of Hillingdon and Croydon, who are participating in a pilot project for practitioners in social work with unaccompanied asylum-seeking children, makes sensible suggestions. It states that it is beneficial to have two assessing workers: clearly, two heads may be better than one. It implies a preference for age assessment to be undertaken over a period of time and involve other professionals, such as residential social worker staff, teachers, and other young people. It states:

> 'It is very important to ensure that the young person understands the role of the assessing worker, and comprehends the interpreter. Attention should also be paid to the level of tiredness, trauma, bewilderment and anxiety that may be present for the young person. The ethnicity, culture, and customs of the person being assessed must be a key focus throughout the assessment. It is also important to be mindful of the "coaching" that the asylum seeker may have had prior to arrival, in how to behave and what to say. Having clarified the role of the social services, it is important to engage with the person and establish as much rapport as the circumstances will allow. This process is sometimes known as "joining". The assessing worker needs to acknowledge with the young person that they will have had to already answer many

questions, and that it may be difficult and distressing to answer some of the questions. In utilising the assessment framework, the practitioner should ask open-ended non leading questions. It is not expected that the form should be completed by systematically going through each component, but rather by formulating the interview in a semi-structured discussion gathering information at different stages, the use of circular questioning is a useful method as it is less obvious to the person being assessed that the questions relate directly to age and hence may reveal a clear picture of age related issues.'

**[34]** The draft includes a form for use when assessing the age of an applicant, with spaces for information as to his or her physical appearance and demeanour, manner of interaction with the assessing worker, social history and family composition, developmental considerations (ie information about the types of activities that the person was involved in before arriving in the United Kingdom), education, his or her level of independence and self-care, health and medical assessment, information from documentation and other sources and, finally, the conclusion of the assessment. In relation to the health and medical assessment, the form comments that 'A medical opinion and view on age will always be helpful', a statement with which it is difficult to quarrel. Side notes make helpful but commonsense suggestions, such as 'Life experience and trauma may impact on the ageing process'.

HOME OFFICE POLICY

**[35]** *Policy Bulletin 33: Age Disputes*, published by the Immigration and Nationality Directorate of the Home Office, states:

'8.1 If the applicant claims to be a minor but his/her appearance *strongly* suggests that s/he is over 18 the applicant will be treated as an adult until such time as credible documentary or medical evidence is produced which demonstrates that s/he is the age claimed. In borderline cases the Immigration Service will continue to give the applicant the benefit of the doubt and to deal with the applicant as a minor. In accordance with existing policy they will continue to inform the Refugee Council's Panel of Advisers of anyone who has claimed to be a minor, even when the age is disputed and the decision has been taken to treat the applicant as an adult ...

9.1 An asylum seeker who declares on arrival that s/he is under 18, and is given the benefit of the doubt by the Immigration Service, will be referred to the local authority social services department (SSD) for support under the Children Act 1989. The SSD will conduct an assessment and on the basis of that assessment may reach the conclusion that the person is aged over 18.

9.2 Where an application is received from an asylum seeker who declares that s/he is under 18, but it is accompanied by a letter from the SSD stating that, in their opinion, the person is aged over 18, s/he should be deemed to be an adult for NASS purposes until such time as s/he can prove otherwise. The burden of proof lies with the asylum seeker. It is up to him/her to prove that s/he is a minor. The applicant should be advised accordingly. A proforma letter, to be adapted as necessary, is attached at Annex A.'

The emphasis is in the original.

DISCUSSION

[36] The assessment of age in borderline cases is a difficult matter, but it is not complex. It is not an issue which requires anything approaching a trial, and judicialisation of the process is in my judgment to be avoided. It is a matter which may be determined informally, provided safeguards of minimum standards of inquiry and of fairness are adhered to.

[37] It is apparent from the foregoing that, except in clear cases, the decision-maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision-maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision-maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.

[38] I do not think it is helpful to apply concepts of onus of proof to the assessment of age by local authorities. Unlike cases under s 55 of the 2002 Act, there is in the present context no legislative provision placing an onus of proof on the applicant. The local authority must make its assessment on the material available to and obtained by it. There should be no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child. Of course, if an applicant has previously stated that he was over 18, the decision-maker will take that previous statement into account, and in the absence of an acceptable explanation it may, when considered with the other material available, be decisive. Similarly, the appearance and demeanour of the applicant may justify a provisional view that he is indeed a child or an adult. In an obvious case, the appearance of the applicant alone will require him to be accepted as a child; or, conversely, justify his being determined to be an adult, in the absence of compelling evidence to the contrary.

[39] However, the social services department of a local authority cannot simply adopt a decision made by the Home Office. It must itself decide whether an applicant is a child in need: i e whether the applicant is a child, and if so whether he or she is in need within the meaning of Pt III of the 1989 Act. A local authority may take into account information obtained by the Home Office; but it must make its own decision, and for that purpose must have available to it adequate information. It follows that if all the defendant had done was, as stated by its letter of 13 February 2003, to have taken the stance of the Home Office, its decision would have been unlawful.

[40] In fact, however, the evidence satisfies me that the defendant did make its own assessment. That it did so, and the reasons given for its decision, are inconsistent with the letter of 13 February 2003. The issue is raised by Mr Latham whether in these circumstances the court should permit the defendant to justify its decision by reference to matters that were not referred to in that letter.

[41] In my judgment in *Nash v Chelsea College of Art and Design* [2001] EWHC 538 (Admin), [2001] All ER (D) 133 (Jul), (2001) Times, 25 July, I sought to summarise the principles applicable to this issue.

> '[34] In my judgment, the following propositions appear from the above authorities: (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in [*R v*

*Northamptonshire CC, ex p W* [1998] ELR 291 at 299]) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all will the court accept subsequent evidence of the reasons. (ii) In other cases, the court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap: (a) Whether the new reasons are consistent with the original reasons. (b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee. (c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b). (d) The delay before the later reasons were put forward. (e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.

[35] To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the court may be less demanding, and readier to accept subsequent reasons.

[36] Secondly, the court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members.'

**[42]** Subsequently, in *R (on the application of Ashworth Mental Hospital) v Mental Health Review Tribunal for West Midlands and North West Region* [2001] EWHC 901 (Admin) at [56], (2002) 5 CCL Rep 78 at [56], I accepted that the statement at [34](i) of my judgment in *Nash*'s case was too widely expressed. Reasons that merely elucidate reasons given contemporaneously with a decision will normally be considered by the court (see *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302).

**[43]** Unlike *Ex p Ermakov*, this is not a case in which statute required that reasons be given for the decision, let alone that reasons be given at the same time as the decision. The factors to which I referred in *Nash*'s case point strongly to the admission of the defendant's evidence as to its true reasons for its decision. In particular, the original reason given can be ascribed to a lack of thought when the letter was written, and on that basis is not wholly in conflict with the evidence now put forward: compare that part of the assessment form quoted at [13], above with the letter of 13 February 2003 quoted at [16], above. There has been no undue delay; Ms Rodney is not a lawyer and a degree of latitude is appropriate when considering the letter she drafted. Most importantly, it is clear that the evidence before me does represent the true basis of, and gives the reasons for, Ms Rodney's decision, and in my judgment those reasons are adequate. The relatively minor inconsistency referred to at [14], above does not lead me to doubt the genuineness of her notes or of the reasons she has put forward for her decision.

[44] On this basis, the issues are: was the information available to the defendant adequate, and was the decision procedurally fair?

[45] However, I accept Mr Latham's submission that a local authority is obliged to give adequate reasons for its decision that an applicant claiming to be a child is not a child, and who is therefore refused support under Pt III of the 1989 Act. The consequences of such a decision may be drastic for the applicant, and he is entitled to know the basis for it, and to consider, if he can, with legal assistance if it is available to him, whether the decision is a lawful one. In my judgment this is the position at common law, irrespective of the issue as to the applicability of art 6 of the convention, as to which I say nothing. It is noteworthy that in the analogous context of a decision by the Home Secretary to refuse support under s 55 of the 2002 Act, in *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWHC 195 (Admin) at [21], [2003] All ER (D) 251 (Feb) at [21], (2003) 100(15) LSG 26; *affd* [2003] EWCA Civ 364 at [80], [2003] 2 All ER 905 at [80], [2003] 3 WLR 365, the Home Secretary accepted that he was under a duty to give reasons for a decision adverse to an asylum seeker. I see no relevant distinction between those cases and the present. I bear in mind that the hypothesis is that the applicant is determined to be over 18, and therefore able to comprehend (if necessary in translation) the reasons given to him.

[46] The availability of an internal review or complaints procedure, to which I refer below, does not obviate the need for reasons: reasons are required so that the applicant may make an informed decision whether to ask the local authority to review its decision or to make a complaint concerning the decision, quite apart from the need for him (or rather a legal adviser) to be able to ascertain whether the decision is lawful or amenable to judicial review.

[47] Mr O'Brien told me that in practice reasons are given, but submitted that it is sufficient for a local authority to state that it refuses to provide the applicant with support under the 1989 Act because he is not a child. In my judgment, such a brief statement is a statement of the decision of the local authority, not of the reasons for its decision.

[48] However, in general, the reasons need not be long or elaborate. On what is ultimately a simple if difficult issue, it should not be necessary to go to the lengths seen in, for example, adjudicators' determinations in asylum cases. In the present case, it would have been sufficient to have stated that the decision was based on the appearance and behaviour (or demeanour) of the claimant, and on the matters referred to in Ms Rodney's statement (referred to at [15], above), which led her to conclude that he was not truthful.

THE ADEQUACY OF THE INFORMATION AVAILABLE TO THE DEFENDANT

[49] Mr Latham submitted that the information available to the defendant, and its procedure, were inadequate. If so, the decision reached by the defendant would be liable to be set aside as being one that no reasonable authority could have arrived at in the circumstances. He submitted that the form used by Ms Rodney was unsuited to the inquiry on which she was engaged: it was designed for an inquiry as to whether a child and his family were in need, not whether the person claiming to be a child is such. He suggested that the questions put to the claimant, and his answers, should have been noted verbatim, by Ms Rodney or by someone else present during the interview, so that the claimant's legal advisers and the court could be assured that the questions were open-ended, fair and appropriate. The procedure used, involving the use of an interpreter at the other end of the telephone, was replete with risk of confusion

and misunderstanding. He suggested that medical evidence was required, and should have been obtained. He pressed the advantages of observation of the applicant over a period of time, preferably by a number of professionals, as mentioned at [33], above.

**[50]** In my judgment, the court should be careful not to impose unrealistic and unnecessary burdens on those required to make decisions such as that under consideration. Judicialisation of what are relatively straightforward decisions is to be avoided. As I have stated, in such cases the subject matter of decision is not complex, although in marginal cases the decision may be a difficult one. Cases will vary from those in which the answer is obvious to those in which it is far from being so, and the level of inquiry unnecessary in one type of case will be necessary in another. The court should not be predisposed to assume that the decision-maker has acted unreasonably or carelessly or unfairly: to the contrary, it is for a claimant to establish that the decision-maker has so acted.

**[51]** Ms Rodney did not make her decision on the basis of the appearance and demeanour of the claimant alone. It is not suggested that the claimant was unaware of the purpose of his interview. She took a full family and personal history, including the claimant's educational history. It was not necessary to obtain a medical report, which for reasons stated above would not have been helpful and was unlikely to have been so. It was not necessary for the local authority to provide support for a period of some days or weeks to give the opportunity for others to observe the claimant, and for him to be observed and assessed over that period, if the information available was sufficient for a decision to be made, which it was.

**[52]** However, where an interpreter is required, it is obviously greatly preferable for him or her to be present during the interview. The procedure adopted in this case carried with it the risk of misunderstandings, and great care was required of Ms Rodney and of the interpreter to ensure that no mistakes were made. As far as I am aware, the interpreter made no note, in either English or French, of the questions asked by Ms Rodney or of the claimant's answers, either in verbatim or rolled up form (i e with the questions and answers combined). Such a note by the interpreter would have been highly relevant to the claimant's suggestions that what he said was not correctly noted, or was misunderstood, by Ms Rodney, who heard his answers at second hand. I am concerned at the contradiction between Ms Rodney's note that the claimant 'identifies with the Islamic faith and its culture' and her later note that 'he is of the Catholic faith'. The contradiction is not referred to in her witness statement, and was not one of the reasons for her decision to reject the claimant's credibility. If she correctly noted his statements, he made an obvious and unintelligent contradiction. In view of my decision in this case, I need say no more about it.

**[53]** In cases such as the present, the social worker must of course bear in mind her unfamiliarity with the background of the applicant. There is no reason to believe that Ms Rodney did not do that. I should also mention that her sympathy with the claimant's situation is apparent from her notes.

**[54]** In my judgment, it is not necessary as a matter of law for there to be a verbatim note of the interview; but such a note would enable the court to be more confident of its accuracy and to address any suggestion that the interviewer put words into the mouth of the applicant by asking leading questions that led the young applicant to accept what was suggested to him. It is not necessary for the note to be countersigned by the applicant, although again that may be helpful for

a a local authority evidentially. The claimant complains that he was not asked to countersign Ms Rodney's notes, but since he cannot speak English, there would have been no point in asking him to do so. Indeed, it would have been thoughtless to have asked him to countersign them.

OTHER REQUIREMENTS OF FAIRNESS

b **[55]** So far as the requirements of fairness are concerned, there is no real distinction between cases such as the present and those considered in *R (on the application of Q) v Secretary of State for the Home Department* [2003] 2 All ER 905, [2003] 3 WLR 365. It follows that the decision-maker must explain to an applicant the purpose of the interview. It is not suggested that that did not happen in this case. If the decision-maker forms the view, which must at that stage be a c provisional view, that the applicant is lying as to his or her age, the applicant must be given the opportunity to address the matters that have led to that view, so that he can explain himself if he can. In other words, in the present case, the matters referred to at [15], above should have been put to him, to see if he had a credible response to them. The dangers of misunderstandings and mistranslations d inherent in the absence of the interpreter reinforced the need for these matters to be put, to give the claimant an opportunity to explain.

**[56]** The claim form clearly alleged that the claimant should have been given an adequate opportunity to answer the points that the defendant was minded to hold against him. Ms Rodney does not suggest that this was done. It follows that her decision should be set aside unless the defendant has established that his e responses to the matters on which she relied could not reasonably have affected her decision. The claimant addresses these matters in his second witness statement. Not surprisingly, he gives no explanation of the implausibility referred to at [15](d), above. His explanations of the matters referred to at (b) and (c) are unsatisfactory, and in essence amount to an assertion that Ms Rodney f must have misunderstood him. It is the risk that there was some misunderstanding of what he said, a risk that is accentuated by the inconsistency between her notes of the two statements as to his religion to which I have referred, and the possibility that he might have been able to rectify any misunderstanding if the matters relied upon had been put to him, that leads me to conclude, albeit with considerable hesitation, that the defendant has not g satisfied the onus of establishing that even if they had been put to the claimant, the same decision would inevitably have been made.

**[57]** Mr O'Brien submitted that this case is to be distinguished from *Q*'s case because of the availability of the complaints and review procedure required by s 26 of the 1989 Act and regulations made under it, which provide a suitable h alternative remedy to judicial review. Mr Latham countered that the complaints procedure is not a suitable remedy, because someone in the position of the claimant requires immediate relief. Section 26(3)(a) requires a local authority to establish a procedure for investigating any complaint or representation made by 'any child ... who is not being looked after by them but is in need'. The Representations Procedure (Children) Regulations 1991, SI 1991/894 require a j response to a representation or complaint within 28 days of its receipt, and this is indeed too long a period in the context of a child in need who has no available accommodation or support. The availability of internal review was not referred to by the defendant in correspondence or in the defendant's acknowledgement of service, and I have no evidence before me as to the complaints or review procedure operated by the defendant, and in particular how it would have been

operated if it had been implemented by the claimant. In these circumstances, I am not satisfied that there was a suitable alternative procedure available to the claimant to challenge the defendant's decision. *a*

[58] In the result, therefore, the defendant's decision will be set aside. The defendant must reconsider the age of the claimant. It will do so on the information now available to it.

*b*

*Order accordingly.*

Dilys Tausz Barrister.

# R v Wacker

## [2002] EWCA Crim 1944

COURT OF APPEAL, CRIMINAL DIVISION
KAY LJ, COLMAN AND OUSELEY JJ
14 JUNE, 31 JULY 2002

*Criminal law – Manslaughter – Involuntary manslaughter – Joint unlawful activity – Whether person criminally responsible for death of others engaged in joint unlawful activity.*

*Sentence – Manslaughter – Proper approach to sentencing where death caused in context of other criminal activity.*

The defendant drove a lorry from Rotterdam to Zeebrugge and embarked on a vehicle ferry to Dover. The lorry had been loaded with a container in which 60 illegal immigrants were concealed. The ventilation to the container was by means of a small vent. Those inside the container had been told that for part of the journey the vent would be shut and that whilst it was shut, to assist in avoiding detection, they must remain silent. The vent was shut several kilometres before the lorry arrived at Zeebrugge and remained closed for over five hours. Fifty-eight of the people hidden in the container died from lack of air. The defendant's fingerprints were later found on the outside covering of the vent. Customs officers stopped the lorry as it was disembarking from the ferry, searched it, and discovered the bodies and the two survivors. The defendant was tried and convicted of conspiracy to facilitate the entry into the United Kingdom of illegal immigrants and of 58 offences of manslaughter. He was sentenced to eight years' imprisonment for the conspiracy and to six years' imprisonment on each of the manslaughter charges. The six-year sentences were to run concurrently but to be consecutive to the eight-year sentence. At his trial the Crown accepted the general proposition that the principle of ex turpi causa non oritur actio applied in determining whether there was a duty of care in considering a charge of manslaughter by gross negligence just as it did in determining whether a civil claim for damages for negligence could succeed. The judge held that a proper distinction could be drawn between those criminal activities for which the passengers were solely responsible, those for which there was a shared responsibility, and those for which the defendant and others were solely responsible. He ruled that the defendant's failure to ensure that the concealed illegal immigrants had sufficient air was incidental to their role but critical to the defendant's own role so that, in establishing the necessary duty of care, since the immigrants would be 'relying' on a matter incidental to their criminality, they would not be 'relying' upon their own unlawful conduct. The defendant appealed against the manslaughter convictions contending that no duty of care could be said to have been owed by him to the illegal immigrants because they shared the same joint illegal purpose; and that the judge had been wrong in his directions to the jury as to the circumstances in which a duty of care would arise. He also appealed against sentence. The Attorney General referred to the court the sentences for manslaughter as being unduly lenient, although he did not contend that the total sentence should be increased but only to the way in which the total of 14 years had been made up.

**Held** – (1) As a matter of public policy there was no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time or because there might have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise. Nor could the duty to take care be permitted to be affected by the countervailing demands of the criminal enterprise. It was not necessary to examine whether the distinction between matters for which the immigrants were responsible and those incidental to their illegality was a proper one; how matters might have been characterised in a civil claim had no relevance to the issue that the jury had to decide. Accordingly, the approach taken in the court below had been too favourable to the defendant. In every other respect the necessary ingredients of the offences of manslaughter had been properly left to the jury and there were no reasons to doubt the safety of those convictions (see [35], [39], [40]–[42], below).

(2) The element of the unlawful activity in the setting of which manslaughter occurred was relevant to the sentence. The sentence which would have been appropriate had no death occurred should be considered and then the extent to which it should be increased to reflect the very serious circumstances of death. Using that approach meant there was a danger of punishing the underlying criminality twice if consecutive sentences were imposed and therefore concurrent sentences should be passed. Accordingly, each of the sentences of six years' imprisonment for manslaughter would be increased to 14 years and would run concurrently with the sentence of eight years for conspiracy (see [51]–[54], below).

**Notes**

For responsibility for recklessness or gross negligence, for sentencing for manslaughter, and for the duty of care owed each other by wrongdoers, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 447 and 437 n1 and 33 *Halsbury's Laws* (4th edn reissue) para 608, respectively.

**Cases referred to in judgment**

*Attorney General's References (Nos 19, 20 and 21 of 2001)* [2001] EWCA Crim 1432, [2002] 1 Cr App (R) S 136.
*Jackson v Harrison* (1978) 138 CLR 438, Aust HC.
*R v Adomako* [1994] 3 All ER 79, [1995] 1 AC 171, [1994] 3 WLR 288, HL.
*R v Brown* [1993] 2 All ER 75, [1994] 1 AC 212, [1993] 2 WLR 556, HL.
*Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, CA.

**Cases referred to in skeleton arguments**

*Ashton v Turner* [1980] 3 All ER 870, [1981] QB 137, [1980] 3 WLR 736.
*Beresford v Royal Insurance Co Ltd* [1938] 2 All ER 602, [1938] AC 586, HL.
*Colburn v Patmore* (1834) 1 Cr M&R 73, 149 ER 999.
*Cross v Kirkby* (2000) Times, 5 April, [2000] CA Transcript 321.
*Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23, [1990] 1 QB 1, [1988] 2 WLR 517, CA.
*Gala v Preston* (1991) 172 CLR 243, (1991) 65 ALJR 366, Aust HC.
*Hall v Hebert* [1993] 2 SCR 159, Can SC.
*Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787, [2001] 1 WLR 225, CA.
*Hillen v ICI (Alkali) Ltd* [1934] 1 KB 455, CA; *affd* [1936] AC 65, [1935] All ER Rep 555, HL.

*Holman v Johnson* (1775) 1 Cowp 341, [1775–1802] All ER Rep 98, 98 ER 1120.
*Italiano v Barbaro* (1993) 114 ALR 21, Aust Fed Ct.
*Pitts v Hunt* [1990] 1 QB 302, [1989] 3 WLR 795; *affd in part* [1990] 3 All ER 344, [1991] 1 QB 24, [1990] 3 WLR 542, CA.
*R v Bateman* (1925) 19 Cr App R 8, [1925] All ER Rep 45, CCA.
*R v Khan (Rungzabe)* [1998] Crim LR 830, CA.
*R v Sinclair* [1998] All ER (D) 416, (1998) 148 NLJ 1353, CA.
*R v Singh (Gurphal)* [1999] Crim LR 582, CA.
*Revill v Newbery* [1996] 1 All ER 291, [1996] QB 567, [1996] 2 WLR 239, CA.
*Sacco v Chief Constable of South Wales Constabulary* [1998] CA Transcript 1382.
*Shelley v Paddock* [1980] 1 All ER 1009, [1980] QB 348, [1980] 2 WLR 647, CA.
*Smith v Jenkins* (1970) 119 CLR 397, Aust HC.
*Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2000] 1 All ER (Comm) 1, CA; *rvsd* [2002] UKHL 43, [2003] 1 All ER 173, [2003] 1 AC 959, [2002] 3 WLR 1547.
*Thackwell v Barclays Bank plc* [1986] 1 All ER 676.
*Tinsley v Milligan* [1992] 2 All ER 391, [1992] Ch 310, [1992] 2 WLR 508, CA; *affd* [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.
*Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249, [2002] 3 All ER 78, [2002] 1 WLR 218.
*Weir v Wyper* 1992 SLT 579, Ct of Sess.
*Winnik v Dick* 1984 SLT 185, Ct of Sess.

**Appeal against conviction, application for leave to appeal against sentence, application for leave to refer sentence**

The defendant, Perry Wacker, appealed with leave granted by McCombe J, against his conviction, on 5 April 2001 in the Crown Court at Maidstone before Moses J and a jury, for conspiracy to facilitate the entry of illegal immigrants into the United Kingdom and for 58 counts of manslaughter. He also applied for leave to appeal against his sentences of eight years' imprisonment for the conspiracy and six years' imprisonment for each of the convictions for manslaughter running concurrently with each other but consecutively to the eight-year sentence. The Attorney General, by an amended reference dated 29 May 2001, applied for leave to refer the sentences for manslaughter to the court as being unduly lenient, pursuant to s 36 of the Criminal Justice Act 1988. The facts are set out in the judgment of the court.

*Michael Lawson QC* and *Simon Russell Flint* (instructed by the *Registrar of Criminal Appeals*) for the defendant.
*Victor Temple QC* and *Duncan Penny* (instructed by the *Crown Prosecution Service*) for the Crown.
*Orlando Pownall QC* (instructed by the *Crown Prosecution Service*) for the Attorney General.

*Cur adv vult*

31 July 2002. The following judgment of the court was delivered.

**KAY LJ.**

[1] On 18 June 2000, Customs and Excise officers stopped a lorry which was disembarking from a ferry at Dover. When they examined a container loaded

onto the trailer, they made the horrific discovery that it contained the bodies of 58 illegal immigrants of Chinese origin and two other such immigrants who were still alive. This appeal raises the issue of whether the lorry driver who was in sole charge of the lorry could properly be held responsible for the manslaughter of each of those who died and if so, whether the sentence imposed upon him, a total of 14 years' imprisonment, was a proper sentence.

**[2]** The defendant, Perry Wacker, a Dutch national aged 34, was tried in the Crown Court at Maidstone before Moses J and a jury. On 5 April 2001 he was convicted of conspiracy to facilitate the entry into the United Kingdom of illegal immigrants and of 58 offences of manslaughter. He was sentenced to eight years' imprisonment for the conspiracy and to six years' imprisonment on each of the manslaughter charges, the six-year sentences being ordered to run concurrently with one another but consecutively to the eight-year sentence. The total sentence was thus 14 years' imprisonment.

**[3]** The defendant appeals against each of the manslaughter convictions by leave of the single judge. He does not appeal against his conviction on the conspiracy charge. He also applies for leave to appeal against sentence, his application having been referred to the full court by the single judge. The Attorney General has also applied to the court for permission to refer to the court the manslaughter sentences as being unduly lenient although he does not seek to persuade the court that the total sentence of 14 years' imprisonment should be increased.

**[4]** Because of the extent of the loss of life, the facts of the case, not surprisingly, attracted a great deal of public attention. All 60 of those who were in the container were on their way from China with the intention of gaining illegal entry into the United Kingdom. Their journey was organised by others, whose involvement was manifestly to make a profit out of the desire of people in China to leave that country and settle elsewhere. Each of the immigrants eventually arrived in Holland and it was there that they were loaded into the container to make the fateful journey by ferry to Dover. There was evidence placed before the jury to connect the defendant with the preparations for that journey, which, since he does not appeal against his conviction for the conspiracy, it is unnecessary to detail.

**[5]** Evidence about the journey was given by the two survivors and this was supplemented by information available from the lorry's tachograph. From this information the following picture emerged. The Chinese immigrants were loaded into the lorry at a place near Rotterdam. The container had been adapted by the construction of a wooden framework partitioning it into two distinct areas. The immigrants were required to go behind the partition and that part of the container nearer the container door was loaded with tomatoes to conceal the illegal human cargo behind. The container was then sealed and it was not possible to open the door from the inside.

**[6]** When the journey commenced the only ventilation to the container came from a small metal window or vent in the front of the container. The container was intended for use as a refrigerated container and accordingly it was constructed with seals in such a way as not to allow any air to enter the container other than through the vent when it was open. Those inside the lorry were told that the journey would be uncomfortable and that for part of the time the vent would be shut. They were advised that when it was opened, they could talk quietly but when it was shut they must be silent. The purpose of shutting the

vent and of the instructions to remain silent was clearly to assist in avoiding detection.

[7] The tachograph recorded the journey as starting at 2.53 pm (continental time). There were several short stops and then at 6.49 pm (continental time), the lorry stopped some four-and-a-half kilometres from Zeebrugge. The two survivors told how at this stage the small vent was shut by someone from the outside. The defendant's fingerprints were found on the outside covering of the vent.

[8] At 7.01 pm (continental time) the lorry resumed its journey, boarding the ferry at Zeebrugge. The ferry crossing to Dover was anticipated to take four-and-a-half hours. The survivors described how approximately two hours after the vent had been shut, those inside began to become distressed because it was difficult to breathe. One described how eventually there was a lot of screaming but no one had come to help them.

[9] The ferry trip took somewhat longer than was anticipated and it was not until 11.14 pm (English time—which was 12.14 am continental time) that disembarkation at Dover commenced. Very soon afterwards the lorry was driven off the ferry and was stopped by the customs officers. The container was then searched and the dreadful loss of life was discovered. The deaths had been caused by the lack of air in the container.

[10] At trial, the defendant denied any knowledge of the illegal immigrants in the container. He claimed that he was simply driving what he believed to be a load of tomatoes from Rotterdam to Bristol.

[11] At the conclusion of the prosecution case, Mr Michael Lawson QC on behalf of the defendant submitted to the trial judge that there was no case for the defendant to answer on each of the manslaughter charges. He took as the foundation for his submission, the observation of Lord Mackay of Clashfern LC in *R v Adomako* [1994] 3 All ER 79 at 86–87, [1995] 1 AC 171 at 187:

> '... in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime.'

[12] Mr Lawson therefore submitted that the first question to be decided was whether applying 'the ordinary principles of the law of negligence', the defendant owed to those in the container a duty of care. He submitted that one of the general principles of the law of negligence, known by the Latin maxim of ex turpi causa non oritur actio, was that the law of negligence did not recognise the relationship between those involved in a criminal enterprise as giving rise to a duty of care owed by one participant to another. In his ruling Moses J summarised Mr Lawson's submission on the facts of the case:

> 'Mr Lawson contends that a failure to produce sufficient air or ventilation stems directly from the criminal activity in which both driver and passengers were engaged. It was essential to the criminal activity of all that secrecy be maintained. The closure of the vent, and the failure to reopen it during the course of the journey on board the ferry, which caused the death by suffocation of the 58 occupants, arose directly, he contends, from an enterprise the very essence of which was that secrecy was maintained.

Secrecy could only be maintained by keeping the vent closed, since if it was open voices might be heard and, as the evidence of at least one of the survivor's revealed, the occupants had been told only to speak when the vent was open. Moreover, it is not possible for the court to determine the appropriate standard of care to be exercised by the driver. What is the appropriate standard of care to be applied in the case of a driver seeking, as part of a joint criminal exercise, to conceal the presence of 60 occupants of his lorry? In other words, the criminal activity on which all were engaged does, so he submits, have a bearing upon the appropriate standard of care. That standard cannot be ascertained without regard to the clandestine nature of the joint criminal activity. It was the driver's job to increase the chance of entry without detection, the very object which the passengers themselves sought to achieve.'

**[13]** Mr Temple QC on behalf of the Crown accepted the general proposition that the principle of ex turpi causa applied to determining whether there was a duty of care in considering a charge of manslaughter just as it did in determining whether a civil claim for damages for negligence could succeed. He submitted, however, that the failure to take reasonable steps to ensure that a supply of sufficient air to breathe was wholly incidental to the criminal enterprise upon which the passengers were engaged and as such the principle would not prevent a claim in negligence. The standard of care could be identified. It was the ordinary standard of care to be expected of a competent and experienced heavy goods vehicle driver carrying 60 people in the container pulled by the tractor he was driving.

**[14]** Moses J in his ruling accepted the concession made by the prosecution that the principle of ex turpi causa applied to a charge of manslaughter. He said:

'There is no doubt but that the ordinary principles of the law of negligence applied to ascertain whether the defendant owed a duty of care to the victims (see *R v Adomako*). Thus, in order to make good an allegation of manslaughter, the Crown must establish that under ordinary civil law principles the defendant owed a duty of care to the occupants of the lorry. This introduces a certain air of unreality to the problem. This is not a case where the relatives of the occupants, or the surviving occupants of the lorry, are seeking to claim compensation. It is a criminal case, where the state is seeking to vindicate a wrong done not primarily to the victims but to the state as a whole. None the less, as all acknowledge, the fact that that issue arises in the context of manslaughter as opposed to a claim in tort makes no difference.'

**[15]** Clearly the judge's view that 'an air of unreality' was introduced to the problem was right. It is only necessary to consider the test as to the standard of care that had been suggested by the prosecution to see that wholly artificial concepts were being introduced. It will be necessary to examine later whether this view accepted at trial as being the law relating to manslaughter is really right.

**[16]** However, having ruled that the concept of ex turpi causa was as much a part of the law of manslaughter as other principles of the law of negligence, the judge then considered whether the Crown's submission that the principle had no application to the facts of the case was right. This involved a careful examination

of the authorities relating to civil claims for damages for negligence involving some form of unlawful activity. The judge said:

> 'I derive from these authorities the following propositions. (1) No duty of care can be established absent the ability of the court to determine an appropriate standard of care. (2) The court cannot determine a standard of care, that is the content of the duty of care, in circumstances where it is compelled to weigh and adjust the conflicting demands of joint criminal activity and the safety of the participants in order to identify the appropriate standard of care. In short, the question is whether the criminal activity on which the plaintiff is engaged, or for which the plaintiff shares responsibility, bears upon the standard of care reasonably to be expected of the participants from whom he is seeking to claim.'

[17] He then referred to further authority and quoted from the judgment of Bingham LJ in *Saunders v Edwards* [1987] 2 All ER 651 at 666, [1987] 1 WLR 1116 at 1134:

> '... I think that on the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn. Where the plaintiff's action in truth arises directly ex turpi causa, he is likely to fail ... Where the plaintiff has suffered a genuine wrong, to which allegedly unlawful conduct is incidental, he is likely to succeed ...'

[18] On the facts of the case, Moses J concluded that a proper distinction could be drawn between those criminal activities for which the passengers were solely responsible, those for which there was a shared responsibility and those for which the drivers and others were solely responsible. The driver's failure to ensure that the passengers had sufficient air was, he ruled, incidental to the passengers' role but, implicitly, critical to his own role. Thus since the passengers would be 'relying' on a matter incidental to their criminality, they would not be 'relying' upon their own unlawful conduct. Accordingly he ruled that there was a case to answer.

[19] When the judge summed the case up to the jury, he explained to them that the allegation was that the death of the 58 who died was caused by 'gross negligence amounting to criminal negligence'. He then explained what was meant by negligence saying:

> 'In order to prove negligence the prosecution must make you sure that Mr Wacker, the driver, owed a duty of care to each and every passenger in the container; if he owed it to one he owed it to all. He owed a duty of care to each passenger in the container and that his conduct amounted to a breach of that duty. That that breach caused the death of those 58 passengers and that having regard to the risk of death involved the conduct of the defendant was so bad, so grossly negligent, as to amount in your judgment to a criminal failure.'

He then looked at each of the elements in turn.

[20] As to duty of care, he explained how in certain circumstances in everyday life one person owes a duty to take reasonable care for the safety of another. He illustrated the general concept by reference to the duty upon a motorist and that upon a pedestrian and explained that the essential feature was that the person

ought reasonably to have foreseen that their conduct, whether it was an act or omission, might cause injury to that other person. *a*

[21] He then said:

> 'Thus, in this case, subject to one qualification I will come to, if the driver knew that he was carrying 60 passengers and ought reasonably to have foreseen that his failure to take any reasonable care to see that there was adequate air or ventilation to sustain life was supplied to the container so that it might result in injury or loss of life, then that driver owed a duty of care to each and every occupant.' *b*

[22] He then turned to the one qualification to which he had referred and dealt with the principle of ex turpi causa saying: *c*

> 'There are circumstances where the law will not recognise a duty of care. A person is not allowed to sue for negligence, bring an action in a court, alleging a failure to take care if that failure arises out of his own criminal action; note those words, "arising out of his own criminal action".'

He gave the well-known illustration of one safebreaker blowing up another and *d* continued:

> 'Why is that relevant in this case? It is relevant because of an argument adopted and advanced by Mr Lawson on behalf of Mr Wacker that you must consider. In this case the occupants themselves were committing a criminal offence. What was that? Seeking to enter the United Kingdom illegally. *e* They got on the lorry, they were told that the vent was going to be closed to preserve secrecy and, therefore, it is said—this is an argument on behalf of Mr Wacker—they shared responsibility for the criminal arrangements made to smuggle them into the country and thus, it is said, the driver owed them no duty of care. What of that argument? It may be it need not keep you for very long for this reason. What you have to consider is whether in reality *f* they did assume or may have assumed significant responsibility for the arrangements which were made. If they did or may have assumed such significant responsibility, no duty of care was owed by Mr Wacker; end of the case of manslaughter against him. But, if you are sure that they did not in any significant way assume responsibility for the arrangements by which *g* they were carried then subject to the issues I have already dealt with—importantly knowledge, of less significance in this case foreseeability of harm—he did owe a duty. In this case you may think that death arose from the failure to take care to see that there was an adequate supply of air for those 60. That failure arose from the arrangements which were in fact *h* made for their transport. Did the occupants of the container play any part in making those arrangements?'

[23] The judge then looked at the facts relevant to the question he had just posed and concluded by saying: 'You may think that the evidence falls miles short of saying that they may have shared responsibility for the arrangements *j* which caused the deaths.'

[24] Thereafter the judge looked in a little more detail at the issues of whether there was a breach of duty, whether it caused death and, if so, whether it could be characterised as criminally negligent.

[25] The grounds of appeal against conviction contend: (i) that the judge was wrong to rule that there was a case to answer; and (ii) that the direction

given to the jury as to the circumstances in which a duty of care would arise was wrong.

[26] Mr Lawson, in his helpful and realistic submissions to the court, contended that no duty of care can be said to be owed by the defendant to the Chinese because they shared the same joint illegal purpose which: (a) displaced the duty of care; (b) made it impossible for the court to define the content of the relevant duty of care; and (c) made it inappropriate for the court to define the content of a relevant duty of care.

[27] He further submitted that since the allegation was of an omission or failure by the defendant to act, by opening the vent, the relevant time at which the 'duty' arose could not in any event be ascertained.

[28] Mr Lawson further submitted that categorisation of the omission to act as being one which was merely incidental to the unlawful purpose of the Chinese is one that is untenable in the circumstances. The sole purpose of closing, and therefore keeping closed, the vent was to bring about the very unlawful objective upon which not only the driver was engaged but also the Chinese, namely their entry into the United Kingdom without detection. In this context Mr Lawson placed particular reliance on the formulation of the rule by Mason J in the High Court of Australia in *Jackson v Harrison* (1978) 138 CLR 438 at 455–456:

> 'If a joint participant in an illegal enterprise is to be denied relief against a co-participant for injury sustained in that enterprise, the denial of relief should be related not to the illegal character of that activity but rather to the character and incidents of the enterprise and to the hazards which are necessarily inherent in its execution. A more secure foundation for denying relief, though more limited in its application—and for that reason fairer in its operation—is to say that the plaintiff must fail when the character of the enterprise in which the parties are engaged is such that it is impossible for the court to determine the standard of care which is appropriate to be observed.'

[29] Mr Temple on behalf of the prosecution argued that the judge, and ultimately the jury, were entitled to draw the distinction that since the method of effecting the illegal entry to the United Kingdom was not something with which the Chinese were in any way concerned, whilst there might be a shared objective, there was no shared responsibility for the arrangements and accordingly such arrangements including the shutting of, and the failure to reopen before it was too late, the vent were incidental to the unlawful activity of the Chinese.

[30] There are occasions when it is helpful when considering questions of law for the court to take a step back and to look at an issue of law that arises without first turning to, and becoming embroiled in, the technicalities of the law. This is such a case. We venture to suggest that all right-minded people would be astonished if the propositions being advanced on behalf of the defendant correctly represented the law of the land. The concept that one person could be responsible for the death of another in circumstances such as these without the criminal law being able to hold him to account for that death even if he had shown not the slightest regard for the welfare and life of the other is one that would be unacceptable in civilised society. Taking this perspective of the case causes one immediately to question whether the whole approach adopted by both counsel and the judge in the court below can be correct, and we must, therefore, examine this matter.

[31] The first question that it is pertinent to ask is why it is that the civil law has introduced the concept of ex turpi causa. The answer is clear from the authorities. Bingham LJ in *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116 in the passage quoted at [17], above, explains that as a matter of public policy the courts will not 'promote or countenance a nefarious object or bargain which it is bound to condemn'.

[32] In other situations, it is clear that the criminal law adopts a different approach to the civil law in this regard. A person who sold a harmless substance to another pretending that it was an unlawful dangerous drug could not be the subject of a successful civil claim by the purchasers for the return of the purchase price. However the criminal law would, arising of out of the same transaction, hold that he was guilty of the offence of obtaining property by deception. Many other similar examples readily come to mind.

[33] Why is there, therefore, this distinction between the approach of the civil law and the criminal law? The answer is that the very same public policy that causes the civil courts to refuse the claim points in a quite different direction in considering a criminal offence. The criminal law has as its function the protection of citizens and gives effect to the state's duty to try those who have deprived citizens of their rights of life, limb or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disapplied just because the civil law is disapplied. It has its own public policy aim which may require a different approach to the involvement of the law.

[34] Further the criminal law will not hesitate to act to prevent serious injury or death even when the persons subjected to such injury or death may have consented to or willingly accepted the risk of actual injury or death. By way of illustration, the criminal law makes assisting another to commit suicide a criminal offence and denies a defence of consent where significant injury is deliberately caused to another in a sexual context (see *R v Brown* [1993] 2 All ER 75, [1994] 1 AC 212). The state in such circumstances has an overriding duty to act to prevent such consequences.

[35] Thus looked at as a matter of pure public policy, we can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time or, indeed, because there may have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise. Public policy, in our judgment, manifestly points in totally the opposite direction.

[36] The next question that we are bound to ask ourselves is whether in any way we are required by authority to take a different view. The foundation for the contention that ex turpi causa is as much a part of the law of manslaughter as it is a part of the law of negligence is the passage from the speech of Lord Mackay of Clashfern LC in *R v Adomako* [1994] 3 All ER 79, [1995] 1 AC 171 set out at [11], above. In particular it is Lord Mackay's reference to 'the ordinary principles of the law of negligence'.

[37] *R v Adomako* was a case where an anaesthetist had negligently brought about the death of a patient. It, therefore, involved no element of unlawful activity on the part of either the anaesthetist or the victim. 'We have no doubt that issues raised in the case we are considering would never have crossed the minds of those deciding that case in the House of Lords. In so far as Lord Mackay

referred to 'ordinary principles of the law of negligence' we do not accept for one moment that he was intending to decide that the rules relating to ex turpi causa were part of those ordinary principles. He was doing no more than holding that in an 'ordinary' case of negligence, the question whether there was a duty of care was to be judged by the same legal criteria as governed whether there was a duty of care in the law of negligence. That was the only issue relevant to that case and to give the passage the more extensive meaning accepted in the court below was in our judgment wrong.

[38] The next question which is posed is whether it is right to say in this case that no duty of care can arise because it is impossible or inappropriate to determine the extent of that duty. We do not accept this proposition. If at the moment when the vent was shut, one of the Chinese had said 'you will make sure that we have enough air to survive', the defendant would have had no difficulty understanding the proposition and clearly by continuing with the unlawful enterprise in the way that he did, he would have been shouldering the duty to take care for their safety in this regard. The question was such an obvious one that it did not need to be posed and we have no difficulty in concluding that in these circumstances the defendant did voluntarily assume the duty of care for the Chinese in this regard. He was aware that no one's actions other than his own could realistically prevent the Chinese from suffocating to death and if he failed to act reasonably in fulfilling this duty to an extent that could be characterised as criminal, he was guilty of manslaughter if death resulted.

[39] One further issue merits consideration, namely is it any answer to a charge of manslaughter for a defendant to say 'we were jointly engaged in a criminal enterprise and weighing the risk of injury or death against our joint desire to achieve our unlawful objective, we collectively thought that it was a risk worth taking'. In our judgment it is not. The duty to take care cannot, as a matter of public policy, be permitted to be affected by the countervailing demands of the criminal enterprise. Thus, in this case, the fact that keeping the vent shut increased the chances of the Chinese succeeding in entering the United Kingdom without detection was not a factor to be taken into account in deciding whether the defendant had acted reasonably or not.

[40] Mr Lawson's final point was that the time when the duty arose cannot be established in the circumstances. With respect to him that is not right. The duty arose from the moment the vent was shut but it was a continuing duty, which continued until air was allowed into the container. At the moment when the duty first arose, the defendant was outside the jurisdiction in Holland. However the duty continued once the ferry had sailed and it is quite clear on the evidence that if the vent had been opened at that stage, the deaths would not have resulted. Thus we can see no difficulty in this regard.

[41] In our judgment, the approach taken in the court below, as advanced by Mr Lawson and accepted by Mr Temple and the judge, was too favourable to the defendant. It is, therefore, wholly unnecessary to examine whether the distinction between matters for which the Chinese were responsible and those incidental to their illegality was a proper distinction or not. Whichever way they might have been characterised in a civil claim had no relevance to the issue that the jury had to decide.

[42] In every other respect we are satisfied that the necessary ingredients of the offences of manslaughter were properly left to the jury. Once the jury had concluded that the defendant was lying when he said that he did not know about the Chinese in the container, this was, in our judgment, as plain a case on the

manslaughter charges as one could encounter. Not surprisingly, and rightly, the jury convicted. There are, therefore, no reasons to doubt the safety of these convictions and the appeal against the conviction is dismissed.

[43] We turn now to the questions arising in relation to the sentences. First the defendant seeks leave to appeal against sentence on the ground that the sentences were manifestly excessive and wrong in principle. It is first argued that it is wrong in principle for consecutive sentences of imprisonment to have been imposed in this case since the offences were so clearly related in their subject matter. Secondly it is contended that the totality of the sentences was manifestly excessive.

[44] The second matter relating to sentence with which the court is concerned is the application by the Attorney General for leave to refer to the court the sentences for the manslaughter offences which he considers to be unduly lenient, pursuant to s 36 of the Criminal Justice Act 1988. Very helpfully Mr Pownall QC who appeared on behalf of the Attorney General made clear from the outset that it was not to be the contention of the Attorney General that the total sentence imposed by the trial judge should be increased and that the application related solely to the way in which the total of 14 years had been made up. The Attorney General's concern is that the imposition of concurrent sentences of six years' imprisonment for the manslaughter offences when compared with the eight years' imprisonment for the conspiracy charge sent out an unacceptable message in that it may have suggested to the public that the court saw the involvement with the evasion of the immigration rules to be a more serious matter than causing the death of 58 people.

[45] Whilst, in many cases, the Court of Appeal will only be concerned as to the total sentence passed and not the way in which the sentences are distributed between particular offences, there are rare cases where the way in which the total sentences are composed may cause public concern and diminish the faith of the public in the criminal justice system as a whole. In such circumstances, and we can see why the Attorney General considers this case comes into that exceptional category, it seems to us right that, provided the point is made out, this court should intervene and give guidance that will assist sentencers not merely to arrive at the right total sentence in the future but also to impose such sentences in a way that promotes public confidence. For these reasons we grant leave to the Attorney General.

[46] We look first at the question of totality. Mr Lawson has pointed to a number of factors that he submits ought to have resulted in a shorter total sentence than 14 years' imprisonment. He first points to the fact that this was a case where the manslaughter convictions were on the basis of gross negligence. It is not suggested that the defendant had any criminal intention to harm any of his victims in any way at all. Next he points to the fact that others connected with the criminal conspiracy, who were at least as involved as the defendant, and in all probability higher up the chain of command, were apprehended in Holland and have received shorter sentences. Further the defendant finds himself imprisoned in this country, which is not his own, and it is submitted that the effect of any sentence for him will be harder to bear than if he was in his own country where he could the more easily be visited by family and friends.

[47] Mr Lawson recognises that the death of so many victims places this case in an exceptional category but he argues that there was no evidence that the defendant knew just how many people were inside the container. He further

submits that the sentence imposed was out of line with other sentences for gross negligence and manslaughter.

[48] We do not accept Mr Lawson's contentions. The professional smuggling of large numbers of illegal immigrants into this country is in itself a very serious matter. The causing of so many deaths by gross negligence arising from a desire to avoid detection whilst committing such a serious offence, in our judgment, puts this case into a category of its own. We are unaware of any case which can remotely be said to be comparable. Accordingly we ask ourselves the straightforward question whether we view a sentence of 14 years' imprisonment as being manifestly excessive for the totality of the defendant's criminal conduct. The answer quite simply is that we do not. This was a difficult sentencing exercise. No sentence could fairly do justice to the loss of life on such a scale but we consider that the total sentence arrived at by the judge fairly reflected the seriousness of the matter and the limited mitigation that could be advanced on behalf of the defendant. Accordingly we refuse leave to appeal against sentence.

[49] We turn to the composition of the sentence. Mr Lawson complained that it was wrong in principle to make the sentences consecutive to one another. In the light of our conclusion as to the correct total sentence, this argument is, from the point of view of the defendant, academic because even if it succeeded, we would alter the sentences to concurrent sentences but increase their length so as to maintain the overall sentence of 14 years' imprisonment. The real issue in this regard is whether sentences of six years' imprisonment for each of the manslaughter cases can properly be viewed as unduly lenient.

[50] In *Attorney General's References (Nos 19, 20 and 21 of 2001)* [2001] EWCA Crim 1432 at [41], [2002] 1 Cr App (R) S 136 at [41], this court reviewed the approach to manslaughter sentences in the context of a death caused in the course of a street robbery. The court concluded:

> 'In considering any case of manslaughter the court inevitably looks at a number of factors to determine the appropriate sentence. First the court will examine the context in which the death was caused. If it is particularly reprehensible conduct, or conduct that calls for deterrence, the court is bound to impose a longer sentence than otherwise might be the case. The response to these factors must inevitably bear a relationship to the prevailing climate and the attitude at the time.'

[51] Thus the element of the unlawful activity in which setting the manslaughter occurs is relevant to the sentence for manslaughter. The court considered in the case to which we have just referred that the sensible approach to such a sentence was to consider what sentence would have been appropriate if no death had occurred and then considered the extent to which the sentence should be increased to reflect the very serious circumstance of death.

[52] If such an approach is adopted there is clearly a danger of punishing the underlying criminality twice if consecutive sentences are imposed. Accordingly we consider that the correct approach is to pass concurrent sentences. The sentence for manslaughter involving death in the particular criminal conducts will thus inevitably be the longer sentence.

[53] Not only does this method of sentencing eliminate the danger of double punishment for the same criminality but it has the further advantage for which the Attorney General contends in this case, namely that it will be more readily

understood by the public. It will not give the appearance, as may have occurred in this case, of devaluing the loss of life. a

[54] We think that, since the sentence for an offence of manslaughter must take into account the criminal context in which it has been committed, the Attorney General is right to contend that six years' imprisonment for each manslaughter was unduly lenient. Accordingly we propose to alter the sentences. Each of the sentences of six years' imprisonment for the manslaughter b offences will be increased to 14 years' imprisonment but the sentence of eight years' for the conspiracy will now run concurrently with the other sentences. Thus the total sentence remains unaltered but there is a proper reflection of the seriousness of the manslaughter charges in this quite dreadful case.

*Appeals dismissed.* c

Lynne Townley Barrister.

# R (on the application of Van Hoogstraten) v Governor of Belmarsh Prison

[2002] EWHC 1965 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
JACKSON J
19, 20, 23 SEPTEMBER 2002

*Prison – Access to legal adviser – Reasonable facilities for legal adviser to interview prisoner in connection with proceedings to which he was a party – Right to a fair trial – 'Legal adviser' defined as 'counsel or solicitor' – Prisoner instructing foreign lawyer – Whether foreign lawyer falling within definition of 'legal adviser' – Courts and Legal Services Act 1990, ss 27, 28 – Human Rights Act 1998, Sch 1, Pt I, art 6(3) – European Communities (Services of Lawyers) Order 1978, SI 1978/1910, art 5 – Prison Rules 1999, SI 1999/728, r 2(1).*

The claimant was convicted of a criminal offence and was remanded in custody awaiting sentencing. He decided to instruct S, an Italian lawyer (an avvocato), in relation to his plea in mitigation and his possible appeals against conviction and sentence. It was envisaged that S would instruct English solicitors as agents who would instruct English counsel in relation to the appeals. Rule 38(1)[a] of the Prison Rules 1999 provided that a prisoner's legal adviser was to be afforded reasonable facilities for interviewing him in connection with proceedings to which he was a party. The defendant, the governor of the prison in which the claimant was remanded, refused to allow S access to give the claimant legal advice on the basis that he was not a 'legal adviser', which term was defined in r 2(1)[b] of the 1999 rules as a prisoner's 'counsel or solicitor'. The claimant applied for judicial review of the defendant's refusal to admit S, contending that it breached his right to a fair trial under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Article 6(3)(b)[c] entitled everyone charged with a criminal offence the right to have adequate time and facilities for the preparation of his defence and art 6(3)(c) entitled such a person, inter alia, to defend himself through legal assistance of his own choosing. The European directive, intended to facilitate the effective exercise by lawyers of freedom to provide services in accordance with the provisions of the EC Treaty, had been implemented by the European Communities (Services of Lawyers) Order 1978. The definition of an 'EEC lawyer' in art 2[d] of the 1978 Order included an avvocato and art 5[e] provided that an EEC lawyer was not to be prevented from providing any service in relation to any proceedings by reason only that he was not an advocate, barrister or solicitor, provided that he was instructed and acted in conjunction with an advocate, barrister or solicitor who was entitled to practise before the relevant court or tribunal. In the course of the hearing the defendant conceded that art 5 of the 1978 Order impacted upon ss 27 and 28[f] of

a Rule 38, so far as material, is set out at [6], below
b Rule 2, so far as material, is set out at [5], below
c Article 6, so far as material, is set out at [35], below
d Article 2, so far as material, is set out at [28], below
e Article 5, so far as material, is set out at [29], below

the Courts and Legal Services Act 1990, which identified the persons who had a right of audience before the English courts and those who had a right to conduct litigation before English courts so that a person who conformed with the requirements of the 1978 Order was entitled to exercise either such a right of audience or such a right to conduct litigation.

**Held** – The claimant was entitled to instruct anyone who had rights of audience under s 27 of the 1990 Act or anyone who had rights to conduct litigation under s 28, although he could not engage an excessive number of lawyers or change them with undue frequency. It followed that he was entitled to instruct an avvocato who had rights under ss 27 and 28 to represent him in ongoing criminal proceedings. He was in the midst of the trial process and was entitled under art 6(3)(b) of the convention to have adequate time and facilities for the preparation of his plea in mitigation and under art 6(3)(c) to defend himself through legal assistance of his own choosing. Accordingly, in r 2 of the 1999 rules, construed in a manner conforming with art 6(3)(b), (c) the term 'legal adviser' embraced any lawyer who was (a) chosen by the prisoner and (b) was entitled to represent the prisoner in criminal proceedings to which the prisoner was a defendant. S had been chosen by the claimant to represent him in ongoing criminal proceedings and fell within the definition of an 'EEC lawyer' in the 1978 Order. It followed that S fell within the term 'his solicitor or counsel' in r 2 and that under r 38(1) he was to be afforded reasonable facilities for interviewing his client (see [38]–[42], below).

**Notes**

For prisoners' access to legal advice and for facilities in connection with litigation, and for the rights to a fair trial, to adequate time and facilities to prepare a defence, and to have legal assistance, see 36(2) *Halsbury's Laws* (4th edn reissue) paras 606, 607 and 8(2) *Halsbury's Laws* (4th edn reissue) paras 134, 144 and 145.

For the Courts and Legal Services Act 1990, ss 27, 28, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1311.

For the Human Rights Act 1998, Sch 1, Pt I, art 6(3), see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

For the European Communities (Services of Lawyers) Order 1978, SI 1978/1910, art 5, see 19 *Halsbury's Statutory Instruments* (2002 issue) 4.

For the Prison Rules 1999, SI 1999/728, r 2(1), see 15 Halsbury's *Statutory Instruments* (2002 issue) 335.

**Application**

The claimant, Nicholas Van Hoogstraten, a prisoner remanded in custody pending sentencing, applied with permission of Jackson J granted on 19 September 2002, for judicial review of the decision of the defendant, the governor of HM Prison Belmarsh, to refuse access to his lawyer, Giovanni Di Stefano, an avvocato, on the basis that he was not a legal adviser within r 2 of the Prison Rules 1999. The facts are set out in the judgment.

f Sections 27 and 28, so far as material, provide: '27(2) A person shall have a right of audience before a court in relation to any proceedings ... (b) where ... he has a right of audience granted by or under any enactment ... 28(2) A person shall have a right to conduct litigation in relation to any proceedings ... (b) where ... he has a right to conduct litigation granted by or under any enactment ...'

*Alan Newman QC, Jonathan Lennon* and *Alison Dorrell* (instructed by *Attridge*) for the claimant.

*Jeremy Johnson* and *Jason Beer* (instructed by the *Treasury Solicitor*) for the governor.

*Cur adv vult*

23 September 2002. The following judgment was delivered.

**JACKSON J.**

[1] This judgment is in six parts: 1. Introduction; 2. The facts; 3. The present proceedings; 4. Is Mr Di Stefano a 'legal adviser' as defined in the Prison Rules 1999, SI 1999/728?; 5. he further challenges to Mr Di Stefano which are foreshadowed; and 6. Conclusion.

1. INTRODUCTION

[2] This is a claim for judicial review. The claimant, Mr Nicholas Van Hoogstraten, is a prisoner on remand. The defendant is the governor of HM Prison Belmarsh, where the claimant is held.

[3] The central issue in this case is whether the claimant is entitled to receive legal visits from Mr Giovanni Di Stefano, who is an Italian lawyer. Mr Di Stefano is principal of the firm Studio Legale Internazionale. That firm is based in Rome.

[4] I must now set out certain relevant statutory provisions. Section 47(1) of the Prison Act 1952 provides:

> 'The Secretary of State may make rules for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein.'

[5] Pursuant to that section the Secretary of State made the 1999 rules. Rule 2(1) of the 1999 rules provides:

> 'In these Rules, where the context so admits, the expression ... "legal adviser" means, in relation to a prisoner, his counsel or solicitor, and includes a clerk acting on behalf of his solicitor ...'

[6] Rule 38(1) of the 1999 rules provides:

> 'The legal adviser of a prisoner in any legal proceedings, civil or criminal, to which the prisoner is a party shall be afforded reasonable facilities for interviewing him in connection with those proceedings, and may do so out of hearing but in the sight of an officer.'

[7] The claimant contends that Mr Di Stefano is a legal adviser within the meaning of the 1999 rules and that, accordingly, pursuant to r 38(1) of the rules, Mr Di Stefano must be permitted to visit him in prison.

[8] Having given this brief introduction, I should now turn to the facts in a little more detail.

2. THE FACTS

[9] Earlier this year the claimant stood trial at the Central Criminal Court on a charge of murder. On 22 July 2002, the claimant was acquitted of murder but convicted of manslaughter. The trial judge, Newman J, adjourned the question of sentence to be dealt with on 2 October. He ordered that the claimant be

remanded in custody. Since 22 July, the claimant has been held as a category A prisoner at HM Prison Belmarsh.

**[10]** Following his conviction the claimant dispensed with the services of the solicitors and counsel who had represented him at trial. The claimant decided to instruct Mr Di Stefano to advise and act for him. Mr Alan Newman QC, who is the claimant's counsel for the purpose of these judicial review proceedings only, has explained that the claimant's intentions are as follows. Mr Di Stefano will from now on be the claimant's principal legal adviser in relation to the current criminal proceedings. Mr Di Stefano will take instructions in relation to mitigation and will take any necessary steps to prepare for the plea in mitigation. Mr Di Stefano will then instruct Attridge, a firm of solicitors, to act as his London agents and as solicitors for the claimant in relation to the hearing at the Central Criminal Court on 2 October, when the claimant is due to be sentenced. Attridge in turn will instruct counsel to represent the claimant at that hearing and to make the plea in mitigation.

**[11]** The claimant has it in mind to appeal against his conviction and, depending on how matters proceed on 2 October, he may wish to appeal against sentence. In relation to the proposed appeal the claimant again wishes Mr Di Stefano to act as his principal legal adviser. It is envisaged that in relation to the appeal Mr Di Stefano will instruct Attridge as his London agents, and that Attridge in turn will instruct counsel.

**[12]** Mr Di Stefano visited the claimant in HM Prison Belmarsh on 16 August 2002. The arrangements for this visit were made by Mr Paul Martin. Mr Martin is a solicitor and is employed by the firm Attridge as a consultant.

**[13]** Following that initial visit, the governor of HM Prison Belmarsh has refused to allow Mr Di Stefano to make further visits to the claimant in prison. A number of different grounds for refusing access have been advanced by the prison authorities in correspondence and in telephone conversations.

**[14]** By 13 September, however, the prison authorities were only relying on one ground. Mr John Knight, the head of security operations at HM Prison Belmarsh, summarised that ground as follows in his letter dated 13 September to Attridge:

> 'The prison's stance remains that we will not allow Mr Di Stefano access as a legal visitor. To this effect we will not accept the legal visit booking for Monday 16 September.'

**[15]** In other words, the prison authorities took the view that Mr Di Stefano was not a 'legal adviser' for the purpose of the 1999 rules. Therefore the claimant was not entitled to receive legal visits from Mr Di Stefano pursuant to r 38(1). The claimant was aggrieved by that decision and, in order to challenge it, he has brought the present proceedings for judicial review.

3. THE PRESENT PROCEEDINGS

**[16]** By a claim form issued on 17 September (which was six days ago) the claimant challenged the governor's decision refusing access to Mr Di Stefano on the following grounds:

> 'The decision is unlawful as it breaches art 6(3)(b) and (c) of the convention [the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998], ie the defendant, by refusing the claimant access to his chosen legal representative, is restricting his need for adequate time and facilities to

prepare for his sentence (part of trial process) to be heard on 2 October 2002—and his appeal against conviction.'

[17] In the claim form the claimant sought two orders from this court: (1) an order that the defendant's decision of 13 September refusing access be quashed; and (2) a mandatory order that visits by Mr Di Stefano to the claimant be allowed forthwith.

[18] These proceedings are on any view urgent. If the claimant is to be represented at the hearing on 2 October by lawyers who were not present during the trial, he needs to confer with those lawyers as soon as possible. These proceedings also raise an important question of law, namely the interpretation of rr 2 and 38 of the 1999 rules in the light of the Human Rights Act 1998 and EU law.

[19] On 17 September Mr Nigel Pleming QC, a deputy judge of the High Court, considered the papers in this matter and ordered that the application for permission be listed for oral hearing on 19 September. The permission application was listed before me on Thursday, 19 September and duly came on for hearing at the end of the morning. It rapidly became apparent that this case raised serious issues. Accordingly, I granted permission to apply for judicial review.

[20] In view of the urgency of this case and the imminence of the date for sentencing, I asked counsel on both sides whether they were ready to proceed immediately to the full hearing. Both counsel told me that they were ready to proceed and that they would welcome that course. I therefore directed that the full hearing should take place immediately.

[21] Mr Jeremy Johnson, who appears for the defendant, stated that his client might refuse access to Mr Di Stefano on other grounds relating to Mr Di Stefano's character in the event that the claimant was successful on the issues currently before the court. Despite that possibility, both parties wished to obtain the court's final decision on the present issues.

[22] Accordingly, the substantive hearing of these judicial review proceedings took place on the afternoon of Thursday, 19 September and between 9.30 and 10.30 am on the morning of Friday, 20 September. On the Friday morning counsel stated that they wished to do further research on the European aspect of this case. Since I had other cases in the list for hearing that day, I suggested that counsel carry out their further researches during the rest of that day and send to me their additional submissions in writing. Both counsel agreed that that was a sensible way to proceed. Neither party sought an adjournment for further oral argument. Both counsel were content that I should give judgment on the morning of Monday, 23 September, based upon the oral argument of Thursday and Friday, and the supplemental written submissions lodged on Friday evening.

[23] This I now do.

4. IS MR DI STEFANO A 'LEGAL ADVISER' AS DEFINED IN THE 1999 RULES?

[24] It is common ground that Mr Di Stefano is not a member of the English legal profession. He is neither a solicitor nor a barrister. The claimant's evidence shows, and the defendant's evidence does not contradict, that Mr Di Stefano is an avvocato who is qualified to practise, and does practise, at the Italian Bar.

[25] Article 59 of the EC Treaty (now art 49 EC) provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member

States who are established in a State of the Community other than that of the person for whom the services are intended.' a

**[26]** As a result of the Treaty of Amsterdam (Amsterdam, 2 October 1997) (OJ C340 10.11.97 p 1), the numbering of that article has since May 1999 been changed to art 49 EC.

**[27]** On 22 March 1977, the Council of the European Communities adopted Council Directive (EEC) 77/249 (OJ 1977 L078 p 17) (the directive). The purpose of the directive is to facilitate the effective exercise by lawyers of freedom to provide services in accordance with art 59 of the EC Treaty (now art 49 EC). Article 1 of the directive defines 'lawyer'. That definition includes an Italian avvocato. Article 2 of the directive requires each member state to recognise any such person as a lawyer. Articles 3–6 set out various rules and restrictions which I need not read out. Article 7 provides: b c

'1. The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.

2. In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.' d e

**[28]** The directive has been implemented in this country by the European Communities (Services of Lawyers) Order 1978, SI 1978/1910. Article 2 of the 1978 order defines 'EEC lawyer' as—

'a person entitled to pursue his professional activities under the designation, in Belgium of an avocat—advocaat, in Denmark of an advokat, in Germany of a Rechtsanwalt, in France of an avocat, in the Hellenic Republic of a dikegoros, in the Republic of Ireland of a barrister or solicitor, in Italy of an avvocato, in Luxembourg of an avocat-avoué, or in the Netherlands of an advocaat ...' f g

**[29]** Article 5 of the 1978 order provides:

'No enactment or rule of law or practice shall prevent an EEC lawyer from providing any service in relation to any proceedings, whether civil or criminal, before any court, tribunal or public authority (including appearing before and addressing the court, tribunal or public authority) by reason only that he is not an advocate, barrister or solicitor; provided that throughout he is instructed with, and acts in conjunction with, an advocate, barrister or solicitor who is entitled to practise before the court, tribunal or public authority concerned and who could properly provide the service in question.' h j

**[30]** Article 12 of the 1978 order provides: 'A competent authority may at any time request a person seeking to provide any services to verify his status as an EEC lawyer.'

**[31]** Article 13 of the 1978 order provides:

'Where a request has been made under article 12, the person to whom it is made shall not, except to the extent (if any) allowed by the competent authority making the request, be entitled to provide services in the United Kingdom until he has verified his status as an EEC lawyer to the satisfaction of that authority.'

[32] For the purposes of this case the competent authority referred to in arts 12 and 13 is the Law Society.

[33] Section 27 of the Courts and Legal Services Act 1990 identifies the persons who have a right of audience before the English courts. Section 28 of the 1990 Act identifies the persons who have a right to conduct litigation before English courts.

[34] In his second supplemental skeleton argument delivered on Friday afternoon, Mr Johnson conceded that art 5 of the 1978 order impacts upon ss 27 and 28 of the 1990 Act. In my view this concession is correct. An Italian avvocato who conforms with the requirements of the 1978 order is entitled to exercise either (a) a right of audience before the English courts, or (b) a right to conduct litigation before the English courts.

[35] At this point it is necessary to turn to art 6 of the convention, upon which the claimant relies in his claim form. Article 6 provides:

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing ...'

[36] The claimant is currently in the midst of the trial process. He has been found guilty of manslaughter by the jury. The trial judge has not yet addressed the question of sentence. The claimant continues to enjoy the rights set out in art 6 of the convention. He is entitled to have adequate time and facilities for the preparation of his plea in mitigation in accordance with art 6(3)(b). In relation to sentence he is entitled to defend himself through legal assistance of his own choosing in accordance with art 6(3)(c).

[37] In the course of his opening submissions Mr Johnson said that it was an oddity that the claimant should dismiss the solicitors and counsel who represented him at trial, and then instruct an Italian advocate as his principal legal adviser rather than fresh English solicitors and counsel.

[38] On this point I agree with the observation of Mr Newman: it is no business either of the court or of the defendant whom the claimant wishes to instruct to represent him in criminal proceedings. Of course the claimant cannot engage an excessive number of lawyers, or change his legal team with undue frequency. Subject to that, however, the claimant is entitled to instruct anyone who has rights of audience under s 27 of the 1990 Act, or anyone who has rights to conduct litigation under s 28 of that Act. Accordingly, the claimant is entitled

if he wishes to instruct an Italian lawyer who has rights under those provisions to represent him in ongoing criminal proceedings.

**[39]** Let me now turn to r 2 of the 1999 rules. Section 3(1) of the Human Rights Act 1998 requires this court so far as possible to read and give effect to the 1999 rules in a way which is compatible with convention rights. Accordingly, I shall construe r 2 of the 1999 rules in a manner which conforms with art 6(3)(b) and (c) of the convention.

**[40]** The term 'legal adviser' in r 2 must embrace any lawyer who (a) is chosen by the prisoner, and (b) is entitled to represent the prisoner in criminal proceedings to which the prisoner is a defendant. On the evidence before the court, Mr Di Stefano is an Italian avvocato who falls within the definition of 'EEC lawyer' in the 1978 order. He has been chosen by the claimant to represent him in ongoing criminal proceedings. It therefore follows that Mr Di Stefano falls within the term 'his counsel or solicitor' in r 2 of the 1999 rules.

**[41]** Under r 38(1) Mr Di Stefano must be afforded reasonable facilities for interviewing his client in HM Prison Belmarsh in connection with the current criminal proceedings.

**[42]** The answer to the question posed in part 4 of this judgment is Yes.

5. THE FURTHER CHALLENGES TO MR DI STEFANO WHICH ARE FORESHADOWED

**[43]** In his second supplemental skeleton argument Mr Johnson stated that on Friday, 20 September the defendant was inviting the Law Society to request Mr Di Stefano to verify his status as an EEC lawyer pursuant to art 12 of the 1978 order. Mr Johnson stated that thereafter Mr Di Stefano would be disentitled from providing legal services in the United Kingdom under art 13 of the 1978 order. Accordingly, the defendant would continue to deny Mr Di Stefano access on that basis.

**[44]** I am perplexed by this argument. If the Law Society or the defendant doubt that Mr Di Stefano is a qualified Italian avvocato, they have had every opportunity since 16 August to request that he verifies his status. They have not done so. Any request which is made at this late stage for the purpose of triggering art 13 of the 1978 order would appear to have as its consequence a denial of the claimant's art 6 rights during the crucial last few days before he appears in the Central Criminal Court for sentence. I accept, of course, that the Law Society can at any time request Mr Di Stefano to verify his status as an EEC lawyer. However, during the period of time which Mr Di Stefano requires to deal with that request, it would not be a lawful exercise of discretion to deny Mr Di Stefano access to his client in HM Prison Belmarsh.

**[45]** I turn to the second possible future challenge which is foreshadowed. This is a challenge based on Mr Di Stefano's character. I quite accept that if there are substantial grounds of this nature (such as those hinted at), then the defendant would be entitled to deny Mr Di Stefano access to any prison establishment. In the meantime, however, unless and until the defendant relies upon substantial grounds relating to character, his exclusion of Mr Di Stefano from HM Prison Belmarsh is unlawful.

6. CONCLUSION

**[46]** For the reasons set out in part 4 of this judgment, I grant to the claimant the first item of relief which he claims, that is a quashing order quashing the defendant's decision dated 13 September 2002.

[47] For the reasons set out in part 5 of this judgment, I do not consider that a mandatory order is appropriate. It may possibly be that the defendant will put forward substantial grounds relating to character for denying Mr Di Stefano access to HM Prison Belmarsh. I therefore propose to grant a declaration along the following lines:

> 'It is declared that the defendant is obliged to permit Mr Di Stefano to visit the claimant in Belmarsh Prison in accordance with r 38(1) of the 1999 rules, unless and until the defendant refuses access on substantial grounds relating to Mr Di Stefano's character. No basis for such refusal has yet been put forward by the defendant.'

[48] I leave the precise wording of the declaration to be discussed between counsel. If it cannot be agreed, I will hear argument on drafting matters later today.

*Application allowed in part.*

James Brooks Barrister.

# Practice Direction (Coal Mining Hand Arm Vibration Syndrome (Vibration White Finger))

COURT OF APPEAL, CIVIL DIVISION
LORD WOOLF CJ
31 JULY 2003

*Practice – Coal mining hand arm vibration syndrome (vibration white finger) actions – Commencement of proceedings.*

**LORD WOOLF CJ** gave the following direction at the sitting of the court.

1. This practice direction revises the scope of the practice note of Lord Woolf CJ made herein on 12 January 1994 (see *Practice Note (Vibration White Finger Actions) (No 1)* (1994) Times, January 13) and the practice direction of Lord Woolf CJ made herein on 29 July 1999 (see *Practice Direction (Queen's Bench Division: Vibration White Finger Actions (No 3)* (1999) Times, August 5).

2. It applies to any proceedings in which a party, whether by claim or counterclaim alleges that he/she has suffered personal injuries in the form of HAVS/VWF or any other injury to the fingers, thumbs, hands, wrists or arms caused or contributed to by exposure to vibration in the course of employment by one or more of the defendants in or about a coal mine, and had not at 16 May 2003 lodged a letter of claim in the British Coal Corporation Vibration White Finger litigation.

3. Any such claim made after 16 May 2003 is not subject to the practice note of 1994 and the practice direction of 1999 and/or any orders of the court made in the British Coal Corporation Vibration White Finger litigation.

4. Any relevant proceedings arising out of such a claim begun after 16 May 2003 should be commenced in the county courts of either Newcastle-upon-Tyne, Sheffield or Cardiff.

5. Any delay or increase in the costs occasioned by the unjustified failure to comply with this practice direction may be taken into account in the assessment of costs.

Kate O'Hanlon Barrister.

# R (on the application of B) v Ashworth Hospital Authority

[2003] EWCA Civ 547

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, DYSON AND SCOTT BAKER LJJ

31 MARCH, 1, 15 APRIL 2003

*Mental health – Patient – Medical treatment – Mental disorder of patient subject to restriction order specified as mental illness – Consent of patient not required for medical treatment given him for mental disorder from which he was suffering – Patient treated for psychopathic disorder – Whether treatment for psychopathic disorder requiring patient's consent – Mental Health Act 1983, s 63.*

The claimant was detained as a patient by a hospital order under the Mental Health Act 1983. He was also subject to the special restrictions, as to duration and discharge, of a restriction order The 1983 Act required that the hospital order should specify the form or forms of mental disorder, being mental illness, psychopathic disorder, severe mental impairment or mental impairment, which the claimant was found to be suffering from. The mental disorder suffered by the claimant was specified as a mental illness. At the hospital he was clinically diagnosed as also suffering from a psychopathic disorder, being a personality disorder. He was transferred to a personality disorder ward and treated for that condition by the medical officer responsible for him. Part IV of the 1983 Act (ss 57–65) dealt with consent to treatment and s 63[a] provided that the consent of a patient was not required for any medical treatment given to him for the mental disorder from which he was suffering (not being treatment falling within ss 57 or 58[b] which specified certain treatments for which consent and/or a second opinion was required) if the treatment was given by or under the direction of the responsible medical officer. The claimant applied for judicial review of the decision to detain him in a personality disorder ward. The judge held that the hospital could lawfully treat the claimant for a personality disorder despite the fact that he was only classified as suffering from a mental illness. The claimant appealed. On appeal the sole issue was whether s 63 of the 1983 Act sanctioned compulsory treatment of a detained patient for any mental disorder which had been clinically diagnosed, or whether it only authorised such treatment, in the case of a patient who had been made the subject of a restriction order, for the mental disorder specified in the hospital order.

**Held** – Section 63 of the 1983 Act, construed in its context, permitted compulsory treatment (other than treatment under ss 57 or 58) only for the mental disorders to which the liability to detention under the 1983 Act was linked. Throughout the 1983 Act the liability to detention was linked to the mental disorder from which the patient was classified as suffering and which was considered to be treatable. Part IV of the 1983 Act dealt with the question of defining the circumstances in which forcible treatment for the mental disorder to which the

a Section 63 is set out at [1], below

b Sections 57 and 58 are set out, so far as material, at [32], below

liability to detention was linked might be given. The problem presented by the presence of co-existing or additional diseases was inherent in the scheme of the 1983 Act. Patients who suffered from more than one mental disorder presented particular problems for those charged with the task of caring for and treating mental patients. But those problems did not compel a different meaning of s 63. Accordingly, the appeal would be allowed, and unless and until the claimant was re-classified as suffering also from a psychopathic disorder it would not be lawful to continue his treatment for that condition (see [16], [42], [43], [46]-[48], [67], [68], [71], [82], below).

Decision of Sir Richard Tucker [2002] All ER (D) 13 (Jul) reversed.

**Notes**

For mental disorder, mental impairment and psychopathic disorder, and for consent to treatment, see 30 *Halsbury's Laws* (4th edn reissue) paras 1202–1203 and 1343–1345, respectively.

For the Mental Health Act 1983, s 63, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 928.

**Cases referred to in judgments**

*B v Croydon Health Authority* [1995] 1 All ER 683, [1995] Fam 133, [1995] 2 WLR 294, CA.

*B v Forsey* [1988] SLT 572, HL.

*F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, sub nom *Re F (mental patient: sterilisation)* [1990] 2 AC 1, [1989] 2 WLR 1025, HL.

*R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419.

*R v Anglia and Oxfordshire Mental Health Review Tribunal, ex p Hagan* (1999) 53 BMLR 9, CA.

*R v Pathfinder NHS Trust, ex p Wey* (1999) 3 CCL Rep 271.

**Appeal**

B, a patient detained under ss 37 and 41 of the Mental Health Act 1983, pursuant to an order made by the Crown Court at Birmingham on 25 August 1987, which specified his mental disorder as a mental illness, appealed from the decision of Sir Richard Tucker sitting as a judge of the Queen's Bench Division on 1 July 2002 ([2002] EWHC 1442 (Admin) [2002] All ER (D) 13 (Jul)) dismissing B's application for judicial review of the decision of Ashworth Hospital Authority (Ashworth) to detain him in a personality disorder ward for treatment of a psychopathic disorder. The facts are set out in the judgment of Dyson LJ.

*Richard Gordon QC* and *Hugh Southey* (instructed by *Roberts Moore Nicholas & Jones*) for B.

*Oliver Thorold* (instructed by *Capsticks*) for Ashworth.

*Cur adv vult*

15 April 2003. The following judgments were delivered.

**DYSON LJ** (giving the first judgment at the invitation of Simon Brown LJ).

THE ISSUE

[1] Section 63 of the Mental Health Act 1983 provides:

> 'The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, not being treatment falling within section 57 or 58 above, if the treatment is given by or under the direction of the responsible medical officer.'

[2] The sole issue that arises on this appeal is whether this provision sanctions compulsory treatment of a detained patient for any mental disorder which has been diagnosed by the clinicians, or whether it only authorises such treatment (in the case of a patient who has been made the subject of a restriction order under s 41(1) of the 1983 Act) for the mental disorder specified by the court under s 37(7) or by the mental health tribunal (the tribunal) under s 72(5). The judge, Sir Richard Tucker, preferred the first interpretation. He said ([2002] EWHC 1442 (Admin), [2002] All ER (D) 13 (Jul)):

> '[11] Mr Thorold, on behalf of the defendants, observes that it is common ground that a patient can be dual qualified and submits that the reference in the section to the disorder from which he is suffering must refer to the actual disorder as diagnosed by the clinicians, and need not, and should not, be confined to the disorder or that part of the disorder classified by the tribunal.
>
> [12] I prefer Mr Thorold's submissions. If Parliament had intended the mental disorder to be that classified by the tribunal it would have said so. It is clearly a matter for the professional judgment and expertise of the clinicians in charge of B's case to decide upon the best therapeutic regime for the disorder from which they assess him to be suffering. To conclude otherwise would be to put an artificial and strange interpretation upon the words of the section.'

[3] The mental disorder specified by the court under s 37(7) in this case was a mental illness. At all times, B was classified as suffering from a mental illness. At no time has the tribunal specified the mental disorder from which he is suffering as a psychopathic personality disorder within the meaning of s 1(2) of the 1983 Act.

THE FACTS

[4] Save for certain brief interludes, B has been a patient at Ashworth Hospital (Ashworth) since 1987. He is 47 years of age. He is currently detained under ss 37 and 41 of the 1983 Act pursuant to an order made in the Crown Court at Birmingham on 25 August 1987. He had been convicted of the manslaughter of his girlfriend. The mental illness specified by the court in making the hospital order was schizophrenia. Most, if not all, of the clinicians who have had B under their care have been of the view that B also suffers from a psychopathic disorder, being a personality disorder (dissocial type). B's case has been considered by the tribunal from time to time. He has always been classified as suffering from a mental illness, and not a personality disorder.

[5] B has been transferred on several occasions to the Raeside Clinic, a medium secure unit. But on each occasion, there have been problems, and B has been returned to Ashworth.

[6] On 17 August 2000, he applied to the tribunal for an order that he be discharged from liability to be detained. At that time, he was on the Shelley Ward at Ashworth, and his responsible medical officer (RMO) was Dr Kumurajeewa. He submitted a report to the tribunal for the purposes of the hearing, stating that B most probably had a schizo-affective disorder of the manic type. Keith Scholey, a psychologist, also submitted a report recommending that B should be placed on a 'comorbidity' ward suitable for the needs of patients suffering from problems of both mental illness and personality disorder. Reports were obtained from experts instructed on behalf of B. Professor Sashidharan, a psychiatrist, advised that a diagnosis of personality disorder would be 'totally inappropriate'. Eric Bromley, a psychologist, questioned whether B should be detained either for mental illness or personality disorder.

[7] Dr Hughes became B's RMO on 16 August 2001. In his witness statement dated 27 June 2002, he explains that B is—

> 'one of the few patients for whom the traditional classification systems do not provide a straightforward diagnosis. He has been diagnosed as suffering from both a mental illness (schizophrenia) and a psychopathic disorder being a personality disorder (dissocial type), a diagnosis with which I completely agree.'

[8] B was transferred to the Newman Ward at Ashworth on 15 December 2000, and was there at the time of the hearing before the tribunal on 8 May 2001. This is a personality disorder ward as is the Shelley Ward where he had been previously. Dr Hughes explains that the reason for the transfer was 'to treat the personality disorder traits of the patient'.

[9] On 8 May 2001, the tribunal refused B's application for a discharge from liability to be detained, and did not reclassify his mental disorder. He, therefore, remained classified as a patient suffering from a mental illness, and not a personality disorder. They said:

> 'We heard the witnesses and studied the reports listed. On that evidence we are satisfied that the patient suffers mental illness (schizo-affective disorder) of a nature or degree that requires his continued treatment in hospital for his welfare and for the safety of others.'

[10] On 13 August 2001, B's solicitors wrote to Ashworth expressing concern that he was in a ward for patients diagnosed with a psychopathic disorder. They referred to a number of reports which, they said, suggested that there was no reason to conclude that B was suffering from a psychopathic disorder.

[11] On 15 January 2002, the chief executive of Ashworth wrote to B's solicitors saying:

> 'The current clinical team who recognise that, clinically, B has a mental illness and personality disorder consider that his needs are best met, at this time, in the Personality Disorder Service. I am sure you are aware of the difference between a clinical diagnosis of personality disorder and mental health classification of personality disorder. The fact that there has not been a re-classification or added classification having been obtained or requested from the Tribunal is because the matter has been re-examined at Ashworth.

a Your client's mental illness is controlled by medication and it would not be appropriate to transfer him to a mental illness ward given the comorbidity that exists and the outstanding difficulties as regards his personality disorder presentation. These should be addressed, as now, in a PD ward. This is not to say the best placement of your client in the Hospital will not be reviewed on a regular basis.'

b

[12] It was in these circumstances that B sought judicial review of the decision to detain him in a personality disorder ward. The stark issue raised by these proceedings is whether Ashworth could lawfully treat B for a personality disorder despite the fact that he was only classified as suffering from a mental illness. Sir c Richard Tucker held that they could do so, and dismissed the application.

[13] There was no material before Sir Richard Tucker as to the nature of the regime and treatment which B has been receiving for the personality disorder which the clinicians have diagnosed. He is now accommodated in the Owen Ward, which is another ward within the personality disorder unit at Ashworth. d On 15 October 2002, Alan Hazlehurst, B's solicitor made a witness statement which contained the following:

'2. The appellant advised me that when he was initially admitted to Ashworth, he spent a considerable period of time on mental illness wards, and that there is a difference between the present circumstances of his being e on a personality disorder ward compared to his being placed on a mental illness ward.

3. The appellant has described to me that there are broadly the following distinctions between the wards. (i) That there is 24-hour access to rooms on a mental illness ward. On Owen Ward and on the personality disorder unit, f rooms are locked off denying patients access from 8.30 am in the morning. They are then reopened from approximately 12.30 pm to 1.30 pm but again locked off until 4.30 in the afternoon when they are reopened. This means that if a patient is unwell or is unable to attend at a workshop and is kept on the ward, he must stay in the day area and is denied access to his room. (ii) The appellant is not permitted to have parole ie access off his ward on to g the hospital site. Occasionally the appellant and other patients are permitted access off the ward if there is sufficient staff, for a short break outside but this occurrence permitting access off the ward occurred much more frequently on the mental illness wards than on the personality disorder unit. (iii) The personality disordered patients are required to attend workshops, and h effectively they are compulsory whereas this is not the case on the mental illness unit. When a mental illness patient feels on a particular day he is not up to attending at the workshops he need not attend. In the event of not attending at the workshop from the personality disorder unit, then payments, which are stage payments made to patients to reward them for j attending at the workshops are reduced. (iv) There is a major difference in terms of treatment and therapy because of the higher level of security and dependency on the personality disorder unit. (v) The appellant has explained that there is always a high level of observation, supervision and therefore a greater degree of intrusiveness on the part of staff in relation to their control and supervision of patients on a personality disorder ward. Conversely the appellant believes that on the personality disorder unit there

is less socialisation and interaction with the staff compared to the mental illness ward.

4. The appellant believes that there are more searches on the personality disorder unit of patients in addition to there being a room search each month, there being random searches of the patient known as rub-down searches when going on and off the ward and when present on the ward.

5. The appellant has instructed me that there is far less frequent meeting with his RMO and supervising doctor compared to his period on the mental illness unit and wards. He advises me that when on the mental illness wards he would see his doctor weekly whereas when on the personality disorder unit, a doctor in his experience is only normally seen on visits and has an appointment with the patient on average every three or four months.

6. On the personality disorder unit wards there is very little by way of activities that can be undertaken whilst present on the ward but there is a TV on each ward. The appellant says that there is more open access on the mental illness wards compared to the wards on the personality disorder unit regarding the TV.

7. The appellant will say that whilst being detained on a 24-hour day basis in a special hospital, these different conditions on the ward and interactions with the care team and staff make a significant difference to his daily quality of life, and his conditions and treatment whilst remaining at Ashworth.'

**[14]** Mr Thorold submitted that implicit in the challenge to the decision to detain B in a personality disorder ward was the proposition that placement decisions within a hospital are justiciable, and that the designation by a hospital of a particular ward for a particular mental disorder would acquire 'binding legal significance'. Given the relief sought by B in his claim form (an order quashing the decision to detain him in a personality disorder ward), this was an understandable response. But in the light of Mr Hazlehurst's statement and the argument advanced by Mr Gordon QC, it has become clear that the challenge is not to the compulsory placement of B in a personality disorder ward per se. Rather, it is to the compulsory treatment of B for a personality disorder in that ward. In view of the unchallenged evidence of Mr Hazlehurst and, above all, the statement of Dr Hughes, it is not surprising that, in his oral submissions, Mr Thorold did not seek to argue that B is not receiving compulsory treatment for a personality disorder. It is for this reason that the only issue for resolution on this appeal is the true construction of s 63 of the 1983 Act.

## THE TRUE CONSTRUCTION OF S 63 OF THE 1983 ACT

### *The statutory framework*

**[15]** Section 63 appears within Pt IV (ss 56–64), which is entitled 'consent to treatment'. Part II (ss 2–34) is entitled 'compulsory admission to hospital and guardianship'. Part III (ss 35–55) is entitled 'patients concerned in criminal proceedings or under sentence'. Part V (ss 65–79) is entitled 'mental health review tribunals'.

**[16]** Section 63 must be construed in its statutory context. The 1983 Act provides a detailed and carefully worked out scheme for the admission of mentally disordered patients to hospital for treatment, the review of their condition from time to time, and their discharge when they are no longer liable to be detained. As I shall seek to show, a theme that runs through the Act is that the liability to detention is linked to the mental disorder from which the patient is classified as

suffering, and that this disorder is considered to be treatable by the person or body making the classification. For convenience, I shall refer to this as 'the classified disorder', although it is to be noted that the language of classification is not used in the Act (save only in the heading to s 16 'reclassification of patients').

[17] An application for admission to a hospital ('an application for admission for treatment') may be made in respect of a patient under s 3(2) on the grounds that:

> '(a) he is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and (b) in the case of psychopathic disorder or mental impairment, such treatment is likely to alleviate or prevent a deterioration of his condition; and (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section.'

[18] An application for admission for treatment must be founded on the written recommendations of two registered medical practitioners in compliance with s 3(3). Such an application, if duly made in accordance with the provisions of the Act, is sufficient authority for the applicant, or any other person authorised by the applicant, to take the patient and convey him to the hospital within the period specified in s 6(1). Where a patient is admitted within the said period to the hospital specified in the application, 'the application shall be sufficient authority for the managers to detain the patient in the hospital in accordance with the provisions of this Act' (see s 6(2)).

[19] These are the material provisions which deal with the admission of a patient for treatment. It will be seen that it is a requirement of an application for admission for treatment that the patient is suffering from one of the specified forms of mental disorder 'of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital' (see s 3(2)(a)). It may be obvious, but it needs to be emphasised, that the basis of the application for admission of the patient is to enable him to receive treatment for the disorder which justifies his detention.

[20] The position of civil patients who are detained is dealt with in ss 16–20. Section 16 provides:

> '(1) If in the case of a patient who is for the time being detained in a hospital in pursuance of an application for admission for treatment, or subject to guardianship in pursuance of a guardianship application, it appears to the appropriate medical officer that the patient is suffering from a form of mental disorder other than the form or forms specified in the application, he may furnish to the managers of the hospital, or to the guardian, as the case may be, a report to that effect; and where a report is so furnished, the application shall have effect as if that other form of mental disorder were specified in it.
>
> (2) Where a report under subsection (1) above in respect of a patient detained in a hospital is to the effect that he is suffering from psychopathic disorder or mental impairment but not from mental illness or severe mental impairment the appropriate medical officer shall include in the report a statement of his opinion whether further medical treatment in hospital is likely to alleviate or prevent a deterioration of the patient's condition; and if

he states that in his opinion such treatment is not likely to have that effect the authority of the managers to detain the patient shall cease.

(3) Before furnishing a report under subsection (1) above the appropriate medical officer shall consult one or more other persons who have been professionally concerned with the patient's medical treatment.'

[21] The appropriate medical officer therefore has the power to reclassify the patient's mental disorder, by furnishing the managers with a report that the patient is suffering from a form of mental disorder other than the form or forms specified in the application for admission for treatment. Thus, he may produce a report which has the effect of deleting an existing classified disorder (A), and substituting a new disorder (B), or, where appropriate, adding a new disorder (B) to an existing disorder (A). The mechanism adopted by the statute for giving effect to the opinion of the medical officer that the patient is suffering from a mental disorder other than the form or forms specified in the application for admission is to provide for a deemed amendment to the application. The application takes effect as if the 'other' disorder were specified in it. The reason for doing it this way is that the crucial link is maintained between the mental disorder which justifies the patient's detention and his treatment in hospital *for that disorder*.

[22] Section 20 makes provision for the duration of the authority to detain the patient. So far as material, it provides:

'(3) Within the period of two months ending on the day on which a patient who is liable to be detained in pursuance of an application for admission for treatment would cease under this section to be so liable in default of the renewal of the authority for his detention, it shall be the duty of the responsible medical officer—(a) to examine the patient; and (b) if it appears to him that the conditions set out in subsection (4) below are satisfied, to furnish to the managers of the hospital where the patient is detained a report to that effect in the prescribed form; and where such a report is furnished in respect of a patient the managers shall, unless they discharge the patient, cause him to be informed.

(4) The conditions referred to in subsection (3) above are that—(a) the patient is suffering from mental illness, severe mental impairment, psychopathic disorder or mental impairment, and his mental disorder is of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and (b) such treatment is likely to alleviate or prevent a deterioration of his condition; and (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and that it cannot be provided unless he continues to be detained; but, in the case of mental illness or severe mental impairment, it shall be an alternative to the condition specified in paragraph (b) above that the patient, if discharged, is unlikely to be able to care for himself, to obtain the care which he needs or to guard himself against serious exploitation ...

(8) Where a report is duly furnished under subsection (3) ... above, the authority for the detention ... of the patient shall be thereby renewed for the period prescribed in that case by subsection (2) above.

(9) Where the form of mental disorder specified in a report furnished under subsection (3) ... above is a form of disorder other than that specified in the application for admission for treatment ... that application shall have effect as if that other form of mental disorder were specified in it; and where

a on any occasion a report specifying such a form of mental disorder is furnished ... the appropriate medical officer need not on that occasion furnish a report under section 16 above.'

[23] It will be seen that the conditions in s 20(4) are substantially the same as the conditions in s 3(2), and that the scheme of s 20 is very similar to that of s 16. In particular, if the form of disorder specified in a report is other than that b specified in the application for admission for treatment, the application shall have effect as if that other form of mental disorder were specified in it. So, once again, the important link is maintained between the mental disorder which justifies the patient's detention and his treatment *for that disorder*.

[24] I turn to the relevant provisions of Pt III. Section 37 makes provision for c hospital orders by the court. Section 37(1) provides that where a person is convicted of certain offences, and the conditions mentioned in sub-s (2) are satisfied, the court may authorise his admission to, or detention in, such hospital 'as may be specified in the order'. The conditions in sub-s (2) are that:

'(a) the court is satisfied, on the written or oral evidence of two registered d medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that either—(i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a e deterioration of his condition; or (ii) ... and (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section.'

f [25] Section 37(7) provides that the order shall 'specify the form or forms of mental disorder referred to in subsection (2)(a) from which ... the offender is found by the court to be suffering'. Section 40(4) provides that a patient who is admitted to a hospital in pursuance of a hospital order shall be treated for the purposes of the provisions mentioned in Pt 1 of Sch 1 to the Act as if he had been g so admitted in pursuance of an application for admission for treatment, subject to the modifications specified in that Part of the Schedule. Sections 16 and 20 apply, with modifications which are not material to this appeal.

[26] It will be seen, therefore, that, although there are differences of detail between ss 37(1)(2) and (7) to (9) on the one hand, and 3(1) and (2) on the other h hand, the essential link between a patient's mental disorder which justifies his detention in hospital and his treatment *for that disorder* is common to both.

[27] Section 41(1) provides that where a hospital order is made in respect of an offender in the Crown Court, and the conditions stated in the subsection are satisfied, then the court may further order 'that the offender shall be subject to the special restrictions set out in this section' (a 'restriction order'). The j restrictions include that the provisions of ss 16 and 20 do not apply; and no application may be made to a tribunal in respect of a patient under ss 66 or 69(1). Section 41(6) provides:

'While a person is subject to a restriction order the responsible medical officer shall at such intervals (not exceeding one year) as the Secretary of State may direct examine and report to the Secretary of State on that person;

and every report shall contain such particulars as the Secretary of State may require.'

[28] Before I turn to Pt IV, I need to refer to Pt V. Section 66 provides that application may be made to a tribunal in the circumstances specified in sub-s (1). Application may be made where a report is furnished under s 16, and where a report is furnished under s 20 and the patient is not discharged. There is, however, no provision for such an application to be made where treatment is given without the patient's consent under the direction of the RMO under s 63. Section 72 gives the tribunal the power to discharge a patient. Section 72(1) provides:

'Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and—(a) the tribunal shall direct the discharge of a patient liable to be detained under section 2 above if they are not satisfied—(i) that he is then suffering from mental disorder or from mental disorder of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; or (ii) that his detention as aforesaid is justified in the interests of his own health or safety or with a view to the protection of other persons; (b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if they are not satisfied—(i) that he is then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (ii) that it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; or (iii) in the case of an application by virtue of paragraph (g) of section 66(1) above, that the patient, if released, would be likely to act in a manner dangerous to other persons or himself.'

[29] Section 72(5) provides:

'Where application is made to a Mental Health Review Tribunal under any provision of this Act by or in respect of a patient and the tribunal do not direct that the patient be discharged or, if he is (or is to be) subject to after-care under supervision, that he cease to be so subject (or not become so subject), the tribunal may, if satisfied that the patient is suffering from a form of mental disorder other than the form specified in the application, order or direction relating to him, direct that that application, order or direction be amended by substituting for the form of mental disorder specified in it such other form of mental disorder as appears to the tribunal to be appropriate.'

[30] Section 73 gives the tribunal the power to direct the discharge of restricted patients. Subsection (1) provides:

'Where an application to a Mental Health Review Tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to such a tribunal, the tribunal shall direct the absolute discharge of the patient if—(a) the tribunal are not satisfied as to the matters mentioned in paragraph (b)(i) or (ii) of section 72(1) above; and

a (b) the tribunal are satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.'

[31] It will be seen that in s 72(5) there is a further assertion of the link between the liability to be detained and the mental disorder specified in the application (in the case of civil patients) and in the order or direction relating to the patient (in the case of criminal patients).

b [32] I can now come to Pt IV. Section 57 applies to the 'following forms of medical treatment for mental disorder'. In the case of these forms of treatment, there is a requirement of consent and a second opinion. Section 58 applies to the 'following forms of medical treatment for mental disorder'. These forms of treatment require the consent of the patient or a second opinion. Section 62(1)

c provides:

'Sections 57 and 58 above shall not apply to any treatment—(a) which is immediately necessary to save the patient's life; or (b) which (not being irreversible) is immediately necessary to prevent a serious deterioration of his condition; or (c) which (not being irreversible or hazardous) is

d immediately necessary to alleviate serious suffering by the patient; or (d) which (not being irreversible or hazardous) is immediately necessary and represents the minimum interference necessary to prevent the patient from behaving violently or being a danger to himself or to others.'

[33] And then we come to s 63 which I shall repeat:

e

'The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, not being treatment falling within section 57 or 58 above, if the treatment is given by or under the direction of the responsible medical officer.'

f

DISCUSSION

[34] Mr Thorold submits that Sir Richard Tucker construed s 63 correctly. It permits any medical treatment not falling within ss 57 or 58 to be given by or under the direction of the RMO for any mental disorder from which the patient is suffering, whether or not it is a classified disorder. In support of his contention,

g he makes a number of points.

[35] First, there is no reference to a patient's classification anywhere in Pt IV. If Parliament had intended that the provisions of Pt IV should apply only to treatment for classified mental disorders, it would have said so explicitly, and not left the matter to 'inference and statutory construction alone' (I quote from

h Mr Thorold's skeleton argument).

[36] Secondly, if s 63 does not permit the giving of medical treatment for non-classified mental disorders, there is an important lacuna in the 1983 Act. The inability to administer medical treatment for such mental disorders in urgent cases would be a serious matter, and cannot have been intended by Parliament.

j It is true that in the case of civil patients, and unrestricted criminal patients who are subject to hospital orders, there is no difficulty, since the appropriate medical officer can reclassify the patient by furnishing a report under s 16. But this speedy solution is not available in the case of restricted criminal patients. In their case, the only route to reclassification is by a reference to the tribunal by the Secretary of State under s 71, with a view to the exercise by the tribunal of its power to reclassify under s 72(5). This is a somewhat cumbersome process which takes

time, and is not apt to deal with cases where there is an urgent need for reclassification.

[37] Nor can the problem be overcome by recourse to the common law. Mr Thorold accepts that, but for the Act, it would be open to the hospital at common law to administer essential medical treatment without the patient's consent in those cases where he or she does not have the capacity to give consent, and in all cases of emergency, regardless of capacity (see the valuable analysis of Lord Goff of Chieveley in *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 563–567, [1990] 2 AC 1 at 72–78). But he submits that the common law power to administer compulsory medical treatment to mental patients who are liable to be detained in a hospital has been impliedly removed by Pt IV of the Act. He relies by analogy on the decision of the House of Lords in *B v Forsey* [1988] SLT 572. In that case, it was held that the powers of detention conferred on hospital authorities by the Mental Health Act (Scotland) Act 1984 are exhaustive, and that any power of detention which they might otherwise have possessed at common law have been impliedly removed by the statute. The provisions of the 1984 Act correspond, so far as material, with those of the 1983 Act. Lord Keith of Kinkel delivered the principal speech. He said (at 576):

> 'In my opinion it is impossible to reach any other conclusion than that the powers of detention conferred upon hospital authorities by the scheme were intended to be exhaustive. Procedure is laid down for emergency, short term and long term detention. The period of short term detention might reasonably be expected to be long enough for an application for long term detention to be submitted to and approved by the sheriff under s. 18. What happened in this case was that the petitioner's condition appeared initially to be improving, so that an application under s. 18 was not thought appropriate. Dr Mackay was of opinion that an application which turned out to be unnecessary would be upsetting and harmful to the patient. The petitioner's condition suddenly and unexpectedly deteriorated, and by then it was too late to have an application submitted and approved before the expiry of the short term detention. That would appear to be a situation which was not in the contemplation of the framers of the legislation. However, I am of opinion that the provisions of ss. 24 (6), 25 (5) and 26 (7) are absolutely inconsistent with a possible view that the legislature intended that a hospital authority should have a common law power to detain a patient otherwise than in accordance with the statutory scheme. That scheme contains a number of safeguards designed to protect the liberty of the individual. It is not conceivable that the legislature, in prohibiting any successive period of detention under provisions containing such safeguards, should have intended to leave open the possibility of successive periods of detention not subject to such safeguards. I would therefore hold that any common law power of detention which a hospital authority might otherwise have possessed has been impliedly removed.'

[38] By parity of reasoning, Mr Thorold submits that the powers of compulsory treatment conferred on hospital authorities by Pt IV of the 1983 Act were intended to be exhaustive. Section 62(1) addresses the question of urgent treatment in terms. In these circumstances, there is no room for the operation of the common law doctrine of necessity to authorise the compulsory treatment of mental patients who are liable to be detained in hospital.

[39] The third point made by Mr Thorold is that, if the s 63 power is restricted to classified mental disorders, this will give rise to great practical difficulty in cases of comorbidity. Take a patient who suffers from mental disorder A (which by itself would justify detention in a hospital having regard to the criteria specified by the Act), and from mental disorder B (which by itself would not justify detention on the basis of those criteria). Mr Thorold submits that it would be unfortunate if the patient can only be treated for disorder A without his consent. Even worse if disorder B aggravates disorder A. Such an outcome cannot have been intended by Parliament. It is in my view unfortunate that the respondent has not adduced any evidence to explain how, and to what extent, if Sir Richard Tucker's construction of s 63 is wrong, this will cause real practical difficulty in cases of comorbidity. As it is, the court has had to make do with Mr Thorold's assertions.

[40] He further submits that, if Sir Richard Tucker's construction is correct, a patient has considerable protection against the possibility of an abuse of the power conferred by s 63. Decisions under s 63 may be challenged by judicial review, and on such a challenge, the court is entitled to reach its own view as to whether the treatment amounts to an infringement of the patient's human rights (see *R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419).

[41] I cannot accept Mr Thorold's submissions, and in large measure for the reasons advanced by Mr Gordon QC. I do not think that Mr Thorold's first (linguistic) point carries any weight. There is nothing which clearly indicates that Parliament intended Pt IV to apply to *any* mental disorder from which the patient is suffering while liable to be detained in hospital, whether classified or not. Compulsory medical treatment is a serious intrusion of a person's autonomy. I would not impute to Parliament an intention to permit compulsory treatment unless this was expressed in clear and unambiguous language. It is important to underline the full reach of Mr Thorold's submission: it is that s 63 authorises any forcible medical treatment for a non-classified mental disorder, even if it does not meet the emergency criteria stated in s 62(1). In my judgment, s 63 comes nowhere near to evincing a clear intention by Parliament to permit such treatment for non-classified mental disorder.

[42] It is true that, if Pt IV is considered in isolation from the rest of the Act, it might appear to apply to any mental disorder from which the patient is diagnosed as suffering, whether classified or not. But Pt IV must be interpreted in its context. The Act contains detailed provisions for the admission to and detention in hospital of patients who suffer from classified mental disorders. It also contains provisions which are designed to ensure that they remain liable to be detained only so long as they continue to suffer from classified mental disorders. I have earlier set out the relevant provisions. Part IV apart, Mr Thorold was unable to draw our attention to any provision in the Act which deals with non-classified mental disorders. Part IV apart, the Act is no more concerned with non-classified mental disorders than it is with physical disorders. The Act is concerned with mental disorders which are treatable and which justify detention for their treatment. In these circumstances, I do not find it at all surprising that Pt IV does not define the mental disorder for which medical treatment may be given without the patient's consent as the classified mental disorder. That is assumed. Part IV is not dealing with the definition of the mental disorder: that is determined elsewhere in the Act. Part IV is dealing with the very

important ancillary question of defining the circumstances in which forcible treatment for the mental disorder may be given.

**[43]** It seems to me, therefore, that the natural interpretation of s 63, when construed in its context, is that treatment (other than treatment falling within ss 57 and 58) may be given without the patient's consent, but only for classified mental disorders. It is at this point that it becomes necessary to examine Mr Thorold's second and third submissions in order to see whether they cast doubt on the correctness of this interpretation.

**[44]** In my judgment, *B v Forsey* [1988] SLT 572 is distinguishable from the present case. It does not compel the conclusion that, if the s 63 power may only be exercised in relation to classified mental disorder, the hospital authority has no power at common law to treat urgent non-classified mental disorder. In *B v Forsey*, it was held, as a matter of statutory construction, that the 1984 Act was exhaustive of the powers of detention in all circumstances, emergency, short-term and long-term. It followed that there was no room for a power to detain at common law in cases of emergency. Such a power would be truly concurrent with the statutory power, and had been excluded by the Act. But the position with regard to treatment under s 63 of the 1983 Act is quite different. The hypothesis under consideration is that s 63 may only be invoked in relation to a classified mental disorder. On that hypothesis, s 63 plainly is not exhaustive of the power to treat for mental disorder. It is only exhaustive of the power to treat for classified mental disorder. It simply does not touch non-classified mental disorder, because the Act is not concerned with such mental disorder, any more than it is concerned with physical illness. It follows that, if a non-classified disorder is diagnosed, and the patient needs emergency treatment to which he or she cannot or will not consent, the common law doctrine of necessity allows the hospital authority to give the treatment. There is no basis for saying that the common law doctrine of necessity has been removed by the Act in such circumstances.

**[45]** I should add for completeness that Mr Gordon also suggested that s 3 of the Act provides a further alternative solution to the problem where there is a need for emergency treatment of a non-classified mental disorder: the patient can simply be admitted under s 3. But s 5(1) specifies the circumstances in which a patient may be admitted under s 3 if he or she is already in hospital. These are where the patient is an informal in-patient, or is already detained under an application for assessment under s 2. They do not include the situation where the patient has already been detained under ss 3 or 37. In these circumstances, I think that Mr Gordon was right not to pursue this point in oral argument.

**[46]** I turn to comorbidity (of which the present case is an example). The problem presented by comorbidity is inherent in the scheme of the Act. At the very outset, the doctors who recommend the patient's admission for treatment have to decide which mental disorder(s) are of a nature or degree which make it appropriate for the patient to receive medical treatment in a hospital (see s 3(2)(a)). Similar judgments have to be made by the doctor furnishing a report under ss 16 or 20, and by the tribunal when considering whether to direct a discharge under ss 72 or 73. If a separately identifiable mental disorder does not satisfy the statutory criteria for compulsory detention, the patient cannot be detained or treated against his or her will for that disorder. That applies at all stages of the process. Thus, the patient cannot be admitted by compulsion for such a disorder, and may not continue to be detained for treatment for that disorder if it ceases to satisfy those criteria. As for Mr Thorold's example of

disorder B (which alone does not justify detention) aggravating disorder A (which alone does justify detention), if treatment for disorder B is required to treat disorder A, it is difficult to see why treatment for disorder B is not ancillary to, and therefore a necessary part of, the treatment for disorder A. In *B v Croydon Health Authority* Hoffmann LJ said ([1995] 1 All ER 683 at 687, [1995] Fam 133 at 138–139):

> 'Nursing and care concurrent with the core treatment or as a necessary prerequisite to such treatment or to prevent the patient from causing harm to himself or to alleviate the consequences of the disorder are, in my view, all capable of being ancillary to a treatment calculated to alleviate or prevent a deterioration of the psychopathic disorder.'

**[47]** In the example just given, the classified disorder is disorder A, but this classification authorises treatment for condition B as part of the treatment for condition A. I accept that patients who suffer from more than one mental disorder present particular problems for those who are charged with the sensitive and difficult task of caring for and treating mental patients. But I am not persuaded that these problems compel a meaning of s 63 which is different from what I conceive to be its natural meaning.

**[48]** For these reasons, I consider that Sir Richard Tucker misinterpreted s 63, and that the appeal should be allowed. But I should not stop here, since we heard considerable argument as to the purpose of classification, and as to the relevance of the decision of this court in *R v Anglia and Oxfordshire Mental Health Review Tribunal, ex p Hagan* (1999) 53 BMLR 9.

THE PURPOSE OF CLASSIFICATION

**[49]** This is directly relevant to the true construction of s 63, since, if that section permits compulsory treatment for any mental disorder which is diagnosed by the clinicians, whether it is classified or not, it is difficult to see what purpose is served by reclassification in ss 16, 20 or 72(5). It is true that ss 16 and 20 do not apply to the present case, since they have no application to restricted patients, but s 72(5) does apply to all patients liable to detention, and anyway s 63 applies indifferently as between restricted and unrestricted patients. If Mr Thorold is right, the purpose of reclassification is not to identify those mental disorders which justify a patient's continued detention and for which compulsory treatment may be given. He is, it seems, unable to attribute any significant purpose to reclassification.

**[50]** In my view, it is clear that the elaborate provisions in the 1983 Act for classification and reclassification are intended to serve a real purpose. In *R v Pathfinder NHS Trust, ex p Wey* (1999) 3 CCL Rep 271, the applicant was detained in hospital under s 3. His classified mental disorder was 'mental illness'. His disorder was reclassified as 'mental illness and psychopathic disorder' under s 16. The applicant appealed to the tribunal. The tribunal made an order under s 72(5) reclassifying his mental disorder back to 'mental illness'. The appropriate medical officer then purported to exercise his s 16 power to reclassify his disorder yet again as 'mental illness and psychopathic disorder'. The applicant sought judicial review of this last decision. The application succeeded before Kay J. The issue was whether, without a significant change of circumstances, the medical officer could make a classification decision which was in conflict with that of the tribunal. Kay J said that he could not do so. He said:

'If the effect of the Act is that, immediately afterwards and with no material change of circumstances, the doctor can re-exercise his powers under section 16, then the protection given for the patient is totally toothless and in no way affords any protection at all.'

**[51]** If Mr Thorold is right, the exercise of classification is not intended to provide the patient with any protection. Classification is irrelevant to treatment, since a patient may be treated for any mental disorder under s 63. It is at this point that I need to consider *R v Anglia and Oxfordshire Mental Health Review Tribunal, ex p Hagan* (1999) 53 BMLR 9.

**[52]** In that case, the applicant was a restricted patient. The hospital order specified that he was suffering from mental illness and psychopathic disorder which were of a nature or degree which made it appropriate for him to be detained in a hospital for medical treatment. In other words, it was a comorbidity case where, at the admission stage, both mental disorders were classified. The applicant applied to the tribunal to be discharged under s 73. The tribunal refused to discharge him. It found that he continued to suffer from the psychopathic disorder, which continued to be of a nature and degree that required his detention in hospital for his own health and safety, and for the protection of others. It also found that the applicant continued to suffer from the mental illness, which was at that time in remission, but that the mental illness taken alone would not justify his being detained. Nevertheless, the tribunal decided not to exercise its power under s 72(5) to reclassify so as to remove from the hospital order the reference to the mental illness. The applicant argued that, in view of its findings, the tribunal was bound under s 72(5) to delete the reference to mental illness in the hospital order. This argument prevailed before Collins J. The tribunal succeeded on appeal before Lord Woolf MR, Waller and Chadwick LJJ.

**[53]** The principal judgment was given by Waller LJ. The central question for the court was whether on the facts of that case the tribunal had a discretion or was under a duty to reclassify pursuant to s 72(5), by deleting mental illness on the grounds that it was a mental disorder which would not by itself justify detention. The court held that the tribunal had a discretion. It is necessary to examine the reasoning of Waller LJ's judgment in a little detail. He recorded (at 15) the submission of Mr Gordon (who appeared for the applicant in that case) that it is not lawful to treat a patient compulsorily for any form of mental disorder other than one that is classified: the very submission that he makes on the present appeal. Waller LJ said that it was unnecessary to decide whether this submission was correct, and that it was 'probably better to leave final resolution to a case where it is directly in issue'.

**[54]** He then turned to the question of reclassification and its purpose. He said (at 17):

'There is force in Mr Gordon's submissions that there should be some touchstone for the use of compulsory powers both of detention and treatment. Nor do I dissent from the view that reclassification is a means whereby that touchstone can be kept under review. Furthermore, I have no doubt that the requirement that there must be at least one common mental disorder as between two medical practitioners before an application is effective, is the touchstone for detention under s 3, but it clearly is not in one sense the touchstone for treatment in that instance because under s 16 one report from the appropriate medical officer stating that the patient is

suffering from a different form of mental disorder will lead to the application being deemed to contain that different form.'

[55] He then considered what the position would be if the appropriate medical officer were of the opinion that the applicant (a) continued to suffer from a mental illness which did not alone justify detention, but (b) also suffered from a psychopathic disorder which did justify detention. Waller LJ said that in such circumstances the medical officer would not be able to reclassify under s 16 because 'it would not be appearing to the appropriate medical officer that the patient was suffering from a form of mental disorder other than the form or forms specified in the application'. He added that he did not see any warrant for implying a duty on the medical officer 'to delete a mental disorder from which the patient suffers and may need treatment, albeit that mental disorder *alone* might not justify detention'. He then considered the position of restricted patients, and said that he derived assistance in construing s 72(5) from the civil context ie the position under s 16.

[56] He said (at 18):

'That leads me to the conclusion that reclassification is not simply about defining those mental illnesses in the sense of making sure that the document authorising detention only contains references to the forms of mental disorder when taken on their own would justify detention. I accept that the document authorising detention, whether it be an application or an order of the court, is the starting point for authorising the powers under the Mental Health Act. But reclassification, in my view, does not involve an obligation to remove from that order a form of mental disorder from which a patient still suffers.'

[57] He summarised his overall conclusions as follows (at 18–20):

'First, the primary purpose of s 72(5) is to enable a tribunal which has concluded that the form of mental disorder which requires the patient to continue to be detained is different from the form of mental disorder specified in an order (or an application or direction), to substitute that mental disorder so as to, in effect, correct the order to accord with the position as it is now known to be. Second, reclassification in the civil context under s 16, would not have taken place if the conclusion of the medical officer was that Mr Hagan still suffered from mental illness, albeit it was in remission, and in the result in the civil context: (a) the application would still have specified mental illness; and (b) whatever s 63 means, treatment for mental illness could continue to be compulsorily administered. Section 72(5) ought to be construed as providing the mental health tribunal with a discretion so that they are not obliged to reclassify Mr Hagan in a way different from that which he would have been classified as a civil patient. In addition, in the context of ss 37 and 41, s 72(5) ought to be construed as giving the mental health tribunal a discretion not to delete a mental disorder from which a patient still suffers where deletion might frustrate their powers in relation to conditional discharge in the future. Reclassification relates to whether the patient suffers from a particular mental disorder; not to whether he is detainable for that mental disorder if it stood alone. It is possible that if the conclusion was that a patient no longer suffered from a form of mental disorder previously specified in the order at all, that deletion in circumstances where substitution was not required would be permissible,

but that is not this case. The judge put Mr Gordon's submissions in this way: "In short, what Mr Gordon's submissions boil down to is this. The purpose of classification, whether it be in an application or in an order, or indeed any other formal document, is to show the basis for the detention of the relevant person. It is, as it were, akin to a warrant or a court order justifying detention in, for example, a prison, because detention in a mental hospital is as much a deprivation of liberty as detention in any other sort of institution. Such a detention must be justified. The document shows third parties why a person is being detained and, therefore, should contain, and contain only, the reference to the form of mental disorder which justifies any current detention." It will be noted that he commences with the words "purpose of classification". I do not dissent from the view that at least part of the purpose of classification in the original form of application, and the court order under s 37, is to show the basis for the detention and at least part of the purpose is to identify the mental disorder for which compulsory treatment is needed (albeit the treatment aspect was not much pursued before the judge). It also seems to me that the reason why under s 16 a report may generate some other form of mental disorder being specified in the application has to do with the lawfulness or otherwise of continued detention pursuant to an application, and the purpose of substitution under s 72(5) has to do with ensuring that the order correctly reflects a basis for detention. But it does not follow in either case that the purpose of reclassification is to ensure that there is not described in the application or order a form of mental disorder from which the patient suffers and may need treatment if he continues to be detained on the basis of another form of mental disorder. Indeed, the ordinary application of s 16 leads to that conclusion, and there is no reason why the tribunal, under s 72(5), should be obliged to reach a different conclusion. Thus, the judge was wrong to accept the submission that the purpose of reclassification wherever it appeared in the Mental Health Act was to ensure that there was not described in the application or the order a mental disorder from which the patient suffered but which would not on its own justify detention. In particular, it seems to me the judge was wrong to accept the submission that the purpose of reclassification under s 72(5) was to describe accurately the basis on which the patient was lawfully detained. The patient was lawfully detained under an order of the court, and there was nothing inaccurate in describing him as being lawfully detained on the bases specified in the order. Furthermore, there is no warrant in my view for reading into the section that it is: "incumbent upon [the tribunal] to reclassify if it decides that one of the current forms of mental disorders, from which the patient is suffering which is contained in the order or application or direction which has lead to his detention, is no longer appropriate ... because the relevant mental illness is not of a nature or degree which makes it appropriate for him to receive medical treatment" where the conclusion of the tribunal is that for another reason the patient is to be detained. Of course, if the conclusion relating to the mental illness related to the only basis for detention, reclassification would not be appropriate but discharge either absolutely or conditionally would follow. I would finally add that there is, in my judgment, possibly a short answer to this case even accepting much of Mr Gordon's submissions. The conclusion of the tribunal was that the mental illness alone would not render him liable to be detained. That conclusion emphasises that Mr Hagan still suffers from mental illness, and

that it may recur unless treatment was available. The conclusion I suggest can be fairly read as being that the mental illness, when taken together with the psychopathic disorder which can be alleviated by treatment in hospital, makes it appropriate for him to be detained in hospital for medical treatment in relation to both types of mental disorder. Clearly, there could be no criticism of the tribunal's refusal to reclassify so as to delete the mental illness if that was their view.'

[58] Mr Gordon submits that *Ex p Hagan* was wrongly decided. He contends that the court should have held that classification is the touchstone for both detention and treatability, and that the decision of Collins J was correct. He submits that it is open to this court not to follow *Ex p Hagan* since that decision was made before the Human Rights Act 1998 came into force, and without reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). He nevertheless submits that the decision in *Ex p Hagan* is no bar to his appeal in the present case, since the court expressly refused (see (1999) 53 BMLR 9 at 15–16) to decide the point that arises here, namely whether it is lawful to treat a patient compulsorily for any form of mental disorder that is not classified.

[59] Mr Thorold submits that *Ex p Hagan* was correctly decided, but he does not contend that the answer to the question that arises in the present case is provided by *Ex p Hagan*. Counsel are, therefore, agreed that *Ex p Hagan* is not determinative of the s 63 question. Nevertheless, it seems to me that at least some of Waller LJ's reasoning is relevant to that question.

[60] I confess, with the greatest of respect, that I am unable to agree with some of that reasoning. The court in *Ex p Hagan* seems to have been of the opinion that classification is the touchstone for detention, but not necessarily for treatability. Waller LJ states in various places that it is the touchstone for detention. Thus, he says (at 18) that the primary purpose of s 72(5) of the 1983 Act is to enable a tribunal which has concluded that the form of disorder which requires a patient to continue to be detained is different from the classified disorder to make a substitution 'so as to, in effect, correct the order to accord with the position as it is now known to be'. And he says (at 19) that (a) 'at least part of the purpose' of an original classification is to show the basis for detention; (b) the reason why a s 16 report may reclassify a mental disorder 'has to do with the lawfulness or otherwise of continued detention pursuant to an application'; and (c) the purpose of substitution under s 72(5) 'has to do with ensuring that the order correctly reflects a basis for detention'. In these passages, Waller LJ is clearly saying that the reason for a reclassification under ss 16 or 72(5) is to provide a touchstone for lawful detention: to ensure that the application or hospital order (as the case may be) accurately describes the mental disorder which justifies the patient's lawful detention in hospital.

[61] As to whether classification provides the touchstone for treatability, Waller LJ sees force (at 17) in the submission that it does; and at least part of the purpose of the original classification is 'to identify the mental disorder for which compulsory treatment is needed' (at 19). But this did not require the removal from the order of a form of mental disorder from which a patient still suffers, even though that would not by itself justify detention (see 18).

[62] It seems to me that two factors played a considerable, and perhaps decisive, part in the conclusion to which I have just referred. First he was of the opinion (at 17) that an appropriate medical officer cannot reclassify under s 16 if

he considers that one of two classified disorders no longer satisfies the s 3(2) criteria. This led to his point that there was no warrant for adding by implication some duty on the medical officer to delete a mental disorder from which the patient suffers and may need treatment, albeit that this mental disorder alone might not justify detention. But I do not see why the medical officer cannot reclassify in such a case (see [21], above). At the outset, there are two classified disorders A and B. The medical officer now considers that there is only one, A. It appears to him that the disorder from which the patient is suffering (A) is 'other' than the disorders which were specified in the application form (A and B). The importance of Waller LJ's opinion as to the scope of s 16 in the reasoning that led to his conclusion about the meaning of s 72(5) is evident from his judgment (at 18–19).

**[63]** The second important factor in Waller LJ's reasoning is the concern expressed (at 15–16) about the implications of accepting Mr Gordon's submissions as to the meaning of s 63. Waller LJ speaks of an 'unsatisfactory state of affairs' if the tribunal were bound to delete mental illness from the order since (1) the hospital could not treat the patient compulsorily so as to keep his mental illness in remission, and (2) even more worryingly, 'could not treat [him] compulsorily if the mental illness came out of remission until they had gone through the Secretary of State route to get the order re-amended'. No reference is made to the possible recourse to the power to treat under the common law doctrine of necessity. It would seem that the relevance of this power was not brought to the attention of the court.

**[64]** Waller LJ acknowledges that part of the purpose of classification is to identify the mental disorder for which compulsory treatment is needed. I respectfully agree. But in my view the corollary is that it is not the purpose of classification to identify a mental disorder for which compulsory treatment is not needed.

**[65]** In my judgment, the better view of ss 16, 20 and 72(5) is that, where a classified mental disorder ceases to meet the s 3(2) or 37(2) criteria, then there should be a reclassification to delete the disorder from the application for admission or hospital order as the case may be. For the reasons that I have given, neither of the factors which seem to have led the court in *Ex p Hagan* to its conclusion as to the meaning of s 72(5) justifies that conclusion.

**[66]** It follows that I do not feel able to agree with the reasoning that led the court to allow the appeal in *Ex p Hagan*. I do not, however, find it necessary to say that it was wrongly decided. In my view, the correct basis for allowing the appeal in *Ex p Hagan* was identified by Waller LJ (at 19–20). It is not, therefore, necessary to consider Mr Gordon's submission that *Ex p Hagan* can no longer be regarded as good law since the 1998 Act came into force.

CONCLUSION

**[67]** For the reasons given earlier, the natural and correct interpretation of s 63 of the 1983 Act is that it permits compulsory medical treatment only for classified mental disorders. Were it otherwise, the carefully drafted provisions for reclassification in ss 16, 20 and 72(5) would serve no real purpose. Those provisions are designed to ensure that the essential link is maintained between the mental disorder which justifies the patient's detention and his treatment for that disorder, and no other.

**[68]** In my opinion, this appeal should be allowed.

**SCOTT BAKER LJ.**

[69] I have had the advantage of reading in draft the judgments of Dyson and Simon Brown LJJ and I agree with them. Detention in a mental hospital is something that the law permits only if the specified conditions are satisfied. I can see no reason why a patient should ordinarily be subjected to treatment without his consent for a condition that does not justify his detention. That this is the position under the Mental Health Act 1983 is in my view clear from the careful analysis of the Act by Dyson LJ.

[70] I cannot see that our conclusion should present an insuperable problem for the treating doctors. Where a patient is suffering from more than one form of mental disorder justifying detention it will be important for him to be classified accordingly and mental health review tribunals will need to keep this in mind. I also see the force of Dyson LJ's point (at [46], above) that there will be circumstances where treatment for disorder B is required to treat disorder A, and it is difficult in such a case to see why treatment for disorder B is not ancillary to, and therefore a necessary part of, the treatment for disorder A.

[71] I too would allow the appeal.

**SIMON BROWN LJ.**

[72] I too would allow this appeal for the reasons given by Dyson LJ but because of the obvious importance of the case and because our decision may be thought to sit somewhat uneasily alongside that in *R v Anglia and Oxfordshire Mental Health Review Tribunal, ex p Hagan* (1999) 53 BMLR 9, I want to add a few words of my own.

[73] Dyson LJ (at [16], above) set out to show, and later in his judgment plainly does show that—

> 'a theme that runs through [the Mental Health Act 1983] is that the liability to detention is linked to the mental disorder from which the patient is classified as suffering, and that this disorder is considered to be treatable by the person or body making the classification'.

[74] That theme of itself to my mind calls into question the correctness of parts at least of the reasoning in *Ex p Hagan* if not the actual result there arrived at. If the patient can only lawfully be detained for a classified treatable mental disorder, there ought properly to be a correlation between the disorder(s) classified and the treatable disorder(s) from which the patient is suffering. That, however, is not directly the question raised on this appeal. Rather the question here is whether, assuming the patient to be lawfully detained, he can thereafter be compulsorily treated for any mental disorder diagnosed by his responsible medical officer (RMO) or only for such disorder(s) as he is at that time classified to be suffering from.

[75] It is the respondent's submission (and here I quote Mr Thorold's skeleton argument) that—

> 'The primary purpose of classification under the 1983 Act is to establish a legal basis for detention, and to indicate which diagnoses are in issue at a tribunal, not to limit the permissible limit of treatments which can be given to the specified disorders.'

[76] In common with my Lords, that is not a submission I feel able to accept. I explained in *R (on the application of Wilkinson) v Responsible Medical Officer*

*Broadmoor Hospital* [2001] EWCA Civ 1545 at [9], [2002] 1 WLR 419 at [9], the scheme for compulsory treatment under the 1983 Act: *a*

> 'Detention under the Act does not of itself authorise treatment without consent. It is not sufficient merely that the patient was admitted (and indeed remains detained) because his condition was regarded as treatable. Compulsory treatment must be authorised if at all under Part IV of the Act. As section 63 makes plain, it is a prerequisite of such treatment that it shall be given "for the mental disorder from which [the patient] is suffering". Without that it will be unlawful in any event. Sections 57 and 58 then provide a range of safeguards graded to reflect the severity of the various treatments which may be contemplated. Section 57 (not here directly in point) is concerned with surgery for destroying brain tissue or other forms of severe and perhaps irreversible treatment prescribed by the Secretary of State and it precludes any such treatment being given compulsorily. Rather it requires both the patient's capacitated consent, which must be certified to be valid by a panel of three persons including a SOAD [second opinion appointed doctor], and also the SOAD's certified approval for such treatment having regard to the likelihood of it assisting the patient's condition. Section 58 applies to two defined forms of treatment for mental disorder: ECT and long-term medication. These are forbidden save—and thereby, taken in conjunction with section 63, permitted only—upon the stipulated conditions. These are that the patient has either (a) given a capacitated consent, so certified by the RMO or a SOAD, or (b) not given such a consent (or, indeed, indicated a capacitated refusal) but the SOAD, having consulted with two others as required, has nevertheless certified that the treatment should be given.' *b c d e*

[77] We are not here concerned with s 57 (which, in any event, as provided by s 56(2), applies 'also to any patient who is not liable to be detained under this Act') because, subject only to the requirement for urgent treatment as defined in s 62, it requires in every case the patient's capacitated consent. Section 58 (also subject to s 62), however, does not always require the patient's consent so that, were Mr Thorold's submission correct, patients classified as suffering only from mental disorder A could be compulsorily subjected to the sorts of severe treatment provided for by s 58 with regard to mental disorder B. That is not a conclusion that I would reach except upon the clearest language and s 63 does not provide it. *f g*

[78] Two important considerations should be borne in mind when construing s 63: first, that on no view does it extend to treatment for any physical condition, however serious, and however mentally incapacitated the patient may be. Secondly, that a person suffering from a treatable mental disorder, but not one of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital, cannot be detained and treated under the Act. If the patient cannot be forcibly treated in either of those circumstances, why should he be amenable to such treatment for a non-specified mental disorder merely because he is already lawfully detained for the treatment of some other mental disorder? *h j*

[79] I add only this. The mental health review tribunal's decision here was made on 8 May 2001, well after this court's judgment in *Ex p Hagan* and presumably with that case in mind. It may be doubted whether in those circumstances, given that the tribunal found the appellant still liable to be

detained on the ground of mental illness, they thought it necessary to give serious consideration to the exercise of their s 72(5) power to reclassify him as suffering also, assuming they thought he was, from a psychopathic disorder. To my mind, indeed, if one looks at the totality of the reasoning for their decision, it seems tolerably clear that they did not. Dyson LJ (at [9], above) has set out the first part of the tribunal's reasoning. It continued as follows:

> 'The RMO gave evidence in accordance with his report and its addendum. He was emphatic that the patient had improved over the last 18 months. That had allowed greater engagement with the care team. The patient was still ill, and without medication and the structured care of the hospital, would relapse. The RMO outlined a pattern of treatment which he considered should be put in hand before a transfer could be considered. The risk factor was difficult to assess but was real. Dr Scholey and Mrs White gave evidence emphasising that of the RMO. Professor Sashidharan considered that the mental illness was controlled by the medication and that the patient's outbursts in past years were due to the culture from which he came reacting against the regime of the hospital, rather than mental illness. However, the Professor was specific that the patient wherever he was, must continue medication for fear of a relapse. Mr Bromley echoed the Professor's view that some of the patient's behaviour was due to growing up in a criminal subculture, but agreed that the patient presented some risk, not readily quantifiable. The patient was courteous and articulate. He was anxious to say that he suffered no mental illness and had not for many years. Questioned, he said that although mad at the time of the offence, he had already recovered by the time he came before the Crown Court for sentence. He would take medication if it was enforceable but not otherwise. We note that the patient has made progress over the past year or two, but much work remains before a transfer would be appropriate.'

[**80**] Had the tribunal appreciated that it would be unlawful to treat the appellant compulsorily in a personality disorder ward without reclassifying him as suffering from that disorder—indeed, that he was already being unlawfully treated in such a ward—it may be supposed that they would have addressed the issue of reclassification altogether more directly, rather than merely appearing to approve the RMO's proposed pattern of future treatment.

[**81**] Clearly, following our judgments on this appeal, the question of reclassifying patients to include other disorders will assume a far greater importance than hitherto it has had.

[**82**] These observations, however, cannot affect the outcome of the present appeal. Clearly it succeeds so that unless and until the appellant is hereafter reclassified by a tribunal as suffering also from a psychopathic disorder it will not be lawful to continue his treatment for that condition.

*Appeal allowed.*

Dilys Tausz Barrister.

# Lambert v Lambert

[2002] EWCA Civ 1685

COURT OF APPEAL, CIVIL DIVISION

THORPE, MAY LJJ AND BODEY J

14, 15 OCTOBER, 14 NOVEMBER 2002

*Divorce – Financial provision – Matters to be considered by court when making order – Contribution by each of the parties to welfare of family – Whether concept of 'special contribution' by money-making partner legitimate in justifying unequal division of assets – Matrimonial Causes Act 1973, s 25(2).*

The parties were married in 1974 and had two adult children. During the course of their marriage, the husband developed a successful company through a combination of hard work, innovation, initiative, determination and business acumen. By creating the family's wealth, the husband made a substantial contribution to its welfare. The wife made a full contribution by looking after their home and caring for their family, supplemented when the need arose by her willingness to support her husband in his efforts to develop the business. The parties separated in 1997. Two years later, the husband's company was sold, and he received nearly £20m for his shares. Several million pounds were also paid into a trust for the two children who were therefore financially independent. The wife, whose life expectancy was 12 years greater than her husband's, brought ancillary relief proceedings, seeking an equal division of the assets. The husband offered her only 30%. At the hearing, the judge considered the factors that he was required to take into account by s 25(2)[a] of the Matrimonial Causes Act 1973, including the contributions that the parties had made to the welfare of their family, and concluded that a split of 63% to 37% in the husband's favour constituted a fair distribution of the assets. In reaching that conclusion, the judge held that an unequal distribution was justified because the husband's contribution had been 'exceptional', even though he had earlier concluded that the husband could not be described as a genius and that the wife could probably not have done any more to justify an award of 50%. On the wife's appeal, the Court of Appeal considered the legitimacy of the concept of special contribution and whether the judge had fallen into the trap of gender discrimination.

**Held** – Special contribution remained a legitimate possibility, but only in exceptional circumstances. It was both futile and dangerous to attempt to speculate on the boundaries of the exceptional. The danger of gender discrimination resulting from a finding of special financial contribution was plain. If all that was regarded was the scale of the breadwinner's success, discrimination was almost bound to follow since there was no equal opportunity for the homemaker to demonstrate the scale of her comparable success. Although there might be cases where the product alone justified a conclusion of special contribution, a case for such a contribution would be hard to establish in the absence of some exceptional and individual quality in the generator of the fortune. A good idea, initiative, entrepreneurial skills and extensive hard work

a Section 25, so far as material, is set out at [37], below

were insufficient to attract the label. It would be too easy to compile a comparable catalogue of qualities that the homemaker had brought to the other essential contribution. In the instant case, once the judge had concluded that the husband was not a genius and that the wife could have done no more, he should not have elevated one contribution above the other, given that the two were essentially incommensurable. The only justification for a departure from equality asserted by the husband could not be upheld without discrimination. It was also important that the wife's needs, given the respective ages of the parties, pointed towards equality. Accordingly, the appeal would be allowed (see [45], [46], [52], [53], [62], [64], [65], [77], below).

*H-J v H-J (financial provision: equality)* [2002] 1 FLR 415 approved.

*Cowan v Cowan* [2001] 2 FCR 331 distinguished.

**Notes**

For equality of division, see 29(3) *Halsbury's Laws* (4th edn reissue) para 731.

For the Matrimonial Causes Act 1973, s 25, see 27 *Halsbury's Statutes* (4th edn) (2000 reissue) 972.

**Cases referred to in judgments**

*Cowan v Cowan* [2001] EWCA Civ 679, [2001] 2 FCR 331, [2002] Fam 97, [2001] 3 WLR 684.

*Duxbury v Duxbury* [1990] 2 All ER 77, [1992] Fam 62, [1991] 3 WLR 639, CA.

*Farmer v Bramley* [2000] FamCA 1615, Aust FC.

*Figgins v Figgins* [2002] FamCA 688, Aust FC.

*G v G* (2 July 2002, unreported), Fam D.

*H v H (financial provision: special contribution)* [2002] 2 FLR 1021.

*H-J v H-J (financial provision: equality)* [2002] 1 FLR 415.

*Lynch v Lynch* [2000] FamCA 1353, [2001] FLC 93-075, Aust FC.

*M v M* [2002] NIJB 47.

*Piglowska v Piglowski* [1999] 3 All ER 632, [1999] 1 WLR 1360, HL.

*White v White* [2001] 1 All ER 1, [2001] 1 AC 596, [2000] 3 WLR 1571, HL.

**Appeal**

By notice dated 16 November 2001, Shan Elizabeth Rose Lambert, the applicant in ancillary relief proceedings brought against her former husband, Harry Paul Lambert, appealed from the order of Connell J on 22 October 2001 ([2002] 2 FCR 413) awarding her a lump sum of £3,152,732 rather than the sum of £5,751,474 which she sought. The facts are set out in the judgment of Thorpe LJ.

*Nicholas Mostyn QC* and *Richard Todd* (instructed by *Schillings*) for the wife.

*Martin Pointer QC* and *Nigel Dyer* (instructed by *Manches & Co*) for the husband.

*Cur adv vult*

14 November 2002. The following judgments were delivered.

**THORPE LJ.**

INTRODUCTION

[1] This is an appeal from the judgment of Connell J dated 22 October 2001 ([2002] 2 FCR 413). He conducted the trial of the ancillary relief proceedings

brought by Shan Lambert against her husband Harry Lambert for eight days between 2 and 10 October. The judgment that he gave some 12 days later was reserved and handed down. Permission to appeal was given by me on paper on 5 December 2001, the application having been lodged with this court on 16 November following refusal by Connell J on 31 October. An interval of ten months between grant of permission and listing of the appeal is most unusual and in many ways undesirable. The skeleton arguments of the appellant and respondent were settled on 14 November 2001 and 17 May 2002 respectively. In the year between trial and listing of the appeal there have been a number of significant decisions both here and abroad in a fluid area of the law. Accordingly the skeletons were but scant guide to the oral submissions. Such a delay is above all undesirable for the parties. Until the litigation is concluded it is difficult for them to complete the transition from married life to independent life either financially or emotionally.

**[2]** The case would be very suitable for use in a textbook on ancillary relief. It is a big money case, and the family fortune, taken by the judge to be £20·2m, was all generated during the marriage. Both husband and wife worked hard for their success. There are two children now grown up and independently rich as a consequence of the diversion of a substantial proportion of the family fortune into a trust for their benefit. There are no complicating factors. Following a take over of the husband's company after the separation the family fortune is more or less all liquid. The wife has always contended for an equal division. The husband offered her only 30% on the grounds that his special contribution entitled him to the lion's share.

THE SHAPE OF THE JUDGMENT OF CONNELL J

**[3]** Having introduced the parties as being then aged respectively 49 (the applicant wife) and 57 (the respondent husband), Connell J summarised the essential history with admirable brevity as follows:

> '[2] The marriage lasted 23 years. There are two children, a son aged 20 and a daughter aged nearly 19. Both are at university and are wealthy as a result of a trust which was created for them by their parents in 1985 and which is based in Guernsey. The value of the trust assets is now £7·3m and both children in reality are financially independent.
>
> [3] The parties' significant wealth arises from the sale of the shares in the company A Ltd in September 1999 for £75m. Of this sum the husband received £19,726,000, the wife received £500,000, and the children's trust received £6m. This company had been floated on the stock exchange in 1987, and the quoted share price at the time of the sale was 155p. However the price paid for the shares after negotiation conducted by the husband and the board of directors was 263p. The company was founded by the husband in March 1973, nine months before he met the wife and 15 months before he married her in June 1974. The company produced and distributed a free local newspaper funded by advertising revenue, and it expanded dramatically over the course of the marriage until it was sold as described.'

**[4]** The judge recorded (at [4]–[5]) the principal area of factual dispute between the parties. The husband's case was that he had launched the company and set it on a successful path prior to the marriage, and that its success during the marriage was the result of his drive and initiative. After the separation he contended that the eventual sale was at an outstanding price achieved by his

special negotiating skills. He asserted that his wife's involvement in the company was more or less ornamental.

[5] By contrast the wife claimed for herself not only a committed contribution as wife and mother but also a contribution to the success of the business which she asserted was pivotal. The judge then recorded Mr Pointer QC's submission that, on the husband's case, his contribution to the creation of the family fortune was exceptional, as defined by this court in *Cowan v Cowan* [2001] EWCA Civ 679, [2001] 2 FCR 331, [2002] Fam 97, and that it significantly outweighed the admittedly full but domestic contribution of the wife.

[6] The judge directed himself as to the law, impeccably in my opinion ([2002] 2 FCR 413 at [6]). He said:

> 'The court's fundamental duty however remains to apply s 25 of the Matrimonial Causes Act 1973 to all the circumstances of this case in its attempt to arrive at a fair outcome. Although the issue of the parties contributions to the welfare of the family has been uppermost in the minds of the parties' and of their representatives, I observe that that issue can claim no statutory priority in the discretionary exercise. I must have regard to each of the eight matters separately specified in s 25(2) against the background of all the circumstances of the case. Since each of the children is now adult and wealthy as described, their welfare no longer requires "first consideration" ...'

[7] The judge then carried out the s 25 exercise considering in turn each of the s 25(2) criteria. That exercise took him from paras [7] to [28]. He reviewed (at [29]–[38]) those passages in *White v White* [2001] 1 All ER 1, [2001] 1 AC 596 and *Cowan v Cowan* of particular application to the case. Finally (at [39] and [40]) he expressed his conclusion, namely a 63%:37% split in favour of the husband. That left the wife with assets totalling £7·5m, nearer the figure of £6m for which Mr Pointer QC had contended than the figure of £10·2m for which Mr Mostyn QC had striven. The order was summarised thus in the final paragraph (at [41]):

> 'Matrimonial home worth £1·6m will be transferred to the wife. She has other assets worth £2·8m in round figures. I shall in addition order a lump sum payment in full and final satisfaction of all her claims of £3·1m.'

THE GROUNDS OF APPEAL

[8] In his grounds of appeal Mr Mostyn attacks the judgment on three fronts. (i) First he contends that Connell J fell into the trap of gender discrimination by concluding that the husband's contribution as a money-maker was special, of greater value than the wife's, and a justification for an unequal division of the family fortune. (ii) Second he submits that the husband held the proceeds of sale of his shares in the company as trustee pending the outcome of the wife's ancillary relief claims. His subsequent investments were reckless and the wife's entitlement should have been determined on the notional basis that the assets retained the value that they held immediately after the sale of the business. (iii) Third he says that the judgment focussed insufficiently on the wife's needs as the future owner of the final matrimonial home, with the consequence that the yield from her investment capital would not meet her outgoings.

[9] This appeal was dominated by the first ground, which raises many difficult questions and requires a review of recent authorities both here and abroad. The submission underlying the second ground had been rejected by Connell J on the

facts and particularly on his assessment of the husband's good faith. Before us when Mr Mostyn saw that the wind was against him he tacitly abandoned this ground. The third ground requires no consideration of law and principle. It is fact dependent and focuses on a single paragraph in the judgment below. I will defer any consideration of ground three until I have dealt with the first ground.

CONNELL J'S TREATMENT OF CONTRIBUTIONS

**[10]** How then did Connell J deal with contributions? It is perhaps indicative that the section of his judgment devoted to contributions is the longest. He considered the wife's contribution, dealing first with home life. He said (at [18]):

> 'The wife's contribution as wife and mother is accepted by the husband. Given that this was a husband who was intent on building up the company, who worked long hours to that end and who, on his own account, was often away from home for much of the working week, the contribution made by the wife in this regard was particularly valuable. The husband's contribution vis-à-vis home life and his children was primarily confined to weekends; so that he was a committed but frequently absent husband and father. When home he made the major decisions on modernisation ... and the wife did her best to implement these when he was away.'

He noted that for at least the first five years of the marriage the wife ran her own business which enabled her to pay for the food and other domestic articles: 'This was a constructive contribution in the early days of the marriage and in my view is evidence of the unsurprising fact that the parties treated the marriage as a partnership from an early stage.'

**[11]** He put the wife's contribution to Adscene into proper perspective, thus (at [21]):

> 'I do not see her role as pivotal. On the other hand it would not be fair to her to describe it as purely incidental, since the husband was able to turn to her for support when such was appropriate or necessary in his view. Thus her contribution to the business was modest when compared to that of the husband, but was not irrelevant or meaningless. Bearing in mind the words of the statute, she made a full contribution by looking after the home and caring for the family, which was supplemented when the need arose by her willingness to support the husband in his efforts to develop the business.'

**[12]** Turning to the husband, he recorded his case for exceptional contribution which was advanced on three fronts: first that the company was created and established prior to marriage, second that during the years of cohabitation the husband's achievement was the product of his exceptional innovation and talent, third that the sale of Adscene some two years after the separation for a price two-and-a-half times the separation value was the product of his exceptional judgment and negotiating skills. As to the first the judge recorded that at the date of the marriage the company was only part way through its first year of trading, that the real growth 'all took place during the course of the marriage and during the time that the wife was supporting the husband as well as looking after his home and bringing up the children. This pot of gold was truly created during the marriage'. However in relation to the second phase the judge held that the development 'was achieved very largely thanks to the husband's efforts and I have no doubt

that he was an excellent businessman and manifestly a successful entrepreneur'. Of the third phase, the sale, this was the finding:

> 'The husband is entitled to significant credit for this in view of his early participation in the sale process, but in my view it would be stretching language to describe this part of his contribution as exceptional. No doubt as a successful entrepreneur he displayed the talents of a good negotiator in order to reach a good conclusion. It was a very satisfactory conclusion materially assisted by a good businessman but no more than that.'

**[13]** Paragraph [26] concluded this section of the judgment with this overall assessment of the husband's contribution:

> 'Thus, as indicated, the husband made a very substantial contribution to the welfare of this family by creating its wealth with occasional assistance from his wife. It would not be right in my view to describe him as a genius, and the most exceptional part of his contribution relates to the very large sum of money acquired by the family as described. It is difficult to envisage a financial contribution in a big money case which is not in one sense exceptional, since by definition exceptional or unusual wealth has been created. Where, as here, that contribution consists of a good idea, initiative, entrepreneurial skills and extensive hard work the question still remains whether that contribution is so special when compared to the contribution of the wife and balanced against the other s 25 circumstances as to demand special recognition.'

**[14]** The judge's answer to the question that he had posed himself in the final sentence of para [26] comes in paras [39] and [40], which not only answer the question but also decide the outcome of the case. I therefore set them out in full:

> '[39] There is of course a problem in that any court which decides that the contribution of one spouse is properly described as special may appear thereby to decry the contribution of the other spouse. But that is not in fact the case. The wife, as here, may have made a full domestic contribution and a modest business contribution. That being recognised, it cannot be described as an exceptional contribution without causing offence to language. On the other hand the husband may have accumulated exceptional wealth by displaying over many years an innovative approach coupled with excellent business skills and very hard work. If that is so the court must decide whether (per Mance LJ) "there was something really special about the skill or effort devoted" by the husband; and in that case must consider its impact on the appropriate order.
>
> [40] In my view the contribution made by this husband is as entitled to the description "really special" or "exceptional" as was the contribution made by Mr Cowan. Although I would not describe him as a genius, he was more than just a hard working businessman. He showed innovative visions and the ability to develop these visions (see [2001] 2 FCR 331 at [67] per Thorpe LJ). He was not merely a successful businessman but an exceptionally active, determined and innovative one (see [2001] 2 FCR 331 at [94] per Robert Walker LJ). His was a special achievement, via special business skills, acumen and effort (see [2001] 2 FCR 331 at [155] per Mance LJ). The wife's contribution was as described, without any feature which can be described as "really special". In answer to the question posed

in argument by Mr Mostyn QC, namely "What more could the wife have done to justify an award of 50%?" The answer is: "In the circumstances, probably nothing". That in my view does not lead to the conclusion that an award of less than 50% is unfair. In a case where the issue of contribution is central to outcome, an award which leaves this wife with approximately 37·5% of the assets (£7,500,000) is a fair outcome, which departs from the yardstick of equality in deference to the really special contribution of the husband as described. It also recognises in full the contribution of this particular wife thanks to whose help and support the husband was free to pursue those skills. In percentage terms it is similar to the award made in *Cowan v Cowan* where the wife achieved 38%. The husband's proposal of a lump sum of £1·6m would have left the wife with (but) 30%. Such an award would not adequately have recognised the various different elements of her contribution which have been previously described.'

**[15]** In developing his attack on these paragraphs Mr Mostyn relies upon the decision in *White v White* and upon five cases that were not available to Connell J. Before coming to his submissions it is convenient to review his authorities.

*The recent authorities*

**[16]** There are three authorities in this jurisdiction, which require scrutiny. I take them in chronological order, the first being the case of *H-J v H-J (financial provision: equality)* [2002] 1 FLR 415. Coleridge J on 17 October 2001 considered cross-appeals in a case first decided by District Judge Million involving assets of approximately £2,711,000. The district judge's order gave the wife approximately 45% of the assets. Coleridge J increased the wife's share to equality. In so doing Coleridge J differed from District Judge Million neither in principle nor in approach but on a point of detail irrelevant to this review. I begin by recording the approach of the district judge. I extract three separate passages from his judgment:

1. 'Counsel says that this greater emphasis on contributions is an inevitable consequence of the decision in *White v White*. I disagree. It is a temptation but it is not a consequence and to give way to it is to commit the very error which *White v White* warns us not to, that is to treat some of the factors in s 25(2), in this case contributions, as more important than the others.'

2. 'For my part, I would find it repugnant as a judicial exercise to have, in effect, to draw up a merit table in which fine gradations of contribution give rise to a marginally increased or decreased share in the financial spoils of marriage. By whose standards should I measure such distinctions?'

3. 'In this case, it is sufficient, as I find, to record that both the husband and wife each made their full and equal contributions in their respective roles within this long marriage. The family has been financially successful and the job of raising the children and looking after the various homes has also been successful. The role of the husband has been predominant in the financial success and, as I find, the role of the mother and wife has been predominant in keeping house and raising the children. Any further distinction is, in my judgment, impossible to draw on the evidence.'

**[17]** Of District Judge Million's approach Coleridge J said (at 428):

'In the context of this case in relation to this question of contribution, I unhesitatingly agree with the district judge that no useful distinction can be drawn between the husband's contribution and the wife's contribution. I can find nothing special, exceptional or stellar about the husband's contribution in this case. He has undoubtedly worked diligently and successfully and over a long period to amass the assets that have been amassed over the duration of this marriage. He has had some good years and some very good years, but if the facts of this case lead to a finding of a special contribution, in my judgment it would be the thin end of a wedge being driven right into the heart of the principles underlying *White v White*. So I unhesitatingly come to the view that the district judge's findings and approach were correct even in the light of *Cowan v Cowan*.'

**[18]** At the conclusion of his judgment Coleridge J said (at 430–431):

'Underlying this appeal and my decision to allow it there seems to me to be two important points:

The significance attaching to a particular fractional percentage is more than merely the monetary value it represents. It goes to the core of the party's understanding of fairness. So 50/50 resonates with fairness (as the House of Lords has identified); both parties depart with the sense of being equally valued. There are no winners or losers. Once there is a departure from equality, as there often has to be, however small that departure, one party (more often the wife) is left with a sense of grievance, of her efforts having been undervalued. Understandably, at the time of divorce these considerations matter a great deal to the parties.

In this case, after a marriage which lasted in excess of 25 years, net assets, after deduction of notional sale costs and capital gains tax, have been accumulated amounting to more than £2·7 million. Accordingly, there is ample to go round. It would indeed be sad if, in this category of cases (as opposed to those cases where the overall means are less than sufficient and so the needs of children and their carers must inevitably remain predominant), the broad and sweeping reform underlying the speeches in *White v White* was to become bogged down in a welter of zealous, over-sophisticated and costly forensic analysis, or watered down by judicial reticence.'

**[19]** The next reported case is a decision of a deputy, Mr Peter Hughes QC in *H v H (financial provision: special contribution)* [2002] 2 FLR 1021. The family assets amounted to approximately £6m. The husband was described as a highly successful city solicitor. Mr Pointer, on his behalf, contended that for various reasons his financial accumulations during the course of his professional life amounted to a special contribution: but on behalf of the wife it was submitted that he was no more than a typical successful city solicitor. The judge noted that the wife had also succumbed to the temptation to play up her own contribution. In rejecting Mr Pointer's submission the judge said:

'[42] I have considerable sympathy for the husband, who has been highly successful and worked extremely hard over many years and no doubt feels that he has created the wealth that exists today. I am unable to accept, though, that his contribution calls for special recognition as in the cases of *Cowan* and *L v L*.

[43] It is not easy to define what may amount to a "stellar" or really special contribution, but rather like the elephant, it is not difficult to spot when you come across it.

[44] In *Cowan* Mance LJ referred to the relevance of the expectations of the parties. In my judgment that is an important consideration. What did the parties anticipate when they set out on their married life together? To what extent have those expectations been realised or have their lives taken a course neither of them would ever have expected and led to riches they would never have contemplated? That was the case in *Cowan*. It was also so in *L v L*. In both cases the success of the marriage far exceeded the parties' joint expectations.

[45] That cannot be said here. The husband was already a qualified solicitor with a well-regarded city firm when the parties married. He was set on the career that he has pursued successfully, as both he and the wife hoped for. He has had to work hard and it has not always been easy. The rewards have though been substantial, as no doubt they had hoped they would be, and over the years he has had the full support of the wife in her role of looking after the home and family.'

**[20]** The last case in this jurisdiction was another decision of Coleridge J given on 2 July 2002 in the case of *G v G* (unreported). The family assets were in the region of £8·5m. The wife sought a half share. The husband proposed that she should have 40%. The husband had built the family fortune through exceptional hard work and astute business acumen in the field of substantial development and construction projects. The case was largely fought on the issue of the husband's contribution. I cite paras [33] and [34] of the judgment in full:

'But how should the court now evaluate those respective contributions in the context of s 25? It is in this area that, needless to say, enormous amounts of forensic energy have been expended. That this should have happened is largely due, of course, to the recent case law on the subject. I have had the benefit of being referred not only to *White v White* at length but also all the decided cases which have been reported since that case on this particular subject. The husband's counsel has helpfully produced a folder containing all the relevant authorities. He did this in aid of his argument that the husband's contribution should be not regarded as one of equality with the wife's but of a character and quality which marks it out as special or stellar or outstanding. This, he said, should lead to a finding that (after applying the equality cross-check required since *White v White*) his client should end up with more than half the resources.

In a number of decisions since *White v White* e g *Cowan v Cowan* and *L v L (financial provision: contributions)* [2002] 2 FCR 413, the court has recognised, in an appropriate case, the possibility of a (financial) contribution by one spouse or another at such an extra-ordinary level that it is entitled to special recognition and value. Unfortunately, this has led to this concept becoming the centrally important issue in almost every case particularly where the assets exceed the party's reasonable needs. Hardly a case is heard nowadays than that one party (usually the husband) seeks to establish that he has played a markedly more valuable part in the accumulation of the wealth and the marriage partnership so that he should be specially rewarded by way of a greater share of the assets. I wonder whether, with respect to the members

of the Court of Appeal in *Cowan v Cowan*, they would have made the extensive remarks they did (about the possibility of a special contribution) if they had realised the forensic Pandora's Box that would be opened in actual practice. The effect is not at all dissimilar to the 'conduct' debates of the 1970s. In those days "conduct" was similarly raised against wives to try and limit their claims. However, the court, recognising the undesirable consequences inherent in those arguments and further the impossibility of fairly adjudicating upon them introduced the concept of "obvious and gross" very effectively to limit their application. It is suggested by some that these current "special contribution" debates are reintroducing conduct by the backdoor. I would say by the front door. For what is "contribution" but a species of conduct. "Conduct" (sub-s 2(g)) refers to the negative behaviour of one of the spouses. "Contribution" (sub-s 2(f)) is the positive behaviour of one or other of the parties. Both concepts are compendious descriptions of the way in which one party conducted him/herself towards the other and/or the family during the marriage. And both carry with them precisely the same undesirable consequences. Firstly they call for a detailed retrospective at the end of a broken marriage just at a time when parties should be looking forward not back. In part that involves a determination of factual issue (and obviously the court is equipped to undertake that). But then, the facts having been established, they each call for a value judgment of the worth of each side's behaviour and translation of that worth into actual money. But by what measure and using what criteria? Negative "conduct" is one thing (particularly where it is recognisably "obvious and gross") but the valuing of positive "contribution" varies from time to time. Should a wealth creator receive more because e g his talents are very unusual or merely conventional but well employed? Should a housewife receive less because part of her daily work over many years was mitigated by the employment of staff? Is there such a concept as an exceptional/special domestic contribution or can only the wealth creator earn the bonus? These are some of the arguments now regularly being deployed. It is much the same as comparing apples with pears and the debate is about as sterile or useful.'

[21] When he came to express his conclusions on the issue of contributions he said (at [36]):

'Does that put the husband into that narrow category of wealth creators whose special gift or talent is the foundation of great wealth? I cannot so find in this case. I cannot evaluate the husband's contribution as greater than the wife's without discriminating against her on the grounds that the work she did over just as long a period was of less value than the husband's. That is precisely the approach foresworn by Lord Nicholls. The husband in this case was a hard working, dedicated husband, a father and provider over 32 years. By the same token the wife was a hard working and dedicated housewife, a mother and homemaker over the same period. *"Each in their different spheres contributed equally to the family"* per Lord Nicholls. To find otherwise would, on the facts of this case in my judgment, amount to blatant discrimination. The husband's role was the glamorous, interesting and exciting one. The wife's involved the more mundane daily round of the consistent carer. That was the way in which the parties to this marriage chose, between

themselves, to organise the overall matrimonial division of labour. How can it then be said fairly, at the end of the day, that one role was more useful or valuable (let alone special or outstanding) than the other in terms of the overall benefit to the marriage partnership or to the family?' a

[22] At the conclusion of his judgment Coleridge J noted that the case had cost the family over £400,000. He continued: b

'That is not especially unusual in this class of case. But the parties are not assisted to achieve compromise when they are encouraged by the law to indulge in a detailed and lengthy retrospective involving a general rummage through the attic of their marriage to discover relics from the past to enhance their role or diminish their spouses. Perhaps "obvious and gross" has a renewed role here. "Obvious" because it imports the concept of very easily discernible and "gross" in the sense of it being abnormally large. Unless this or something similar is soon introduced to curb these debates I fear there is a real danger that the forward looking *White* innovations will be lost in a sea of post break-up, backward-looking mutual recrimination and the court's task and role in this already uncertain area will thereby be set back at least a generation.' c d

[23] I turn now to the neighbouring jurisdiction of Northern Ireland whose statutory provision more or less mirrors ours. McLaughlin J decided the case of *M v M* [2002] NIJB 47 on 20 December 2001. The overall assets amounted to about £3·67m. The case had a number of complexities which I need not record. I want only to demonstrate the judge's approach to the evaluation of contributions. He said (at 60): e

'In the course of adducing evidence before me [counsel] sought to tempt me with a bait of this kind. He led evidence, and relied upon it in his closing submissions, that the husband worked very long hours getting out of bed at 6.00 am to be at work by 7.00 am. His work did not finish until late in the evening as he carried on his working day by supervising Y Ltd and the other business premises owned by the company. I accept all of that evidence as true, but to concentrate on that and fail to recognise that, whilst he toiled at work on company business, Mrs M from early in the morning was getting the children ready for school, taking them there, running the home during the day, collecting them after school, cooking and cleaning, nurturing them by ferrying them to social, sporting and recreational activities, supervising homework and tutoring them when required, would be to be guilty of the very kind of discrimination warned against by Lord Nicholls. An example of the value of the life's work of Mrs M can be seen today in the accomplishments and personalities of their children. These are the abiding rewards of her labour of love rather than the transient rewards in the form of money produced by the labour of the husband. In the context of this family's life these admirable qualities of both parties are to be considered of equal value. Indeed the words of Lord Nicholls might almost have been written to describe the respective roles of Mr and Mrs M.' f g h j

[24] I close my review of Mr Mostyn's authorities by recording a recent significant development in Australia. This is of particular relevance given the extent to which Mance LJ was influenced by Australian authority, and particularly the case of *Lynch v Lynch* [2000] FamCA 1353, [2001] FLC 93-075, in

formulating and expressing guidance in the case of *Cowan v Cowan* on the assessment of what constitutes an exceptional contribution by the family money-maker. The case in point is *Figgins v Figgins* [2002] FamCA 688. *Figgins v Figgins* was an appeal to the Full Court in a big money case whose distinguishing features were inheritance and a relatively brief marriage. The Full Court consisted of Nicholson CJ sitting with Ellis and Buckley JJ. In giving the judgment of the court Nicholson CJ said that in the Australian jurisprudence special contribution 'clearly refers to some special factor of skill or capacity that produces the result that there is a loading in favour of the party providing it'. By way of instance he cited the case of *Lynch v Lynch* and in particular this paragraph from the judgment of the majority of the Full Court:

> 'However, there are cases where the performance of those roles has what may be described as "special" features about it either adding to or detracting from what may be described as the norm. For example in relation to the homemaker role the evidence may demonstrate the carrying out of responsibilities well beyond the norm as, for example, where the homemaker has the responsibility for the home and children entirely or almost entirely without assistance from the other party for long periods or cases such as the care of a handicapped or special needs child. On the other hand, in the breadwinner role the facts may demonstrate an outstanding application of time and energy to producing income and the application of what some of the cases have referred to as "special skills".'

**[25]** Immediately following that citation comes this highly critical appraisal (para 57):

> 'We are troubled that in the absence of specific legislative direction, courts consider they should make subjective assessments of whether the quality of a party's contributions was "outstanding". It is almost impossible to determine questions such as: Was he a good businessman/artist/surgeon or just lucky? Was she a good cook/housekeeper/entertainer or just an attractive personality? We think it invidious for a judge to in effect give "marks" to a wife or husband during a marriage. We think that this doctrine of "special contribution" should, in an appropriate case, be reconsidered. We think that the decision of the House of Lords in *White v White* gives force to these concerns.'

**[26]** The court returned to this theme at para 131. The court's clear message is that the concept of special contribution reached its zenith in the decision of the Full Court in *Lynch v Lynch*. The impact of *White v White* in Australia stretches beyond valuing equally the contribution of the male breadwinner and the female homemaker to challenge and seemingly to overrule the proposition that one spouse's contribution might, in an appropriate case, be elevated to such an exceptional degree as to dictate the division of the family fortune. Accordingly it is necessary to cite in full paras 131–134 of the court's judgment:

> 'In *Cowan* Thorpe LJ commented (at 210) in relation to Lord Nicholls' formulation in *White* that the ratio of the judgments in *White* is that the judge's objective is about fairness rather than equality. See *Cordle* [2001] EWCA Civ 1791.
>
> We respectfully agree. We think that the important concept that can be said to emerge from *White* is that, in order to test whether a result is fair, or

in Australian terms just and equitable, it is important to ask whether the husband and wife are being treated equally. It states in the clearest terms the modern recognition of equality of the sexes and the need to abandon all forms of discrimination.

In the present case we think that the emphasis given by *White* to gender equality is important in testing the overall result. We think that the lesson to be learned from *White* is that it is a major error to approach these cases upon the basis that one arrives at a figure that is thought to satisfy the needs of the wife and give the balance to the husband.

In some cases that may produce an appropriate result but in many others it is likely to be productive of a grave injustice. We reject the concept that there is something special about the role of the male breadwinner that means that he should achieve such a preferred position in relation to his female partner. To do so is to pay mere lip service to gender equality. Marriage is and should be regarded as a genuine partnership to which each brings different gifts. The fact that one is productive of money in large quantities is no reason to disadvantage the other. We think that cases such as *Lynch v Lynch* (supra) and the minority view of Guest J in *Farmer v Bramley* [2000] FamCA 1615 have missed this point and have led to an imbalance of gender considerations in arriving at results that unduly favour the male partner.'

**[27]** From these authorities in this and related jurisdictions two consistent themes emerge. First it is unacceptable to place greater value on the contribution of the breadwinner than that of the homemaker as a justification for dividing the product of the breadwinner's efforts unequally between them. Second both the practicality and the value of the exercise of marking the parties to a failed marriage on their respective performances is questioned. Some judges understandably regard it as a distasteful exercise. In this jurisdiction, both in the judgment of District Judge Million and in the judgments of Coleridge J are clear warnings that the excess commonly seen in the litigation of the issue of the applicant's reasonable requirements has now been transposed into disputed, and often futile, evaluations of the contributions of both of the parties. Additionally the decision of the Full Court in *Figgins v Figgins* clearly supports Coleridge J's distaste for special contributions and suggests the need for this court to return to the relevance of an asserted special contribution and to reconsider its impact upon the s 25 exercise.

**[28]** Before turning to Mr Mostyn's detailed criticisms of Connell J's approach it is very necessary to remember where *L v L* stands in the chronology of the authorities cited to us. It was handed down only five days after the decision of Coleridge J in *H-J v H-J* and it seems reasonable to assume that each was delivered without knowledge of the other. It therefore precedes *H v H*, *G v G* and *Figgins v Figgins*. Had this appeal been listed within three months of the grant of permission, which would be usual enough in family appeals, Mr Mostyn would probably have had only *H-J v H-J* to support his submissions.

COUNSEL'S SUBMISSIONS

**[29]** In developing his submissions Mr Mostyn states that the consequence of the decision of this court in *Cowan v Cowan* has been to create a culture in which the husband in every big money case asserts an exceptional financial contribution, thus provoking lengthy and costly battles. He further states that the judges of the Family Division have divided into those who have embraced the

spirit of the decision in *White v White* and those who have adhered to ingrained discriminatory thinking.

[30] Mr Mostyn's detailed submissions stop short of wholesale assault on the decision in *Cowan v Cowan*. He suggests that its acknowledgment of the possibility of special contributions must be confined to the rarest instances and perhaps only where the acquisition of the family fortune is achieved by innovative genius: thus the court can terminate the new forensic industry in the field of contribution. He submits that the fundamental and important rule against gender discrimination must lead to the following plain conclusions. (i) The contribution of the homemaker is no less valuable than the contribution of the breadwinner and judges should eschew the undesirable exercise of awarding marks to parties for performance during marriage. (ii) The breadwinner's contribution cannot be rendered special by reference to the size of the product. If the size of the pot alone constitutes a good reason for departure from equality that would mean that the yardstick could never apply in such a case. So too would it be wrong to regard the workaholic breadwinner as having made a special contribution, since invariably his physical and emotional absence from family life casts special burdens on the homemaker. As to entrepreneurs, Mr Mostyn emphasises that they live dangerously: the wife is not shielded when the husband's effort results in bankruptcy. Since she fully shares the risks she should equally share the fruits of success. Finally he suggests that the entrepreneur continues his earning capacity uninterrupted after the division of the family fortune whilst the wife, whose earning capacity has long since been sacrificed, has little or no prospect of reviving it.

[31] Turning to the present case Mr Mostyn emphasises the judge's respective findings that this husband could not be described as a genius whilst the wife could probably have done no more to qualify for an award of 50%. He submits that having categorised the husband's contribution realistically at the outset of para [26] it was not open to the judge to elevate it to something special by taking selected excerpts from the judgments in *Cowan v Cowan*. Finally he submits that,in so far as exceeded expectations is a relevant consideration, the husband, in advancing the first limb of his claim to special contributions, had asserted that Adscene was immediately and spectacularly successful.

[32] When Mr Mostyn was asked to explain why, given his clear submissions as to the equal worth of the different contributions, he had devoted so much time and effort at the trial to establish the wife's pivotal business contribution, he responded that it was because he anticipated that he had no other prospect of achieving an equal share in front of Connell J. He pointed out that by contrast he had argued the case of Mrs G in front of Coleridge J on the simple basis that her contribution as homemaker was no less valuable than that of Mr G.

[33] I turn to the rival submissions of Mr Pointer. He was critical of the scale of the wife's costs which are put at £650,000. That was to be contrasted with his client's costs which he put at £344,000. That was by way of introduction to his first clear submission that the case had been fully tried by a most experienced Family Division judge over the course of eight days. Having seen and heard the parties the judge had arrived at clear conclusions in the exercise of a broad discretion. The speech of Lord Hoffman in *Piglowska v Piglowski* [1999] 3 All ER 632, [1999] 1 WLR 1360 rendered any interference by this court unprincipled. He characterised Mr Mostyn's submissions as implicitly labelling the decision in *Cowan v Cowan* as being inconsistent with that in *White v White*. He relied most

strongly on the judgment of Mance LJ in *Cowan v Cowan* which shows that the trial judge is entitled, indeed bound, to make a value judgment as to the respective worth of the contributions of the spouses and to place the husband's financial contribution on the spectrum stretching from the ordinary to the extraordinary. Mr Pointer contests that a new litigation industry has developed around the concept of special contribution or in the area of contributions generally. He disputes that exceeded expectations has become a new field of unnecessary skirmishing. He does not recognise a broad division of the Family Division bench into those who seek to find equality and those who seek to avoid it. He submits that the statute requires the judge to make a full and comparative assessment of the respective contributions of the parties. It is a task that cannot be avoided and judges of the Division have particular expertise in making value judgments of that nature. He supports the judge's view that wherever the family fortune is spectacular the breadwinner will in all probability have made a special contribution. He suggests a threshold of about £10m: above that the fortune made entirely within the marriage by the unaided efforts of one of the spouses is likely to be regarded by the court as a significant achievement and therefore a special contribution to be reflected in the outcome. He is particularly critical of the decisions of Coleridge J who he submits has taken an impermissible judicial stride towards a presumption of equality.

**[34]** Turning to the present case Mr Pointer submits that the single question is whether the wealth generated by Mr Lambert allowed a discretionary choice of a 37%:63% split. He argues that the submission that the wife bore additional burdens because of the husband's commitment to the company is to make a stereotypical assumption: here the children were at boarding schools and the family employed staff. Mr Pointer defends paras [26] and [40] of the judgment as being proper findings in a territory that is essentially that of the trial judge. As to the suggestion that genius alone deserves recognition in the award, Mr Pointer submits that cases are not to be decided by reference to the IQ of the parties but to what has been achieved by acquisition. Finally he draws a comparison between Mrs Cowan, who contributed over 40 years of marriage during which the husband accumulated a fortune of £11·5m, with Mrs Lambert, who contributed during 23 years of marriage during which her husband achieved a fortune of £27m. Ultimately he suggests that greater restraint on unnecessary future litigation would be achieved by dismissing the appeal.

**[35]** In his submissions in reply Mr Mostyn reiterated that this was essentially a discriminatory judgment. If due allowance be made for the lifetime needs of each, the whole of the balance above that calculation was awarded to the husband.

**[36]** I will consider the issues raised by these submissions generally and then in their application to the present appeal.

GENERAL CONCLUSIONS

**[37]** Section 25(2)(f) imposes a duty on the court to have regard amongst other matters in particular to—

> 'the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.'

**[38]** How then is the court to approach that duty in the light of the judicial debate revealed by recent authority? The language of the subsection certainly

does not suggest any bias in favour of the breadwinner. Lord Nicholls could hardly have expressed more clearly or more forcefully the need to guard against gender discrimination in this as in all areas of the trial judge's assessment. There must be an end to the sterile assertion that the breadwinner's contribution weighs heavier than the homemaker's. It is easy to criticise with hindsight and I do not mean to do so by suggesting that even in October 2001 Mr Mostyn should have had the courage of his convictions. Perhaps more realistically his strategy was driven by the need to respond to the husband's special contribution riposte to the case for equal division. Hereafter there is much to be said in favour of a straightforward presentation of the homemaker's case on this issue unencumbered by unrealistic and strategic claims to significant contribution to the accumulation of wealth. As Robert Walker LJ succinctly said in *Cowan v Cowan* the nature of the contributions is intrinsically different and incommensurable. Each should be recognised as no less valuable than the other. Whilst I accept Mr Pointer's submission that the judge has a duty to assess each and every one of the s 25(2) criteria that bear on outcome and equally that judges of the Family Division have great expertise in making value judgments, I do not accept that the duty requires a detailed critical appraisal of the performance of each of the parties during the marriage. Couples who cannot agree division are entitled to seek a judicial decision without exposing themselves to the intrusion, indignity and possible embarrassment of such an appraisal. I fully agree with Coleridge J that any other approach encourages a vain endeavour to recreate historic situations, choices and failings which in the context of a long marriage can never be recaptured fully or accurately. I share the views of District Judge Million cited by Coleridge J in *H-J v H-J* [2002] 1 FLR 415 at 421. I fully agree with the views expressed by McLaughlin J in the case of *M v M*. I do not consider that the approach which has been adopted by Coleridge J amounts to an impermissible judicial stride towards a presumption of equality. A distinction must be drawn between an assessment of equality of contribution and an order for equality of division. A finding of equality of contribution may be followed by an order for unequal division because of the influence of one or more of the other statutory criteria as well as the over-arching search for fairness.

**[39]** A formula for the equal division of assets on divorce is justly criticised for producing crude and unfair outcomes. It might be unfair to the one who inherited those assets years before the marriage. It might be unfair to the one who needs all the available assets to provide a secure home for the children. However a formula for the equal division of whatever surplus there may be having made fair provision for the assessed needs of each of the parties before the court would produce a fair outcome in many test cases. When chairing the Ancillary Relief Working Group charged with advising the Lord Chancellor on options for reform of s 25 I tabled a proposal for some reduction in the width of judicial discretion by adopting a rebuttable presumption of equal division of any surplus (see App 1 to the report). The proposal met with little support at the time. However it was subsequently reflected in the government's proposal contained in para 4.49 of the inter-departmental White Paper *Supporting Families* published in October 1998. The government's publication in June 1999 of the responses demonstrates that, although the proposal attracted relatively few responses, the vast majority of the responses were in favour. I have since consistently argued that the reform of s 25 along the lines of the government's

proposal would be beneficial in many respects, not least in bringing statutory provisions first enacted in 1970 more into line with contemporary social values and expectations. In the absence of legislation and given the encouragement expressed by Lord Nicholls (and more strongly by Lord Cooke of Thorndon) in *White v White*, Coleridge J is, in my judgment, entitled to regard the crosscheck of equality as an important duty.

**[40]** I would not, however, share all the reasoning of Coleridge J expressed in the concluding paragraphs of his judgment in *H-J v H-J*. It is the objective judicial consideration of fairness rather than the parties' subjective understanding that must determine outcome. Parties who share the perception that equality would be fair to each of them never get to trial. The notion that the judge who orders equal division despatches the parties from the judgment seat without a sense of grievance and with a sense of being equally valued may instance a piece of judicial wishful thinking. I am however in full agreement with the approach expressed in his following paragraph to cases that broadly equate with the case that he there decided.

**[41]** Equally the warnings which he, as an experienced specialist amongst specialists, expresses in para [34] of his judgment in *G v G* must be heeded. Where a family has accumulated a fortune almost too large to dissipate, it might be thought that an expensive and contentious trial would be an unlikely necessity. But all who specialise in this field know that it is not so and accordingly there is a tendency for the case to escalate as it proceeds, each tactical development attracting at least another in response. Therefore if the decision of this court in *Cowan v Cowan* has indeed opened what Coleridge J describes as a forensic Pandora's Box, then it is important that we should endeavour to close and lock the lid.

**[42]** I also endorse concerns that he expresses in his final paragraph at the costs of these tactical exercises. Our concern should be all the greater given that the costs in the present case are estimated to amount to almost £1m.

*Special contributions*

**[43]** The absence of any legislative review of s 25 since 1984 has undoubtedly created problems for the judiciary. (I leave aside the somewhat enigmatic amendment to s 25(2)(g) enacted by the Family Law Act 1996 which is not to be brought into force.) The judgments in *Cowan v Cowan* that consider the legitimacy of a departure from equality on the basis of exceptional financial contribution must be understood in the context of that case. First the trial had been conducted before the decision in *White v White* and therefore decided on the basis of reasonable requirements. On appeal it was common ground that in principle the court was free to depart from equality if the husband's financial contribution had been sufficiently exceptional. Both parties submitted that that issue should be remitted for determination by the trial judge. Out of a desire to achieve finality and avoid further costs we declined and ourselves made the value judgment from the evidence and findings at trial, which were of course not specifically directed to the issue. With the advantage of hindsight it seems regrettable, given the significance subsequently attached to our judgments, that the crucial issue was not addressed at trial nor was there any argument before this court on the validity of the principle.

**[44]** The authority of *Cowan v Cowan* cannot therefore be elevated nearly as high as Mr Pointer would have it. In my judgment I based my departure from

equality on five considerations, of which the special character of the husband's contribution was but one. Each member of the court advanced different reasons for arriving at the same result. Those who have subsequently attempted to argue that their breadwinning contributions were special have focused on the judgment of Mance LJ. In his reasoning he placed considerable reliance on the Australian authorities culminating in the decision of the Full Court in *Lynch v Lynch*. But a large question mark has been placed against that line of authority by the judgment of the Full Court in *Figgins v Figgins*. In *Cowan v Cowan* [2001] 2 FCR 331 I offered no new approach and certainly no new principle. As I said (at [41]), this court could do no more than explore the boundaries by the application of the principles to be found in *White v White* on a case by case basis. I recognise that the specialist professions hope for and probably expect more. But just as this court evolved guidelines for the application of the statutory criteria approximately 30 years ago (notably of course the concept of reasonable requirements and the *Duxbury* mechanism for capitalisation of reasonable requirements; see *Duxbury v Duxbury* [1990] 2 All ER 77, [1992] Fam 62), so, it seems to me, this court must adopt the same approach now that those guidelines have to a substantial extent become outdated and then proscribed by the decision in *White v White*.

**[45]** Having now heard submissions, both full and reasoned, against the concept of special contribution save in the most exceptional and limited circumstance, the danger of gender discrimination resulting from a finding of special financial contribution is plain. If all that is regarded is the scale of the breadwinner's success then discrimination is almost bound to follow since there is no equal opportunity for the homemaker to demonstrate the scale of her comparable success. Examples cited of the mother who cares for a handicapped child seem to me both theoretical and distasteful. Such sacrifices and achievements are the product of love and commitment and are not to be counted in cash. The more driven the breadwinner the less available will he be physically and emotionally both as a husband and a father. There is also some justification in Mr Mostyn's emphasis on the extent to which the homemaker frequently sacrifices her potential to generate assets by undertaking the domestic commitment to husband and children. At the same time she risks the outcome of failure and so earns her entitlement to share in the successful outcome.

**[46]** In sum I am much more wary of the issue of special contribution than I was in writing my judgment in *Cowan v Cowan*. Perhaps Chief Justice Nicholson, who seems poised to banish the phenomenon, may have found the better path. The circumstances set out in [43], above, allow this court to re-evaluate the whole issue. However for the present, given the infinite variety of fact and circumstance, I propose to mark time on a cautious acknowledgment that special contribution remains a legitimate possibility but only in exceptional circumstances. It would be both futile and dangerous even to attempt to speculate on the boundaries of the exceptional. In the course of argument I suggested that it might more readily be found in the generating force behind the fortune rather than in the mere product itself. A number of hypothetical examples were canvassed ranging from the creative artist via the superstar footballer to the inventive genius who not only creates but also develops some universal aid or prescription. All that seems to me to be more safely left to future case by case exploration.

*Exceeded expectations*

[47] I am doubtful of the development of this test for the existence of a special contribution. There is no doubt that it originates from the judgment of Mance LJ in *Cowan v Cowan* [2001] 2 FCR 331 at [161]. There he said:

> 'The underlying idea is that a spouse exercising special skill and care has gone beyond what would ordinarily be expected and beyond what the other spouse could ordinarily have hoped to do for himself or herself, had the parties arranged their family lives and activities differently.'

[48] The interpretation that Mr Hughes QC in *H v H* placed on that passage appears from the paragraphs of his judgment which I have cited above.

[49] Certainly Mance LJ posits success going beyond general expectations but when he turns to the subjective hopes of the other spouse he does not relate those hopes to the outset of the venture but rather to what might have been had family lives and activities been differently divided.

[50] However all that may be I reject the interpretation and approach adopted by Mr Hughes. There is an understandable desire for tests and mechanisms to strengthen judicial confidence in the rationality of the discretionary outcome. But the danger is over-sophistication and complexity that ends up by perverting the statutory task. The concept of special contribution is first formulated and then the concept of exceeded expectations is deployed to demonstrate special contribution. Each provides an opportunity to win a point over the other party. Furthermore the concept of exceeded expectations invites exactly the sort of exchanges that raise the emotional temperature and augment the costs. The exchanges are of questionable relevance to the essential objective assessment of fairness. In any marriage of considerable duration evidence as to what the young couple at the outset of their married life each thought, felt, intended, expected or aspired to is likely to be more imaginative and self-serving than realistic.

SPECIFIC CONCLUSIONS

[51] How then do these general conclusions bear on the principal issue argued in the present appeal, the issue of special contribution? Within it there are two questions: (a) was the judge right to find that the husband's contribution was special, and (b) if yes, was he right on that ground, and on that ground alone, to depart so far from equality?

[52] Mr Mostyn criticises para [26] of the judgment, perhaps not entirely fairly, as posing a question at its close which has effectively already been answered in the negative in the opening. It may be that the main foundation for the judge's conclusion was the size of the family fortune, albeit generated by the husband's hard work, determination and acumen. If that be the yardstick there is an obvious danger of gender discrimination. There may be cases where the product alone justifies a conclusion of a special contribution but absent some exceptional and individual quality in the generator of the fortune a case for special contribution must be hard to establish. If I turn to the question posed by Connell J at the end of para [26], a good idea, initiative, entrepreneurial skills and extensive hard work are in my judgment insufficient to attract the label. It is too easy to compile a comparable catalogue of qualities that the homemaker has brought to the other essential contribution.

[53] I have every sympathy for Connell J and every appreciation of his succinct and skilful judgment. I am in no doubt that he looked at the case as he

did in part because of the way the applicant's case was fought with its outdated endeavour to present her as pivotal in the company. Furthermore we judge this appeal against a consistent pattern of recent authority which was not available to Connell J. I recognise that he had eight days of evidence in which to assess the parties, and particularly the special qualities of the husband. I recognise the force of Mr Pointer's submission that it is not for us to interfere with such assessments. However there is a gulf between the approach of Connell J in *L v L* and the approach of Coleridge J in *H-J v H-J*, each writing independently and handing down within a week of each other. The two approaches cannot be reconciled and in my judgment the approach of Coleridge J must be supported. Once Connell J had concluded that the husband was not a genius and that the wife could not have done more, he should not have elevated one contribution above the other, given that the two are essentially incommensurable.

[54] Even if Connell J was entitled to find the husband's contribution special it would not in my opinion justify so great a departure from equality. If it be conceived that each needed approximately £7·5m to maintain their respective lifestyles the surplus of £5·2m all went to the husband. That hardly satisfies the fairness test. If outcomes become driven by comparative assessment of contribution then there is an obvious danger of over-emphasis on that criterion with a corresponding under-emphasis of others. Of course, as I have said before, the special characteristics of each case draw to them some of the criteria whilst others are evidently not engaged. We must therefore ask which criteria, other than contribution, were engaged here and how did the judge deal with them?

[55] He dealt with each of the s 25(2) considerations in turn. First he carefully considered the assets, as to the extent of which there was no great contention, although much dispute as to whether after the sale of Adscene the husband had exercised his control and management irresponsibly or selfishly. All those issues were resolved in the husband's favour. Next came needs. This is an important paragraph to which I will return. On the standard of living, Connell J recorded that it had improved dramatically, achieving a rating of high from the mid-1980s onwards and, by the 1990s, extravagant. He concluded that each should be able to enjoy a comparable standard for the future. In relation to age and duration of marriage Connell J recorded the facts: the husband then 57, the wife then 49, the marriage 23 years in duration. However nothing follows as to how those considerations bore on outcome. The lengthy section dealing with contributions I have already reviewed. In relation to the three remaining subsections (disability, conduct and loss of pension) the judge simply recorded that neither party had suggested that these considerations had any bearing on the case.

AGE AND DURATION OF MARRIAGE

[56] With all due respect to Connell J, I consider that some reflection should have been given to age and duration of marriage. As to the latter it is not just the duration of 23 years but the fact that they span the most productive period of the wife's life from 22 to 45. Not only are those the years of child bearing and rearing but those are the years in which an adult develops talents and expends the force of energy in the chosen work. The wife had a modest business which she gave up. What sort of an independent career she sacrificed is a matter of speculation.

[57] In my judgment the respective ages of the parties are also relevant. Of the fortune of £27·5m derived from the sale of Adscene, £7m has been allocated to the children. The greater part that remains is primarily, if not exclusively, for the parties to meet their needs during the remainder of their lives. Applying actuarial tables the wife has a further span of 35 years whilst the husband has a further span of about 23 years. This consideration may require some reflection in an assessment of the respective future needs of the parties, the consideration to which I now turn.

NEEDS

[58] At the outset the judge considered two inter-connected areas of dispute, the wife's desire to remain at the former matrimonial home, Ringleton Manor, and her asserted need for an income of £460,000 a year net. As to the first the judge held that the wife's proposal was reasonable. However the judge did not make any finding as to what her expenditure would be as the owner/occupier of the property. The husband had advanced a figure of £194,000. Connell J merely criticised the forensic exercise of preparing for the wife a budget that was plainly inflated. He said ([2002] 2 FCR 413 at [14]):

> 'I question the value of an exercise of this nature in a case of this type. It is manifest that there are ample funds available to provide properly for the future needs of both spouses. In such a case it is for the wife (or the husband as the case may be) to decide whether a particular aspect of proposed expenditure is justifiable in the circumstances ... In short the *Duxbury* type exercise which has been undertaken in this case for illustrative purposes as well as by way of quantification of the wife's claim in part is in my view of little value. The wife will have available to her the home which she chooses and sufficient income to enable her to maintain a high standard of living. The same will be the case for the husband ... Whichever solution is preferred by the court in this case both parties will be well able to satisfy their financial needs and to meet their obligations and responsibilities for the foreseeable future.'

[59] Mr Mostyn's argument focuses on the final sentence. The solutions to which the judge refers are the solution of £10·2m or the solution of £6m advanced by the wife and the husband respectively. But Ringleton Manor and its contents account for £1·878m. On the judge's eventual award of £7·5m the sum remaining to the wife for income production is therefore £5,622,000. At an annual yield of 4·5% gross, less tax, that would leave the wife with an annual income of £150,000 approximately without amortisation. So she would be forced to draw down capital in order to remain in the former matrimonial home, even on the husband's assessment of her need at £190,000 a year. Contrast the position of the husband. Under the judge's division he has about £12·7m. Assuming for him the same investment in housing and chattels of £1·878m he has a sum for income production of £10·8m which would produce for him at the same assumed rate nearly £300,000 per annum after tax without amortisation.

[60] In my judgment Mr Mostyn succeeds in this submission which Mr Pointer could not convincingly undo. Assuming in the husband's favour that his present residence in Monaco where he is not subject to United Kingdom tax is only short-term, I see no possible reason why the wife alone should be required to amortise in order to meet the cost of living in the

property which the judge has found that she reasonably occupies. If there were any consideration of amortisation then the wife's greater life expectancy enters the calculation. Finally there is validity in Mr Mostyn's submission that after the sale of Adscene the husband resumed his entrepreneurial activities with the prospect of a further decade of successful business. By contrast the wife has no realistic prospect of augmenting the yield from her investment capital.

[61] I conclude that Connell J fell into error in holding that however the family fortune were divided both parties would be able to satisfy their financial needs for the foreseeable future. Had there been a finding as to the wife's reasonable income needs as the occupier of the final matrimonial home (a figure that would presumably be less than half her assertion but no less than the figure for which the husband contended) then it would have become critical to consider whether division of assets at the level proposed by the husband or at any level less than that for which the wife contended, would indeed meet her future needs.

[62] I have therefore reached the conclusion that the wife is entitled to succeed in this appeal. The only justification for a departure from equality asserted by the husband cannot be upheld without discrimination. Of importance too is the rival consideration that the wife's needs, given the respective ages of the parties, point towards equality. I would therefore increase the wife's lump sum from £3,152,732 to £5,751,474 or such other sum as counsel may agree to be necessary to bring her to a 50% share.

[63] I am conscious that this conclusion does little to increase clarity or predictability of outcomes. However any expectation of such was surely unrealistic. Specialists in the field, whether judges, practitioners or academics, have yet to suggest a principle or mechanism that might produce greater certainty or predictability within the very wide discretionary field for which Parliament opted in 1984. Such new approaches as have been advocated or debated all require legislation for their introduction. Accordingly it must be recognised that a largely unfettered judicial discretion comes at a price.

**MAY LJ.**

[64] I agree that this appeal should be allowed to the extent which Thorpe LJ describes and for the reasons which he gives.

**BODEY J.**

[65] Notwithstanding the understandable submissions of Mr Pointer QC that this court should not interfere with the discretionary decision of a most experienced Family Division judge, who both saw and heard the witnesses and properly directed himself as to the law, I nevertheless agree that this appeal should be allowed.

[66] This is for two main reasons. The first relates to the evaluation of the parties' differing contributions, in which respect Connell J made four crucial findings of mixed fact and value-judgment, namely: (i) that 'the parties treated this marriage as a partnership from an early stage'; (ii) that 'this pot of gold was truly created during the marriage'; (iii) that 'in answer to the question posed in argument by Mr Mostyn QC, namely "what more could the wife have done to justify an award of 50%?", the answer is "in the circumstances, probably nothing"'; and (iv) that 'it would not be right in my view to describe [the husband] as a genius and the most exceptional part of his contribution relates to the very large sum of money acquired by the family as described'.

[67] Without overlooking the judge's other findings as to the husband's qualities as an exceptionally active, determined and innovative businessman able to develop his visions, it does seem to me that the four findings at (i)–(iv) above flagged up cumulatively the risk of unfairness, if unequal weight were to be given to the differing nature of the parties' respective contributions to the family's welfare according to their particular roles in the marriage.

[68] The recent authorities examined by Thorpe LJ further developing the law both here and elsewhere since the decision under appeal, which we (unlike Connell J) have had the advantage of considering, make this point not only the more forcefully but, in my view, conclusively.

[69] I agree that it is not possible to define once and for all, by way of some formulaic label, the precise characteristics of the fortune-maker (or fortune-making) required in the paradigm case such as this, in order that when the proposed distribution of the resources is checked against the 'yardstick of equality', the fully contributing homemaker should receive a lesser share of the wealth than the fortune-maker.

[70] However, those characteristics or circumstances clearly have to be of a wholly exceptional nature, such that it would very obviously be inconsistent with the objective of achieving fairness (i e it would create an unfair outcome) for them to be ignored.

[71] I do not accept Mr Pointer's submission that to state the position in this way represents an 'impermissible judicial gloss' on one of the s 25 statutory criteria (i e the requirement to consider the parties' contributions). It is rather to apply the guidance of the House of Lords in *White v White* [2001] 1 All ER 1, [2001] 1 AC 596, recognising that where—in the paradigm case like this—the homemaker has given of her (or his) utmost, then any weighting of the impact of contributions in favour of the fortune-maker is almost always going to be unfair, since ex hypothesi the pure homemaker neither has the opportunity to create wealth, nor in the nature of things the ability to have any meaningful comparative 'value' accorded to her (or his) particular contributions to the welfare of the family.

[72] I conclude that, as the law has now been further developed, such wholly exceptional characteristics and circumstances as are referred to in [70], above did not exist in this case.

[73] The second main reason for allowing this appeal, being more of fact and less of general importance, relates to the criterion of the wife's needs.

[74] As demonstrated by Thorpe LJ, her income position under the existing award would be insufficient to enable her to continue to reside at Ringleton Manor, as was held by the judge to be a reasonable aspiration, unless (even on the basis of the lower budget put forward by the husband for her to do so) she were to amortise part of her capital.

[75] For her to have to amortise capital when the husband himself would not have to do likewise, does not seem to me to meet the aim of achieving fairness in the circumstances of a long marriage such as this, during which the family fortune was created and within which, as found, each party gave respectively of his/her all.

[76] I agree with Thorpe LJ that the wife's presentation below of an excessively high budget would have tended to divert attention away from this significant point, as would the very fact of the judge's conclusion that the

husband's contribution by way of wealth creation called for an unequal distribution of the available resources.

[77] For these reasons and the others expressed more fully by Thorpe LJ, I too would replace the order of the learned judge with one achieving an equal division of the overall capital resources.

*Appeal allowed.*

*25 March 2003. The Appeal Committee of the House of Lords refused permission to appeal.*

Manjit Gheera Barrister.

# Fisher and others v English Nature

[2003] EWHC 1599 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

LIGHTMAN J

18–20 JUNE, 4 JULY 2003

*Environment – Protection – Site of special scientific interest – Defendant confirming site as site of special scientific interest – Claimants having interest in site of special scientific interest – Claimants challenging decision to confirm site – Whether defendant having discretion not to confirm – Wildlife and Countryside Act 1981, s 28(1), (5) – Land Compensation Act 1961.*

The defendant, English Nature, was a specialist nature conservation body. By s 28(1)[a] of the Wildlife and Countryside Act 1981 if English Nature were of the opinion that any area of land was of special interest by reason of any of its flora, fauna or geological features, they were under a duty to notify that fact to every owner and occupier of any of that land and the Secretary of State. Section 28(5)[b] provided that where notification had been given English Nature 'may' within nine months from the date of which notification was served give notice withdrawing notification or confirming it. English Nature decided to confirm the notification of the Breckland Farmland, Norfolk and Suffolk Site as a site of special scientific interest (SSSI) because the site had an important population of stone curlews which was identified by Council Directive (EEC) 79/409 (on the conservation of wild birds) as requiring special conservation measures. Under the directive, member states had to classify the most suitable territories for the conservation of stone curlews as special protection areas (SPAs). English Nature proposed to the Secretary of State that he include the SSSI within an SPA but a decision on that was deferred. The claimants, whose land fell within the SSSI, applied for judicial review of the decision to confirm. They contended, inter alia, that English Nature had exceeded their jurisdiction. The claimants submitted that the stone curlews could have been protected by the imposition of an SPA which would impose less constraints upon and which consequently would be less onerous to the claimants, as landowners, than an SSSI. The question arose therefore whether it was open to English Nature to decide not to confirm the notification of the SSSI for that reason.

**Held** – On its true construction, s 28(1) of the 1981 Act afforded scope for judgment, but no scope for discretion. English Nature had a duty under that subsection to notify an area if they held the opinion that the statutory criteria were satisfied. The notification of the SSSI had immediate legal effect. With regard to confirmation, although s 28(5) in setting out the alternative courses open to English Nature used the word 'may' a term which ordinarily connoted a discretion, if English Nature continued to be of the opinion that the statutory criteria were satisfied, the discretion could only lawfully be exercised in one way, that was in favour of confirming the notification. They could not lawfully

a Section 28(1) is set out at [15], below

b Section 28(5) is set out at [15], below

withdraw the notification or allow it to lapse. For any other course than confirmation would bring into play again the immediate duty of English Nature to make notification, and the legislature could not sensibly have intended that roundabout method of continuing the legal consequences of the continuing opinion of English Nature that the statutory criteria were satisfied. In particular, English Nature could not refuse to confirm because they considered that the population of stone curlews would be protected more effectively and in a way occasioning less interference with the peaceable enjoyment of their possessions by landowners by voluntary agreements or by the classification by the Secretary of State of the area of land in question as part of an SPA. Whether the area satisfied the criteria of an SSSI could not be affected, still less determined, by the existence of what might appear more attractive alternative courses of action, such as classification as an SPA, nor could their existence lawfully deflect English Nature from the course of notification and confirmation. In the instant case, English Nature had applied and determined the issue of confirmation by reference to the statutory criteria which they considered were satisfied and there could be no challenge to their decision (see [18], [20], [22], and [48], below).

*R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83 considered.

**Notes**

For areas of special scientific interest, see 34 *Halsbury's Laws* (4th edn reissue) para 210.

For the Wildlife and Countryside Act 1981, s 28, see 32 *Halsbury's Statutes* (4th edn) (2001 reissue) 228, 229.

**Cases referred to in judgment**

*Commission of the European Communities v French Republic* Case C–96/98 [1999] ECR I-8531, ECJ.

*Fredin v Sweden* (1991) 13 EHRR 784, [1991] ECHR 12033/86, ECt HR.

*Holder v Law Society* [2003] EWCA Civ 39, [2003] 3 All ER 62, [2003] 1 WLR 1059.

*James v UK* (1986) 8 EHRR 123, ECt HR.

*Oerlemans v Netherlands* (1989) 62 DR 200, E Com HR.

*R (on the application of Aggregate Industries UK Ltd) v English Nature* [2002] EWHC 908 (Admin), [2003] Env LR 83.

*R v Nature Conservancy Council, ex p London Brick Co Ltd* [1996] Env LR 1.

*Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1988] 3 PLR 25, CA.

*Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309, [1989] ECHR 10873/84, ECt HR.

**Cases referred to in skeleton arguments**

*Chassagnou v France* (1999) 7 BHRC 151, ECt HR.

*Mellacher v Austria* (1990) 12 EHRR 391, [1989] ECHR 10522/83, ECt HR.

*R v North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health intervening)* [2000] 3 All ER 850, [2001] QB 213, [2000] 2 WLR 622, CA.

*Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665, [1977] AC 1014, [1976] 3 WLR 641, CA and HL.

*Southern Water Authority v Nature Conservancy Council* [1992] 3 All ER 481, [1992] 1 WLR 775, HL.

*Sporrong v Sweden* (1983) 5 EHRR 35, [1982] ECHR 7151/75, ECt HR.

**Application for judicial review**

The claimants, the Honourable Patrick Fisher and the trustees of the Honourable PV Fisher's Children's 1986 settlement, applied for judicial review of the decision of the defendant, English Nature, made on 11 July 2001 and communicated to the claimants on 3 August 2001, confirming the notification of the Breckland Farmland, Norfolk and Suffolk Site of special scientific interest under s 28 of the Wildlife and Countryside Act 1981. The facts are set out in the judgment.

*David Holgate QC* and *Daniel Kolinsky* (instructed by *Richard Buxton*, Environmental and Public Law, Cambridge) for the claimants.

*John Howell QC* and *Jane Collier* (instructed by *Browne Jacobson*, Nottingham) for English Nature.

*Cur adv vult*

4 July 2003. The following judgment was delivered.

**LIGHTMAN J.**

INTRODUCTION

**[1]** The claimants on this application challenge the decision (the decision) of the defendant English Nature to confirm the notification of the Breckland Farmland, Norfolk and Suffolk Site of Special Scientific Interest (the SSSI) (which includes land belonging to the claimants) under s 28 of the Wildlife and Countryside Act 1981. On the same day that English Nature confirmed notification of the SSSI, English Nature confirmed the notification of the Bramshill SSSI which was the subject of a challenge dismissed by Forbes J in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2002] EWHC 908 (Admin), [2003] Env LR 83.

**[2]** English Nature confirmed the notification of the SSSI under s 28 of the 1981 Act on 11 July 2001 and communicated the decision confirming the notification by letter dated 3 August 2001. In confirming the notification the decision confirmed the designation of over 13,335·7 hectares of intensively farmed arable land as an SSSI. The reason given for the notification and confirmation was stated as follows: 'This site is notified for its internationally important population of stone-curlew.' The notification specified five types of operation likely to damage the features of special interest (OLDs) as requiring the prior consent of English Nature.

| 'Stand Ref No | Type of operation |
|---|---|
| 10. | Killing, injuring, taking or removal of stone curlews, or their eggs and nests. Intentional or reckless disturbance of stone curlews, their eggs or chicks.* |
| 12. | Long term afforestation of farmland in excess of 5 hectares. |
| 20. | Extraction of minerals including hard rock, sand and gravel, topsoil and subsoil except for on farm use. |

| | |
|---|---|
| 21. | Construction of roads, or the laying, maintenance or removal of pipelines and cables, above or below ground, except for agricultural or forestry purposes. |
| 23. | Erection of permanent buildings or reservoirs, or the undertaking of engineering work, including drilling, except for agricultural or forestry purposes. |

*Accidental disturbance through agricultural and game management, for example, is not regarded as intentional or reckless disturbance.'

[3] Council Directive (EEC) 79/409 (on the conservation of wild birds) (1979 OJ L103 p 1) (the Birds Directive) as adapted by Council Directive (EEC) 92/43 (on the conservation of natural habitats and of wild fauna and flora) (1992 OJ L206 p 7) (the Habitats Directive) identifies species listed in Annex I that require special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. The stone curlew is one of those species. Article 4(1)(d) of the Birds Directive requires the member states to classify 'the most suitable territories in number and size ... for the conservation of' that species as special protection areas (SPAs). SPAs must under national law be provided with a legal protection regime which is capable in particular of ensuring both the survival and reproduction of the species (see *Commission of the European Communities v French Republic* Case C–96/98 [1999] ECR I-8531). The Secretary of State has the function of classifying SPAs in this country which he performs with the advice of English Nature. English Nature have proposed to the Secretary of State that he include the SSSI (together with other areas) within an SPA. This proposal is supported by the claimants. The Secretary of State is minded to do so, but has decided to defer his decision until the outcome of this application is known. In the meantime the SSSI is merely included within a proposed SPA.

[4] The challenge made on this application is to the decision so far as it confirms the notification. There is no challenge to the notification itself or to the OLDs. The grounds of the challenge are that English Nature: (1) acted irrationally and failed to take into account material, and only material, considerations; (2) exceeded their jurisdiction; and (3) in breach of s 6 of the Human Rights Act 1998 acted in a way that was incompatible with the claimants' rights under art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). The claimants were granted permission to challenge the decision on the ground that English Nature had failed to provide a scientifically justified basis for the area of land which they notified, but the claimants did not pursue this ground at the hearing.

[5] The grievance of the claimants underlying this application is that an SPA imposes less constraints upon and consequently is less onerous to landowners than an SSSI and that the stone curlew could be protected without any need for the notification and confirmation by leaving it to the Secretary of State to include the area in question within an SPA or by concluding voluntary agreements with the landowners. A question to be decided is whether under s 28 of the 1981 Act

it was open to English Nature to decide not to confirm the notification of the SSSI for this reason.

THE ORNITHOLOGICAL BACKGROUND

**[6]** Stone curlews are a migratory species nesting from March onwards in any year and migrating to southern Spain or North Africa from October. The birds nest from March each year in cultivated land which has plenty of bare ground and fairly short vegetation, as they prefer an open relatively unobstructed vista (so as to be aware of predators) and stony ground so that their eggs are camouflaged. The locations of the nests of the stone curlew may vary from year to year and nesting attempts at different locations in one year are commonplace. Field work has found that stone curlews may travel up to 3 km from the nest site to forage. Stone curlews are very sensitive to recreational disturbance and benefit from lack of recreational access on agricultural land. They are not usually affected by mechanised agricultural operations.

**[7]** The stone curlew is a species identified as being of European significance and as requiring special measures of conservation in the Birds Directive. It is a species that is protected under Pt I of the 1981 Act by special penalties at all times. It is also a priority species under the United Kingdom Biodiversity Action Plan.

**[8]** The stone curlew is an extremely scarce bird species nationally. Numbers have fallen by 85% in the past 50 years and by more than 50% since 1960. The British population was estimated to be 215 pairs in 1998 and 234 pairs in 1999. It is one of the rarest breeding bird species in Great Britain.

**[9]** The Joint Nature Conservation Committee established by English Nature, Scottish Natural Heritage and the Countryside Council for Wales under s 128(4) of the Environment Protection Act 1990 produced guidelines (the guidelines) for the selection of sites as SSSIs which are in large part those published by the Nature Conservancy Council in 1989 (*Guidelines for the Selection of Biological SSSIs*). The guidelines indicate that localities which normally contain 1% or more of the total British breeding population of any native species are eligible for selection and that, in view of the mobility of some species, the guidelines apply to sites used for other essential activities (such as feeding) as well as nesting sites. Two pairs of stone curlews represent approximately 1% of the Great Britain population of that species.

**[10]** Around 95% of the United Kingdom population is found in two areas: the Norfolk/Suffolk Brecklands and Wessex. Most are in the Brecklands area. That area suits the stone curlew because of the big open fields, mimicking the bird's preferred habitat of open stony heaths, and the amount of bare land resulting from spring sown crops.

**[11]** The criteria for the selection of SPAs for birds and those for SSSIs for birds are similar. The selection guidelines for SPAs suggest that an area which is used regularly by 1% or more of the Great Britain population of a species listed in Annex I to the Birds Directive is likely to qualify as an SPA. The guidelines state in relation to the Birds Directive and SPAs:

> 'Any site that supports nationally important numbers of an Annex I species or a migratory bird species (at any season of the year) should be given consideration as to whether it should be proposed as an SPA. Some sites holding lower numbers of some Annex I species may also need consideration in view of the requirement to maintain distributions. Any such site should

qualify as a potential SSSI. These SSSI selection guidelines have been written to embrace such special interest.'

[12] In January 2000 English Nature submitted proposals to the Secretary of State for a Breckland SPA. In 1998 the Breckland-proposed SPA supported some 142 pairs of stone curlews (66% of the Great Britain population) and in 1999 it supported 159 pairs (68%). A large proportion of the Breckland-proposed SPA stone curlew population nests on arable land. In 2000 arable land supported 61% of the first choice stone curlew nests and 59% of the total fledged in that area was on arable land.

[13] The SSSI falls within the larger Breckland-proposed SPA. The SSSI itself supported some 102 pairs of stone curlews in 1999 (44% of the Great Britain population). The SSSI would qualify on its own as an SPA under the relevant criteria.

STATUTORY PROVISIONS

[14] English Nature (until January 2001 known as the Nature Conservancy Council for England) are a specialist nature conservation body. Section 131 of the 1990 Act provides that English Nature shall have 'nature conservation functions' and defines 'nature conservation' as 'the conservation of flora, fauna or geological or physiographical features'. Section 131 also provides that it is the duty of English Nature in discharging their conservation functions to take appropriate account of actual or possible ecological changes.

[15] Section 28 vests English Nature with responsibilities in respect of SSSIs. Section 28 (which appears in Pt II of the 1981 Act headed 'Nature conservation'), as amended by the Countryside and Rights of Way Act 2000, reads, so far as material:

> **28.** *Sites of special scientific interest.*—(1) Where the Nature Conservancy Council are of the opinion that any area of land is of special interest by reason of any of its flora, fauna or geological or physiographical features, it shall be the duty of the Council to notify that fact—(a) to the local planning authority in whose area the land is situated; (b) to every owner and occupier of any of that land; and (c) to the Secretary of State ...
>
> (3) A notification under subsection (1) shall specify the time (not being less than three months from the date of the giving of the notification) within which, and the manner in which, representations or objections with respect to it may be made; and the Council shall consider any representation or objection duly made.
>
> (4) A notification under subsection (1)(b) shall also specify—(a) the flora, fauna, or geological or physiographical features by reason of which the land is of special interest, and (b) any operations appearing to the Council to be likely to damage that flora or fauna or those features, and shall contain a statement of the Council's views about the management of the land (including any views the Council may have about the conservation and enhancement of that flora or fauna or those features).
>
> (5) Where a notification under subsection (1) has been given, the Council may within the period of nine months beginning with the date on which the notification was served on the Secretary of State either—(a) give notice to the persons mentioned in subsection (1) withdrawing the notification; or

(b) give notice to those persons confirming the notification (with or without modifications).

(6) A notification shall cease to have effect—(a) on the giving of notice of its withdrawal under subsection (5)(a) to any of the persons mentioned in subsection (1); or (b) if not withdrawn or confirmed by notice under subsection (5) within the period of nine months referred to there, at the end of that period.'

(The provision in sub-s (4) for a statement of the council's views was added by the 2000 Act.)

**[16]** Section 28D of the 1981 Act provides that, if English Nature are of the opinion that all or any part of an SSSI is no longer of special interest by reason of any of the matters mentioned in s 28(1), they may decide to notify that fact, in which case the notification under s 28(1)(b) ceases to have effect.

**[17]** Notification has a number of legal consequences. In particular: (1) English Nature may enter into an agreement with the owners, lessees and occupiers of any land within such an area for the purpose of conserving or restoring the matters by reason of which the area is of special interest (under s 15 of the Countryside Act 1968), imposing restrictions on the exercise of the rights of those persons and for the carrying out of work or the doing of such other things on the land as may be expedient. English Nature may acquire all or any part of an SSSI compulsorily if they are satisfied that they are unable to conclude an agreement as to the management of the land on reasonable terms or if any such agreement is breached in such a way that the land is not being managed satisfactorily; (2) English Nature may formulate a 'management scheme' for conserving or restoring the matters by reason of which the area is of special interest, following the procedure set out in s 28J of the 1981 Act. If it appears to English Nature that any owner or occupier of land is not giving effect to a provision of a management scheme, that they are unable to conclude an agreement with him as to its management in accordance with the scheme and that, as a result, any such matters are being inadequately conserved or restored, they may serve a 'management notice' on him (under s 28K of the 1981 Act). Such a notice may require him to carry out such work on the land or do such other things with respect to it as are reasonably required to ensure that that the land is managed in accordance with the management scheme. Failure to comply with any requirement of a management notice without a reasonable excuse is a criminal offence and entitles English Nature to do what is required; (3) the owner or occupier of any land included in an SSSI may not carry out, or cause or permit to be carried out, on that land any operation specified in the notification itself as being likely to damage the matters by reason of which the area is of special interest, unless English Nature have been given notice of a proposal to carry it out (specifying its nature and the land on which it is proposed to be carried out) and the operation is carried out either in accordance with the terms of a relevant agreement with English Nature, a management scheme or a management notice or with English Nature's written consent. English Nature's decisions in relation to such consents may be the subject of appeal to the Secretary of State. A person who contravenes these requirements without a reasonable excuse is guilty of a criminal offence. Such an excuse may exist if the operation carried out is an emergency operation, if it was authorised by certain planning permissions or if it was permitted by certain public bodies in other circumstances; and (4) other public bodies are required to take reasonable steps in the exercise of their own

functions, in so far as their exercise is likely to affect matters by reason of which the area is of special interest, to further the conservation and enhancement of those matters provided that such steps are consistent with the proper exercise of their own functions. Such public bodies are also required to follow a specific procedure designed to protect such matters which requires them to take into account English Nature's advice if they propose to carry out, or to give any consent for, any operations that are likely to damage such matters. It will be apparent that the consequences of notification go far beyond anything that can be achieved by voluntary agreement of affected landowners.

STATUTORY CONSTRUCTION

**[18]** I should first say a few words on the construction of ss 28 and 28D of the 1981 Act. English Nature have a duty under s 28(1) to notify an area of land if it holds the opinion that the statutory criteria are satisfied. If (for example) English Nature are of the opinion that an area of land is of special interest because of the bird population which it supports, then they must notify. Section 28(1) affords scope for judgment: it affords no scope for discretion. The notification has immediate legal effect. English Nature must however thereafter within nine months decide whether to withdraw the notification or confirm it (with or without modifications) or it will lapse. Though s 28(5) in setting out the alternative courses available to English Nature uses the word 'may', a term which ordinarily connotes a discretion, notwithstanding the obiter dictum in *R v Nature Conservancy Council, ex p London Brick Co Ltd* [1996] Env LR 1 to the contrary, as it appears to me, if English Nature continue to be of the opinion that the statutory criteria are satisfied, the discretion can only lawfully be exercised one way, that is in favour of confirming the notification. They cannot lawfully withdraw the notification or allow it to lapse. For any other course than confirmation would bring into play once again the immediate duty of English Nature to make the notification, and the legislature cannot sensibly have intended this roundabout method of continuing the legal consequences of the continuing opinion of English Nature that the statutory criteria are satisfied.

**[19]** The statutory scheme requires English Nature at two distinct and successive stages to exercise their expert judgment on three matters: (1) to determine whether the statutory criteria are satisfied; and if so (2) to specify the flora, fauna or geological or physiographical features by reason of which it is of special interest; and (3) to specify any operations likely to damage the flora, fauna or those features. The first stage is the notification stage and the second is the confirmation stage when the decisions at the notification stage require reconsideration in the light of objections, representations and further information received in the interim. English Nature in determining whether the area is of special interest for any of the four possible statutory reasons will have regard to the fact that the judgment is called for in the context both of their nature conservation function and of legislation directed at nature conservation and designed to place constraints on landowners required in the interests of such conservation. There is no requirement that the land is of national importance (cf s 29(2)(b) of the 1981 Act since repealed by the 2000 Act).

**[20]** In view of the arguments before me I must underline one consequence of the fact that the exercise required of English Nature is exclusively one of

judgment. If English Nature are of the opinion that the statutory criteria are satisfied, they have no discretion to decline to notify or confirm (and accordingly displace s 28 of the 1981 Act and the statutory scheme of which it forms part) by reason of a preference for application of some other statutory or non-statutory scheme or by reason of any objection to or dissatisfaction with the legal consequences of notification or confirmation. In particular English Nature cannot refuse to confirm (as submitted by the claimants) because they consider that the population of stone curlews would be protected more effectively and in a way occasioning less interference with the peaceable enjoyment of their possessions by landowners by voluntary agreements with landowners or by the classification by the Secretary of State of the area of land in question as part of an SPA.

**[21]** Further it is clear (notwithstanding submissions by the claimants to the contrary effect) that the duty of English Nature to exercise their own judgment and notify and confirm in accordance with their expert judgment cannot and should not be qualified by their own past practice or by provisions in the guidelines. The guidelines may inform English Nature in reaching their judgment, but not constrain. This fully accords with the judgment of Forbes J in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83, who made clear that, once the current members of the council of English Nature (the council) came to the conclusion that a site did satisfy the statutory criteria, they were duty bound to act in accordance with their own opinion, whether or not this involved a departure from a previous decision or a change in policy.

**[22]** As I have already said, it is to the existence of the legal consequences of the notification and confirmation that the claimants take objection as unfair and unnecessary interferences with their rights of ownership and which (they contend) are avoidable by classification as an SPA instead of confirmation as an SSSI as the statutory vehicle for bird protection or by recourse to non-statutory means, namely agreements with the landowners. In my view, for the reasons which I have given, these grounds of objection are not legally tenable. English Nature are statutorily obliged to apply the criteria laid down in s 28 of the 1981 Act. Whether the area satisfies the criteria of an SSSI cannot be affected, still less determined, by the existence (let alone the possible future existence) of what may appear more attractive alternative courses of action (e g classification as an SPA) nor can their existence lawfully deflect English Nature, if satisfied that the criteria are satisfied, from the course of notification and confirmation.

CHALLENGES TO DECISION

**[23]** It is clear from the minutes of its meetings and beyond dispute that the reason for the resolutions of English Nature to notify and to confirm the notification was the internationally important population of stone curlews: on both occasions English Nature stated this was the reason for their resolution. It is accordingly incumbent on the claimants to establish grounds of challenge to what on the face of it is a valid decision to confirm for this reason.

**[24]** Before I consider in turn each of the grounds for which the claimants were granted permission to apply for judicial review, I must consider two matters on which the claimants addressed me at the hearing. The first was that the members of the council who made the decision were unaware of the terms of the guidelines or failed to have in mind those provisions. No such allegation

was made in the application to the court and no evidence was adduced in support of it. None the less the claimants in the course of the hearing made submissions to the effect that the failure of English Nature to have regard to provisions of the guidelines vitiated the decision. In my judgment it is not open to the claimants to advance such a case. If the claimants had included such a case in their application to the court, English Nature would have been placed on notice of this fact when they prepared their evidence. They could have put forward evidence by the members on this issue. There was no occasion to do so as this was not part of the case which they had to address. I should add that I am fully satisfied that, in the absence of evidence to the contrary, I should assume that in accordance with their duty the members familiarised themselves with the guidelines.

[25] The second is that on the day prior to this hearing the claimants gave notice of intention to apply for permission to rely on an additional ground, namely that in deciding to confirm the notification English Nature took no account of serious concerns about the SSSI expressed by the Ministry of Agriculture, Fisheries and Food (MAFF). The claimants explained that they had only just received from English Nature a letter disclosing the existence of such concerns on the part of MAFF and accordingly the possibility of challenge on this ground. English Nature opposed the application. They told me that the anxieties expressed at one stage by MAFF had been allayed at a meeting with English Nature prior to the decision and that they had so informed the claimants by letter prior to the hearing. English Nature contended that there was no evidence to the contrary; that there was nothing in the point; that there was no relevant correspondence with MAFF on this issue to be disclosed; and that it was far too late to raise the matter at the hearing. On the material before me no reasonable grounds exist for the belief that there is any substance in this ground of complaint. (I may add that the claimants should surely have pursued inquiries with MAFF prior to the hearing if they wished to challenge or question English Nature's statement in its letter regarding its meeting with MAFF.) The issue could not be explored further without an adjournment; I do not think that the adjournment would serve any useful purpose; and in the circumstances justice does not require or justify allowing the claimants to pursue this objection on this application.

IRRATIONALITY

[26] The challenge to the decision on grounds of irrationality rests on a number of separate grounds. The first is that English Nature departed from previous practice between 1994 and 2000 of not granting SSSI status in case of extensive areas of conventional plantation or to habitats for migratory birds or birds who nested in areas only sporadically. But English Nature decided in February 2000 not to be bound in future by this practice and rightly so, for their duty required them to accept no such constraints on the exercise of the judgment committed to them. This decision in February 2000 has never been challenged in judicial review proceedings, no doubt because any such challenge was doomed to failure. I cannot see how the earlier (later abandoned) practice is of any assistance.

[27] The second is that English Nature departed from the guidelines. I have already held that English Nature, far from being legally bound by the guidelines, was legally bound to depart from the guidelines if they went beyond

informing, and placed any constraint upon, the exercise of their judgment. But, going beyond this, I can find no departure from the guidelines. The guidelines advised care and caution before deciding to notify or confirm largely artificial habitats for the reason of the presence of rare birds and that croplands should not normally be selected, but in no way precluded the decision, and the evidence reveals that all due care was exercised (and in any event should be presumed to have been exercised) by English Nature in reaching the decision.

**[28]** The third (which is the most serious allegation) is that English Nature decided to confirm the notification, not on its merits, but to give effect to the wishes of the Secretary of State and to underpin the proposed SPA in this way and to improve the prospects that the Secretary of State would classify the SPA.

**[29]** This challenge requires consideration of two matters: (1) the relationship of designations or classifications as SPAs and SSSIs; and (2) the approach adopted by English Nature to designating the SSSI and the statements made by, on behalf of and to English Nature up to and including the meeting at which the decision was made.

(1) *The relationship of designations as SPAs and SSSIs*

This application is not the occasion for any detailed examination of or exegesis on the relevant legislation (and in particular European legislation) relating to SPAs. In this context it is important to bear in mind that there is as yet no SPA and (in particular in the absence of an SSSI) there may never be, and the performance of the duty of English Nature under s 28 of the 1981 Act cannot lawfully be deferred to await the exercise of jurisdiction by the Secretary of State to classify an SPA. It is sufficient for the purpose of this application to have in mind two matters. The first matter is that there are close links between the two statutory schemes. In this context it is relevant to note: (1) reg 3 of the Conservation (Natural Habitats) Regulations 1994, SI 1994/2716 provides that English Nature shall exercise their powers under s 28 so as to secure compliance with the Habitats Directive; (2) the guidelines, after referring to the international obligation to nature conservation in terms of site protection under (amongst other treaties) the Birds Directive and the Habitats Directive (transposed into English law by the 1994 regulations), go on at p 560 (para 3.2) to say:

> 'It seems axiomatic that, if an area, feature or species is of international importance, it must be of special interest in its total national occurrence. In these cases it is necessary to select all sites above a critical standard, and not to [rely] on choosing only exemplary areas, in order to meet the international conservation obligation. This can apply to habitats which are extensive (e g blanket bog) and to species which are numerous ... as well as to habitats and species which are localised and rare.'

and (3) in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83 at [125] Forbes J held that English Nature were to take into account 'the site's function as part of a larger area of European importance'.

**[30]** The second matter is the government's views on the relationship between the two schemes. By letter dated 19 June 2003, the Treasury Solicitor confirmed to this court: (1) that 'the Government takes the view that the provisions of the Birds Directive with respect to SPAs, as adapted by the Habitats Directive, are transposed in part by the provisions of the 1981 Act

relating to SSSIs, as supplemented and adapted by the provisions of the Habitats Regulations 1994'; (2) that 'the Government's view on the interrelationship of sites of international importance (such as SPAs) and SSSIs is as recorded by Forbes J in para 25 of his judgment in [the *Aggregate Industries* case]; and (3) that the government's view on the question whether an area should not be classified as an SPA unless it has also been notified as an SSSI was reflected in the same paragraph.

> 'The Government would expect, as a matter of logic, a site appropriate for SPA designation to fulfil the criteria for SSSI notification. If a site being considered for SPA designation were to be regarded as not fulfilling the SSSI selection criteria, the Government would wish to reconsider the evidence supporting SPA candidature.'

These clearly have been the thrust of the government's views for some time and were correctly understood as such by English Nature when the decision was made.

*(2) English Nature's approach to designating the SSSI*

**[31]** I have already traced the history of the current approach adopted by English Nature to notifying and confirming SSSIs. At no time between 1994 and 2000 did English Nature (or its statutory predecessors) regard the present site or indeed any transitory habitats as satisfying the requirements for an SSSI, and the guidelines stated that care should be exercised if the presence of rare birds is the only reason for considering a largely artificial habitat and that croplands should not normally be selected. In a word, caution was advocated in these cases. In February 2000 however English Nature's approach to determining the threshold for what counts as a 'site of special scientific interest' changed fundamentally in relation to artificial habitats with transitory populations of birds. The decision of English Nature of that date to this effect has never been judicially challenged and for this reason (as well as its accord with s 28 of the 1981 Act) plainly is valid and correct. None the less the claimants contend that the reason for this fundamental change and for the decision was that English Nature reluctantly succumbed to pressure from the Department of the Environment, Transport and the Regions (the DETR) (as it then was) to notify and confirm the SSSI to underpin the proposed SPA and that English Nature notified and confirmed in order to achieve the goal of the designation by the DETR of the Breckland SPA, a precondition for which was that English Nature notify and confirm the SSSI.

**[32]** In support of this contention the claimants have referred me to letters between English Nature and the DETR and reports and papers to English Nature reflecting the wish of English Nature at one time that there should be an SPA and not an SSSI; the insistence by the DETR that there should be an SSSI before the DETR classified the SPA and that all SPAs are underpinned by SSSI notifications and confirmations; discussions between English Nature and the DETR as to the timing of the SSSI and regard by English Nature as to the wishes of the DETR in this regard; and the expression of view by English Nature that they would not recommend for inclusion in the SPA land which they did not confirm as an SSSI.

**[33]** Whether the claimants' contention is correct in respect of the decision must be determined by reference to what was said and done at the critical

meeting at which the decision was made. The events preceding the meeting put the court on its guard to scrutinise with care whether in their deliberations English Nature asked themselves and decided the right question, namely whether the statutory criteria were satisfied: they do not determine the issue. I approach the issue mindful of the guidance provided by *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1988] 3 PLR 25 that a decision should in general be quashed if by way of error a relevant consideration is not taken into account or an irrelevant consideration is taken into account unless the decision-maker was bound on the facts to have reached the same conclusion if the error had not occurred.

**[34]** At the meeting of the council held to consider confirmation of the notification: (i) a representative of the claimants, Mr Falcon, addressed the council. He stated that it was not legally necessary to 'designate' and that 'the existence of itself of an SPA does not in itself obligate the United Kingdom Government to create an SSSI'; (ii) the council then received the legal advice given to them by the solicitor they employed for that purpose, Mr Richard Barlow, who stated:

> 'Council members must be satisfied that the land which is being notified is of special interest. Much work has been done to devise this package in a way which properly covers all the issues but also can protect that which is considered to be special. And so the decision for you is to apply the provisions of the Act to this land';

(iii) in the course of the council's discussions, however, one member of the council (Mr Nicholas Woolley) said that he thought that the fact that the land ought to be part of an SPA 'in itself in the light of the English legislation and in the light of quite clear specific government direction to us ... justifies and requires this land to be designated as an SSSI'; (iv) thereupon another member of the council, Mr Stephen Tromans (a well-known barrister who specialises in environmental law), stated his view that, while—

> 'the fact that land may be an SPA is clearly relevant to our decision, I don't think ... [we can] say that ... automatically it must pass the SSSI test, I think that we have to make up our own minds on that on the information available because that's what the legislation requires us to do';

(v) in response to a question by another member of the council about the relationship between SPAs and SSSIs, the chairman stated that Mr Tromans had answered it, but the chairman none the less asked Mr Tromans to say it again as it was an important point; (vi) Mr Tromans then stated:

> 'It seems to me that whatever Government policy may be as to the linkage between SPAs and SSSIs, the question for us this morning as Richard Barlow said is whether the land meets the criteria of the legislation that we are dealing with. We can't regard ourselves as being bound by Government policy to say that something is a SSSI if we don't think in our heart of hearts that it really is, I think that is the key to it';

(vii) the chairman stated that he thought that was 'very clear' and invited Mr Woolley to speak; (viii) Mr Woolley then sought to explain that his view was that—

'if we have an area of land whether it be large or small, if it is of sufficient international importance that it should be declared an SPA. Surely to goodness if it's of such international importance it is very hard to believe that it isn't of sufficient national interest. If the science is there to back up the international interest it surely is there in abundance to back up the national interest';

(ix) the minutes of the meeting record: (a) 'Council discussed the issues noting that a decision was required upon the existence of special interest at the site and concluded that such special interest is in place on the Breckland Farmland site'; (b) the reason for the notification (which the Council of English Nature was invited to, and did, confirm) was that 'this site is notified for its internationally important population of stone curlew ...'

[35] The claimants challenge the decision on the ground that what they describe as the earlier 'mistaken approach' 'was not cured by the comments of Mr Tromans' as: (i) 'the flaws in the decision-making process were by that date so entrenched that they could not have been cured without a fundamental re-evaluation of whether or not it was appropriate to designate'; (ii) there was 'confusion amongst members of the council'; (iii) Mr Woolley treated notification as 'a foregone conclusion' given that the area was part of a proposed SPA; and (iv) even Mr Tromans thought that the fact that the land was within an SPA might be relevant to the decision. I totally reject this challenge.

[36] It is manifest from the transcript and minutes of the meeting that the members of the council were advised and recognised that they had to determine whether the land notified was of special interest as stated in s 28 of the 1981 Act. It was not simply Mr Tromans who gave that advice; he was endorsing the advice provided previously by the council's own solicitor, given after representations made by a representative of some of the landowners affected about the relationship between SPAs and SSSIs. The chairman found Mr Tromans' advice very clear and Mr Woolley did not suggest that in the light of it he remained of the view that there was any legal requirement as such to notify if the land was in an SPA. There is no reason to doubt (and the claimants have not alleged that the minutes are untruthful when they state) that the council noted that 'a decision was required upon the existence of special interest at the site' and that they concluded that there was such a special interest. The council accordingly addressed themselves to, and answered, the correct statutory question and confirmed the reason why the area of land had special interest.

[37] In my judgment it is wrong to suggest that it is legally irrelevant or impermissible for English Nature to take into account, in deciding whether an area is of special interest by reason of the bird population it may support, the fact they consider that that area is (or forms a part) of one of the most suitable territories in number and size for the conservation of birds who are recognised as being of special significance at a European level as well as in national legislation. Indeed (as I have already said) Forbes J held in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83 at [125] that English Nature were entitled to take into account 'the site's function as part of a larger area of European importance'. I refer also to the matters and the passage in the guidelines set out in [11]–[12], above.

[38] I see no reason to disagree with the government's views as to the relationship between SPAs and SSSIs in terms of the transposition of the Birds Directive but whether or not those views are correct is immaterial. What is clear

is that English Nature applied and determined the issue of confirmation by reference to the statutory criteria and for the reason which they gave, namely to protect stone curlews and for no such collateral reason as the claimants allege; and that, so far as they regarded it as a relevant consideration in the exercise of their judgment whether the statutory criteria were satisfied that the area of land in question was appropriate to be classified as an SPA and that they had made a recommendation to this effect to the Secretary of State, that was a view they were fully entitled to take. But even if I am wrong and they were not entitled to treat as a relevant consideration the fact that the site was in their view appropriate to be classified as an SPA, there can be no doubt that, even if English Nature had ignored this consideration, they would have reached (and indeed could only have reached) the same conclusion namely that the statutory criteria under s 28 of the 1981 Act were satisfied.

JURISDICTION

**[39]** The claimants contend that it was beyond the range of reasonable meanings open to English Nature of the statutory formula 'a site of special interest by reason of its fauna' to designate the entirety of 13,335·7 hectares as an SSSI where the reason for designation was the preservation and protection of the habitat for nesting and breeding of single pairs of stone curlews, which only occupied the habitat from March to October and changed their sites from year to year with the rotation of crops. The claimants sought reinforcement of this argument by praying in aid the fact that the decision contradicted consistent practice to the contrary between 1994 and 2000 and departed from provisions in the guidelines. As I have already held, there were in fact no such departures from the guidelines, but whether or not this is so, as a matter of law none of these considerations could preclude a determination by English Nature that the statutory criteria were satisfied: rather these are at most relevant considerations for English Nature to take into account in the exercise of the jurisdiction committed to them of deciding whether the statutory criteria were satisfied and the area in respect of which it was satisfied. It at all times remained open to English Nature reasonably and sensibly to reach the conclusion which they did that the whole area was of special interest because of the support which it provided for such a significant proportion of such an important and rare bird species recognised as being of European significance (consider the *Aggregate Industries* case at [132]). English Nature had to decide whether to confirm and (if so) how extensive the SSSI area had to be if it was to provide the requisite protection. The members visited the area between the dates of notification and confirmation and applied their expertise and judgment. There is no basis on which this court can or should substitute its judgment for that of English Nature. As Forbes J said in the *Aggregate Industries* case at [106](iii): 'English Nature is far better placed and qualified than a court to make the requisite assessments and value judgments'. In this context it is to be noted (as I said earlier) that the claimants, though granted permission to challenge the decision on the ground that English Nature had failed to provide a scientifically justified basis for the land which it notified, did not pursue this ground and there is accordingly no vulnerability or exposure to criticism of the decision on this ground.

ARTICLE 1

**[40]** Article 1 of the First Protocol to the convention protects a person's right to the peaceful enjoyment of his possessions but it goes on to provide that

this protection does not 'in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...' Section 6 of the 1998 Act renders it unlawful for English Nature to act in a way which is incompatible with art 1. The claimants accept that protection of stone curlews is a legitimate public interest justifying the imposition of restrictions on the use of their property. But they contend that English Nature's decision to confirm the notification was incompatible with their convention rights because it occasioned a disproportionate interference with the peaceful enjoyment of their possessions. In respect of that submission I fully accept and adopt the answer given by Mr Howell QC in his submissions.

**[41]** There are four possible matters on which in theory an art 1 complaint might focus. These are: (i) the confirmation of English Nature's opinion, (ii) the confirmation of the specified OLDs, (iii) the effect of being within an SSSI under other statutory regimes, and (iv) being within an SSSI rather than an SPA.

**[42]** (i) An allegation that the confirmation of English Nature's notified opinion that the area is of special interest was disproportionate (assuming that opinion to be genuinely and not unreasonably held) is plainly unmaintainable because: (1) English Nature were duty bound to confirm the notification if they held that opinion and accordingly their decision to do so could not as such be incompatible with convention rights: only the statutory provisions could be incompatible, and in this case the claimants have disavowed any such challenge to the legislation; and (2) in any event, the claimants do not, and cannot, contend that the mere notification or confirmation of English Nature's opinion would in itself be incompatible with their convention rights. English Nature's opinion of itself does not interfere with the peaceful enjoyment of their possessions in any respect. It simply represents English Nature's opinion.

**[43]** (ii) A challenge to the confirmation of the specification of OLDs and that the specification of these restrictions imposed disproportionate restrictions on ownership rights has now been disavowed. In any event, it would be unsustainable because: (1) it is not in dispute that the operations specified are likely to damage the stone curlew. All that their specification requires is that consent is obtained for them before they are carried out on pain of committing a criminal offence. If and when the claimants ever propose to carry out such an operation, a fair balance can be struck in determining whether consent should be granted between the acknowledged public interest in protecting the stone curlew and the claimants' interests in carrying out any such operation. Such a regime is not disproportionate nor is it alleged to be. (Moreover in this case multiple consents are not required as suggested by the claimants, even if more than one set of controls are applicable to any particular operation); and (2) furthermore none of the operations specified is likely in any event to have any significant impact on the agricultural use of the claimants' land (nor do the claimants contend otherwise). Any complaint about control of those operations is accordingly manifestly unfounded (see *Oerlemans v Netherlands* (1989) 62 DR 200 at 204–206).

**[44]** (iii) A complaint relating to the effect of being within an SSSI under other statutory regimes eg the Town and Country Planning (General Permitted Development) Order 1995 and the Town and Country Planning (General Development Procedure) Order 1995 (the GDO) and to the effect that restrictions imposed under those regimes in respect of land within SSSIs are

more than are strictly required is likewise misconceived. For it is irrelevant to English Nature's decision to confirm the notification. At best (from the claimants' point of view) the claimants might show that the effect of being within an SSSI under other statutory regimes is unlawful as being disproportionate. Their complaint in such a case would be that eg the GDO was unlawful as being incompatible with their convention rights. But it does not mean that English Nature's decision that this area is of special interest and that their confirmation of the notification are themselves incompatible with the claimants' rights under art 1.

**[45]** (iv) Finally, a complaint that the claimants' property should lie within, not an SSSI, but within an SPA is again irrelevant. The only decision for English Nature relates to whether or not to notify, and to confirm the notification of, the area of land as being of special interest. Given that English Nature are duty bound to notify and maintain the notification if in their judgment the statutory criteria are satisfied, any complaint on the part of the claimants must be that the statutory scheme (not the decision) is incompatible with their convention rights if it permits or requires such notification when (a) English Nature think that the land ought to be within an SPA or (b) when it is. Such a case of statutory incompatibility the claimants disavow.

**[46]** I should add that if the legal merits of any complaint did need to be examined in any more detail, under art 1 of the First Protocol to the convention a fair balance must be struck between the general interest and the interest of any property owner. But in considering questions of proportionality under art 1 the European Court of Human Rights has made it plain that states enjoy a wide 'margin of appreciation' in this area relating to the control of the use of land in the public interest for environmental reasons, and that the controls prescribed or interferences involved must be without any reasonable foundation if the court is to regard them as disproportionate (see *Fredin v Sweden* (1991) 13 EHRR 784). It is well established that a reasonable relationship of proportionality under art 1 does not import a test of strict necessity (as Mr Holgate QC has argued). The fact that there may be other even better methods of achieving the same ends does not necessarily mean that any particular measure is disproportionate under art 1 (see *James v UK* (1986) 8 EHRR 123; *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309). That 'margin of appreciation' is properly reflected domestically in the respect that is due: (a) to the choices that the legislature is entitled to make in this area (for which it is democratically accountable); and (b) to any judgment made by English Nature as a specialist regulator, expert in the matters of nature conservation (cf *Holder v Law Society* [2003] EWCA Civ 39, [2003] 3 All ER 62). As Forbes J stated in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83, the legislation and decision fall well within the areas of respect to be accorded to the legislature and English Nature. Most particularly the provisions for notification and confirmation are essential parts of a regime: (a) designed by the legislature to ensure that informed decisions are made before potentially damaging (and indeed irreversible) actions are taken; and (b) to be brought into play in appropriate situations by English Nature; but (c) leaving the landowners free at all times to apply to be absolved from the bonds imposed on them. It was a choice which the legislature was entitled to take in this area and it was likewise open to English Nature to make the decision.

[47] I accordingly reject the claimants' challenge under art 1.

CONCLUSION

[48] For the reasons which I have set out in this judgment I accordingly reject this challenge to the decision and dismiss this application. I record with gratitude the immense assistance which I received from counsel throughout this case.

*Application dismissed.*

Dilys Tausz Barrister.

# Waters and another v Welsh Development Agency

[2002] EWCA Civ 924

COURT OF APPEAL, CIVIL DIVISION

SCHIEMANN, LAWS AND CARNWATH LJJ

23, 24 MAY, 28 JUNE 2002

*Compulsory purchase – Compensation – Assessment – Development scheme – Compulsory purchase in pursuance of scheme – Construction of barrage in river estuary causing loss of wetlands – Claimants' land acquired for wetlands nature reserve to replace lost habitat – Whether value of compensation including increase in value of land due to necessity to replace lost habitat – Whether scheme consisting of nature reserve only or including barrage – Land Compensation Act 1961.*

Planning towards constructing a barrage in Cardiff Bay began in 1985 and work on the barrage started in June 1994. One of the anticipated environmental consequences was the loss of local wetlands and several possible locations were considered for the establishment of a wetlands nature reserve. By October 1995 the United Kingdom government was under pressure from the European Commission to implement mitigating environmental measures. In about November 1995 an area which included land owned by the claimants was selected and eventually acquired using compulsory powers by the predecessor to the defendant authority. The determination of the amount payable by the authority to the claimants was subject to the 'no-scheme' rule, which provided that compensation for compulsory purchase could not include any increase in the value of the land which was entirely due to the scheme underlying the acquisition. The claims for compensation were referred to the Lands Tribunal which directed that there should be a hearing as a preliminary issue of, inter alia, whether the scheme underlying the acquisition was the intended use of the land taken as a nature reserve or the construction of the barrage, and whether or not it was necessary to discount for the purposes of valuation any increase in the value of the land taken as being due to the need to acquire it as a palliative measure necessary as a result of the environmental consequences of the construction of the barrage. The tribunal held that it was immaterial whether the scheme underlying the acquisition was the barrage or the nature reserve proposal itself, since in either event any effect on the value of land acquired arising from the public purpose prompting the acquisition was to be disregarded under the no-scheme rule. Since that did not answer the preliminary issue in the terms in which it had been formed, the tribunal went on to consider whether the 'scheme', for the purposes of the no scheme rule, should be regarded as being confined to the nature reserve on its own, or should be regarded as including the barrage. It concluded that the scheme underlying the acquisition was the barrage. The tribunal raised, as a point of its own motion, whether, even if the scheme did include the barrage, the value could still take that purpose into account, in so far as it would have led a purchaser to offer a higher price in 'friendly negotiations' but discounted it, finding that such an approach, although supported by authority, was 'unquestionably at odds' with the no-scheme rule. The claimants challenged the tribunal's decision on the grounds, inter alia, (i) that

it should have held that notwithstanding the no scheme rule the acquiring authority had to pay the price that it would have been willing to pay in friendly negotiations, having regard to the barrage project; and (ii) that as a matter of law it was an essential feature of a 'scheme' that the land in question should be an integral part of it, that the claimants' land could not have been an integral part before November 1995, that by that time the barrage scheme had been approved and work had begun, and that therefore the proposals for the nature reserve could not be regarded as integral to the barrage scheme but were a distinct project and should be so regarded for compensation purposes.

**Held** – (1) The tribunal had been wrong to treat the approach to the assessment of compensation of having regard to the acquiring authority's purpose in acquiring the land but assuming a friendly negotiation between it and the vendor, rather than one taking place against the background of the authority's pressure to buy under the compulsory acquisition, as at variance with the no-scheme rule and therefore wrong. The case providing authority for 'friendly negotiations' was distinguishable on the facts. However, that did not affect its conclusion, on the facts, as to the nature of the scheme for the purpose of the no-scheme rule (see [95], below); *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 and *Sri Raja Vyricharla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317 considered.

(2) A prerequisite of a scheme was the identification of the subject land as part of it. That did not impose a temporal limitation on the matters which could be regarded as included in the scheme. The mere fact that the claimants' land had not been identified until a date when the barrage project was already under way did not, as a matter of law, prevent it being treated thereafter as part of the same project. The tribunal had showed no error of law in its conclusion of fact that the nature reserve for which the land was needed was an integral part of the barrage project. Accordingly, the appeal would be dismissed (see [109], [111], [112], [117], [118], below).

**Notes**

For the general rule as to the assessment of purchase money or compensation in the compulsory acquisition of land, and disregard for the scheme for which the land is taken, see 8(1) *Halsbury's Laws* (4th edn reissue), paras 242, 268.

For the Land Compensation Act 1961, see 9 *Halsbury's Statutes* (4th edn) (2000 reissue), 165.

**Cases referred to in judgments**

*Batchelor v Kent CC* (1989) 59 P & CR 357, CA.

*Bird v Wakefield Metropolitan DC* (1978) 37 P & CR 478, CA.

*Birmingham DC v Morris and Jacombs Ltd* (1976) 33 P & CR 27, CA.

*Camrose (Viscount) v Basingstoke Corp* [1966] 3 All ER 161, [1966] 1 WLR 1100, CA.

*Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569, [1914–15] All ER Rep 571, PC.

*Davy v Leeds Corp, Central Freehold Estates (Leeds) Ltd v Leeds Corp* [1965] 1 All ER 753, [1965] 1 WLR 445, HL; *affg* [1964] 3 All ER 390, [1964] 1 WLR 1218, CA.

*Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846, [1995] 2 AC 111, [1995] 2 WLR 404, PC.

*Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment, Newell and ors (executors of JV Longmore (decd)) v Secretary of State for the Environment* [2000] 1 All ER 929, [2000] 2 AC 307, [2000] 2 WLR 438, HL.

*Fraser v Fraserville City* [1917] AC 187, PC.

*Fraser v R* (1963) 40 DLR (2d) 707, Can SC.

*Horn v Sunderland Corp* [1941] 1 All ER 480, [1941] 2 KB 26, CA.

*IRC v Clay, IRC v Buchanan* [1914] 3 KB 466, [1914–15] All ER Rep 882, CA.

*Kaye v Basingstoke Corp* (1968) 20 P & CR 417, LT.

*Lambe v Secretary of State for War* [1955] 2 All ER 386, [1955] 2 QB 612, [1955] 2 WLR 1127, CA.

*Lucas and Chesterfield Gas and Water Board, Re* [1909] 1 KB 16, [1908–10] All ER Rep 251; *on appeal from* [1908] 1 KB 571.

*Melwood Units Pty Ltd v Comr of Main Roads* [1979] 1 All ER 161, [1979] AC 426, [1978] 3 WLR 520, PC.

*Mercury Communications Ltd v London and India Dock Investments Ltd* (1993) 69 P & CR 135.

*Myers v Milton Keynes Development Corp* [1974] 2 All ER 1096, [1974] 1 WLR 696, CA.

*Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565, PC.

*Reid v Bickerstaff* [1909] 2 Ch 305, [1908–10] All ER Rep 298, CA.

*Rugby Joint Water Board v Foottit* [1972] 1 All ER 1057, [1973] AC 202, [1972] 2 WLR 757, HL.

*Secretary of State for Foreign Affairs v Charlesworth Pelling & Co* [1901] AC 373, PC.

*Sidney v North Eastern Railway Co* [1914] 3 KB 629, [1914–15] All ER Rep 341.

*Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37.

*Stokes v Cambridge Corp* (1961) 13 P & CR 77.

*Vyricharla Narayana Gajapatiraju Bahadur Garu (Sri Raja) v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317, [1939] AC 302, PC.

*Wilson and anor (personal representatives of FH Wilson (decd)) v Liverpool City Council* [1971] 1 All ER 628, sub nom *Wilson v Liverpool Corp* [1971] 1 WLR 302, CA; *affg* [1969] RVR 741, LT.

**Appeal**

The claimants, Melville John Waters, Elizabeth Lillian Waters, William Neville Waters, Henry Dyson Preece, Sarah Preece, Roger Williams and Stephen Waters, appealed from the decision of the Lands Tribunal (George Bartlett QC, President) on 3 January 2001 ([2001] 1 EGLR 185) on preliminary issues arising from their claims to compensation from the defendant, the Welsh Development Agency, following the compulsory acquisition of land at Nash, near Newport, Gwent. The facts are set out in the judgment of Carnwath LJ.

*David Holgate QC* and *Timothy Morshead* (instructed by *Jacklyn Dawson & Meyrick Williams*) for the appellants.

*Anthony Porten QC* and *Adrian Trevelyan Thomas* (instructed by *Roy Thomas*, Cardiff) for the authority.

*Cur adv vult*

28 June 2002. The following judgments were delivered.

**CARNWATH LJ** (giving the first judgment at the invitation of Schiemann LJ).

INTRODUCTION

[1] This is an appeal from the decision of the President of the Lands Tribunal (George Bartlett QC) ([2001] 1 EGLR 185) on preliminary issues arising from claims to compensation by landowners at Nash, near Newport, Gwent. It raises difficult questions as to the application of the so-called *Pointe Gourde* rule (or no-scheme rule), that compensation for compulsory purchase 'cannot include an increase in value which is entirely due to the scheme underlying the acquisition' (see *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 at 572).

BACKGROUND

[2] The subject land is low-lying farmland adjacent to the Severn estuary. The various parcels total about 225 acres. They were included, along with other land, amounting in total to some 1,000 acres, in the Land Authority for Wales (Gwent Levels Wetlands Reserve, Newport) Compulsory Purchase Order 1997. The respondent Welsh Development Agency is the successor to the Land Authority for Wales (LAW).

[3] A general vesting declaration was made on 26 January 1998, vesting the land in LAW on 25 February 1998, upon which it was transferred to the Cardiff Bay Development Corporation (CBDC), who themselves transferred it immediately to the Countryside Council for Wales (CCW). The valuation date is 25 February 1998, when the land vested in the CBDC.

[4] The background history was set out in considerable detail in the President's decision. Even so, the appellants before us have suggested that there were some significant omissions. However, it seems to me that the main points necessary for our decision are not controversial, and can be summarised quite shortly.

[5] Plans for a barrage across the estuary of the Taff and Ely rivers were first supported by government in November 1985. In April 1987 the CDBC was established by order under the Local Government, Planning and Land Act 1980, and the Cardiff Bay area became an 'urban development area' under that Act. After several abortive attempts to promote a parliamentary Bill, the Cardiff Bay Barrage (No 2) Bill was introduced in July 1991 to provide the necessary authorisation for the barrage scheme.

[6] It was apparent from the outset that there would be serious environmental objections arising from the loss of wetlands, and that mitigation measures would be required. The 1991 Bill included provision for a tidal lagoon to be constructed in a coastal area at Wentlooge. That proposal was dropped after it had been strongly criticised by the House of Commons committee, partly because of the financial consequences for the farming families in the area. The Welsh Office, with the support of the conservancy bodies, including the Royal Society for the Protection of Birds (RSPB), established a working group to look for alternatives. Local agents were instructed to report as to the feasibility of acquiring an area of land up to a maximum of 1,000 acres within a defined area of search.

[7] LAW became involved in May 1992. At that time LAW had a special role (not replicated by any similar authority in England), which (under s 103(1) of the 1980 Act) was that of acquiring land in Wales for development, and of disposing

of it to other persons for development by them. Under s 102, it was required to comply with directions of the Secretary of State for Wales relating to performance of its functions, but it was not to be regarded as a servant or agent of the Crown. Under s 104(1), it had power to acquire by agreement or, if authorised by the Secretary of State, compulsorily, 'any land which, in the Authority's opinion, is suitable for development'.

**[8]** In May 1992, the Welsh Office indicated the government's intention that LAW should in due course acquire the land for the reserve once identified, if necessary using their compulsory powers, but that the long-term ownership and management of the site would be entrusted to CCW. In response, LAW made clear that they would reserve their position until approached with a specific proposal.

**[9]** The attention of the working group was initially directed to an area at Redwick, which is about 2 km east of the subject land at its nearest point. This idea progressed sufficiently for the CCW and RSPB to withdraw their petitions against the Bill, which was enacted on 5 November 1993, with no specific mitigation measures. By June 1994 work had started on the barrage, and a specific request had been made to LAW to consider using its acquisition powers to create a bird reserve on the Redwick land. However the discussions with the landowners at Redwick, and appreciation of the damage that the proposal would do to farming interests in the area, led to the investigation of alternative options.

**[10]** Matters seem to have come to a head in October 1995. As the President found, the urgency shown by the Secretary of State for Wales at that time was 'substantially due' to the pressure brought by the European Commission. The European Commission had been involved since as early as 1987 when a formal complaint had been made by the RSPB. There had also in the same year been a proposal to include the Cardiff Bay area in a proposed special protection area (SPA) under Council Directive (EEC) 79/409 (on the conservation of wild birds) (1979 OJ L103 p 1). The Commission's position was that the Cardiff Bay proposal could be accepted under the directive as justified by overriding socio-economic reasons, but only if their requirements as to compensatory measures were fully met. This was stated in a letter to the Welsh Office from the Commission dated 11 October 1995. The Commission expressed strong concern that in spite of assurances previously given by the Welsh Office and in spite of the commencement of the barrage project there was no sign of implementation of the mitigation measures.

**[11]** At about the same time the decision was made not to proceed with the Redwick proposal but to concentrate on an alternative area on the Gwent Levels, including the subject land. On 6 November 1995, LAW and the CBDC entered into a formal agreement for LAW to assist in acquiring the necessary land, on CBDC's undertaking to pay the relevant costs. The agreement identified the intended area, including the subject land. The agreement stated that it did not create any partnership or agency between the parties. Following this agreement the Secretary of State informed the Commission of the new proposals and assured the Commission that the government remained 'committed to implementing appropriate compensation/mitigation measures as soon as practicable'.

**[12]** On 17 January 1996 the Secretary of State gave a written answer in Parliament, announcing the proposal for the Gwent Levels Wetland Reserve. Since this seems to have been the first formal public announcement of a project

including the claimant's land, it is worth recording what Mr Hague said in full (269 HC Official Report (6th series) written answers cols 622–623):

> 'I am pleased to announce my plans to proceed immediately with bird reserve compensation measures at Uskmouth and Goldcliff and the area in between on the Gwent levels. These new proposals have been developed with the assistance of the Countryside Council for Wales, from the conclusions reached by the Cardiff Bay development corporation steering group report on alternative mitigation measures—October 1995—and discussed with the European Commission ... I have asked the Cardiff Bay development corporation to set up immediately a project implementation steering group to oversee the establishment of the new integral reserve of over 375 hectares, with the firm objective of completion before the start of impoundment of the waters in Cardiff bay. The longer term objective is for the reserve to be developed so that it qualifies for special protection area status. The first task of the group will be to provide clear proposals for the management of the site and by the end of May, specific targets for the birds to be attracted to it. The Land Authority for Wales, working on behalf of CBDC, has already secured from National Power 164 hectares of the land required and lodged a planning application for engineering works for the whole of the reserve site.'

On the same day LAW submitted a planning application for the nature reserve to the local planning authority. The Commission indicated that in view of the guarantees given it was satisfied that the requirements of the directive had been met and the complaint file was being closed.

[13] During the following months, LAW began steps to acquire the necessary land by agreement. No decision having been made on the planning application by January 1997, LAW gave notice of appeal to the Welsh Office. At the same time it made the compulsory purchase order which led to the present dispute. Although by then it had acquired some 80% of the relevant interests in the land needed for the reserve, the order covered the whole site. (As I understand it, this was done largely as a precaution to ensure that no interests were overlooked.) The purpose of acquiring the land (as stated in the order) was 'for the purpose of disposing of it for the development and maintenance thereafter of a wetlands reserve involving the creation of saline pools, reedbeds and managed grassland'.

[14] The statement of reasons for making the compulsory purchase order referred to the agreement entered into in 1995 and stated that the proposal for the reserve—

> 'arises from the need for an agreement between the UK Government and the European Commission to provide compensatory measures for the loss occasioned by the construction of the Cardiff Bay Barrage of the site of Special Scientific Interest in the Taff/Ely estuary ...'

That reference to some form of agreement with the European Commission led to exchanges of correspondence between the claimants' solicitors and the Welsh Office and an application for judicial review. The effect of these exchanges, together with the Welsh Office's evidence in the judicial review proceedings, was to confirm that there was no formal agreement with the Commission; and also to assure the claimants that objections to the order would be properly considered, and that, if the proposed reserve was unacceptable, an alternative would be

sought, notwithstanding the very tight timescale. On this basis, the judicial review proceedings were withdrawn.

**[15]** Following a public inquiry, the compulsory purchase order was confirmed and planning permission was granted, by a decision letter of the Secretary of State dated 14 November 1997. The present appellants had originally objected, but they withdrew their objections before the inquiry, because (as they said) they regarded the result as inevitable. The decision letter stated Welsh Office policy that a compulsory purchase order should not be made in the absence of 'a compelling case in the public interest', but considered this test to be satisfied:

> 'The Secretary of State accepts the inspector's conclusion that there is a requirement to provide compensation for the loss of the Cardiff Bay habitat and no better scheme than that proposed by the Land Authority has emerged.' (Paragraph 21.)

This view was amplified under the heading 'the adequacy of the compensation measures':

> 'The Secretary of State ... accepts that in the case presently before him, the provision of a reserve has been proposed because of the need for compensatory measures due to the construction of Cardiff Bay Barrage and the consequent loss of the intertidal mudflats when impoundment of the water in the Bay occurs. However, regardless of the Barrage project and the adequacy of the compensatory measures when considered in the terms of the Birds and Habitats Directives, the Secretary of State is satisfied that the provision of a substantial nature reserve which will aim to qualify for SPA status and which will contribute to meeting the UK's objectives under the Bio-diversity Convention (signed at Rio de Janeiro in June 1992) is, of itself, a project that is in the public interest and, although not a primary reason for seeking the CPO, he nonetheless accepts the view of LAW that it will form a valuable conservation measure in its own right.' (Paragraph 27.)

**[16]** A general vesting declaration was made on 26 January 1998 and the land constituting the Gwent Level Wetlands Reserve was vested in LAW on 25 February 1998. In due course ownership of the land passed to CBDC and from them to CCW.

**[17]** Claims were submitted for compensation which were later referred to the Lands Tribunal. The President's decision does not set out the alternative bases of claim in any detail. He simply notes ([2001] 1 EGLR 185 at 186) the claimants' contention that their land had a 'ransom value', in that—

> 'the loss of the habitats in Cardiff Bay has given their land a value in excess of agricultural value, because, together with the rest of the 1,000 acres, it constitutes the most suitable area for the nature reserve that it was necessary to establish as a compensatory measure.'

**[18]** We have been shown the particulars of the claim, as submitted following a direction of the tribunal. Although it is not material for present purposes to consider the detail, nor the valuation evidence in support, it is helpful in considering the preliminary issues to have some idea of their possible implications in monetary terms. Four alternative bases are put forward by the claimants. The lowest two are not said to be dependent on the preliminary issues. They are (in summary) agricultural value (£4,500 per acre), and

'development hope value' (£9,000 pa). (The authority's valuations are based simply on agricultural value, which they put slightly lower.)

**[19]** The two higher bases, which are said to be dependent on the preliminary issues, are 'nature reserve value' (£13,000 pa) and (to use Schiemann LJ's suggested shorthand) 'barrage inhibition value' (£28,000 pa). The way the latter is put in the claimants' particulars is instructive:

> 'Upon the premise that the land commands a particular value consequent upon its indispensable status vis-à-vis the Cardiff Development Scheme and upon the premise that the Pointe Gourde principle and s 5, r (3) of the Land Compensation Act 1961 does not preclude such an approach ... the claimants maintain that regard must be had to the extent and importance of the Cardiff Bay Development Scheme ... The best estimate which the claimants can presently give is that the total value element of that scheme would have been of the order of £180,000,000.'

**[20]** The precise relationship between the latter figure and the claimed figure of £28,000 per acre is not explained, although details are also given of some other transactions in the area, including purchases by LAW. One may infer, though this is not stated, that the claimants have in mind a valuation exercise comparable to that adopted in *Stokes v Cambridge Corp* (1961) 13 P & CR 77 (where land required for access to unlock the potential of a development site was valued by reference to a share of the development value).

**[21]** As to the other of the two higher valuations, there is no doubt that the claimants are entitled in principle to 'nature reserve value', if (which is disputed) it is worth more than agricultural value. This is because the Land Compensation Act 1961 allows the claimant the benefit of an actual or assumed permission for the authority's proposed development, whether or not it would have been granted in the absence of the authority's scheme (see ss 14(2) and 15(1)). Accordingly, it is 'barrage inhibition value' which is at the heart of the debate.

**[22]** The tribunal directed that there should be a hearing of two preliminary issues. The first was whether the case was governed by s 5, r (3) of the 1961 Act. This was determined against the authority, and there is no cross-appeal against that part of the decision. However since the President's findings on that issue are relevant to the other issue it will be necessary to refer to them. The second issue, which was determined against the claimant, and is now subject to appeal, was expressed in these terms ([2001] 1 EGLR 185 at 186):

> 'Whether the scheme underlying the acquisition is the intended use of the land taken as a nature reserve or for the construction of the Cardiff Bay barrage; and whether it is necessary to discount, for the purposes of valuation, any increase in the value of the land taken as being due to the need to acquire it as a palliative measure necessary as a result of the environmental consequences of the construction of the Cardiff Bay barrage: following [*Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565].'

THE PRESIDENT'S DECISION

**[23]** Rule (3) provides:

> 'The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart

from ... the requirements of any authority possessing compulsory purchase powers ...' a

[24] In the context of the present case, two questions arose: first, whether the land had 'special suitability' for the authority's purpose; and, secondly, whether there was any market for that purpose apart from the requirements of an authority possessing compulsory purchase powers. (It was not contended that this was a purpose to which the site 'could be applied only in pursuance of statutory powers'.) The President (at 191) found against the authority on the first question: b

'Whether the subject land has a special suitability or adaptability within the terms of r 3 falls to be judged in relation to the purpose for which the acquiring authority acquired it—that is to say, as part of a nature reserve that would meet the need to provide compensatory measures for the loss of the Taff/Ely SSSI ... The requirement of special suitability is not met by showing that the land is the most suitable land for the purpose. In [*Batchelor v Kent CC* (1989) 59 P & CR 357 at 362], Mann LJ, having considered the *Oxford English Dictionary* definition of "special", said: "Most suitable does not correspond with specially suitable." The land must possess some exceptional character in relation to the purpose in question. I am satisfied that the subject land does not have a special suitability or adaptability in this sense. The evidence suggests strongly that there are other areas along the Severn estuary that could have performed the same function.' c d e

[25] He indicated that, had he decided the 'special suitability' question in favour of the authority, he would have found in their favour on the other question:

'Mr David Holgate QC submitted that both the Welsh Office, which did not have compulsory purchase powers, and the RSPB were potential bidders. On this, I accept Mr Porten [QC]'s submissions. The purpose of the acquisition—to create a wetlands reserve to compensate for the loss of the Taff/Ely SSSI—was not one that the RSPB saw, or would ever have seen, as being its function to achieve. Its concern throughout was to bring pressure to bear on the government to provide a compensatory reserve, and it would have been inconsistent with this stance to consider providing a reserve itself. As for the Welsh Office, I can see no evidence that it would ever have pursued land acquisition on its own behalf. LAW was there with the specific function of acquiring land in Wales for development, and the Secretary of State had power to give LAW directions as to the performance of its functions. I can see no reason for thinking that he would ever have acted other than by these means.' f g h

[26] On the *Pointe Gourde* issue, the President conducted a detailed review of the case law, which led him to state the 'principle' in the following terms (at 193):

'The basis of the *Pointe Gourde* rule, and the rules contained in sections 5 to 9 of the 1961 Act, appears to be this. The owner is to receive, as compensation, the equivalent in money terms of what he has lost through the compulsory acquisition of his land. He must be put into the position that he would have been in if there had been no compulsory acquisition. Compulsory powers of acquisition are only conferred in the public interest. A compulsory purchase order is only made and confirmed for a public j

purpose that the making authority and the confirming authority judge to be sufficiently important to warrant compulsion. The principle is that any effect upon the value of the land acquired arising from the public purpose, or public purposes, prompting the acquisition, whether from their adoption by the authority or from their implementation, is to be disregarded. A scheme or proposal is the embodiment of the public purpose, or public purposes, concerned.'

[27] On that basis, in his view, it was—

'immaterial whether the "scheme underlying the acquisition" is the Cardiff Bay barrage or the nature reserve proposal itself, since there is no suggestion that the barrage had any effect upon demand for the subject land other than for the public purpose so identified. Whichever of the alternatives constitutes the scheme, there must be left out of account such effect upon value as the adoption, or implementation, of the purpose of providing the compensatory nature reserve may have had. Given this conclusion, it becomes unnecessary to seek to identify the scheme underlying the acquisition in the way that is frequently necessary in compensation cases.'

[28] He recognised, however, that this conclusion did not answer the preliminary issue in the terms in which it had been formulated. Accordingly, he went on to consider whether the 'scheme', for the purposes of the *Pointe Gourde* rule, should be regarded as confined to the nature reserve on its own, or should be regarded as including the barrage. He concluded (at 194):

'Since, in my view, it is the public purpose, or public purposes, of the acquisition upon which the identification of the scheme must depend, the crucial factors are that the nature reserve proposal was made necessary by the barrage scheme and that the barrage scheme proceeded upon the basis that some such compensatory measures would be provided. In the absence of the barrage scheme, there would have been no public purpose for the acquisition, and, in the absence of assurances on the part of government that a compensatory nature reserve would be provided, it is unlikely that the Act would have become law, certainly in its present form. If it had done, I think it probable that action would have been taken by the European Commission to prevent impoundment. Thus, the implementation of the barrage scheme, as regards the permanent inundation of Cardiff Bay, was, I find, dependent upon the acquisition and development of land for the Gwent Levels nature reserve. The fact that the Secretary of State, in confirming the [compulsory purchase order], saw the nature reserve as having an additional, wider justification, and the fact that the Commission sought, and obtained, additional compensatory measures on the part of the government, do not change the essential nature of the acquisition as one element in the barrage scheme. That different agencies were used for the purposes of developing the barrage, and for acquiring and developing the land taken for a nature reserve, does not prevent there being a single scheme. The agencies, the CBDC, LAW and the CCW, acted in concert at the behest of the government, and finance for the nature reserve was channelled through the CBDC. In the light of these factors, if it is necessary to identify the scheme underlying the acquisition, I find that it was the Cardiff Bay barrage.'

**[29]** Before leaving the President's decision, it is necessary also to mention what he said about the so-called 'Indian case' (*Sri Raja Vyricharla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317, [1939] AC 302). I understand that it was the President himself, rather than the parties, who introduced the Indian case into the argument. He also noted that it had been approved and applied by the Court of Appeal in *Lambe v Secretary of State for War* [1955] 2 All ER 386, [1955] 2 QB 612, and in one major Lands Tribunal case. He described its effect as follows (at 193):

> 'The Judicial Committee of the Privy Council decided that the proper approach to the assessment of compensation was to have regard to the authority's purpose in acquiring the land, but to assume a "friendly negotiation" between it and the vendor, rather than one taking place against the background of the authority's pressure to buy under the compulsory acquisition ...'

The suggestion appears to have been that, on this basis, even if the 'scheme' did include the barrage, the value could still take that purpose into account, in so far as it would have led a purchaser to offer a higher price in 'friendly negotiations'. However, having raised the point, the President discounted it, because, as he thought, the approach of the Indian case was 'unquestionably at odds' with the *Pointe Gourde* rule as stated and applied in later cases in the Court of Appeal and House of Lords.

THE APPELLANTS' CASE

**[30]** The appellants challenge the President's decision on a number of grounds. They can I think be summarised and reordered in five main points, the first two of general principle, and the others more fact-specific. (i) The President should have treated the Indian case as establishing that, notwithstanding the no-scheme rule, the acquiring authority must pay the price that it would have been willing to pay in friendly negotiations, having regard to the barrage project. (ii) In applying the no-scheme rule, the President applied a 'public interest' test which is not supported by the authorities. (iii) The 'scheme' for the purposes of the no-scheme rule must be a scheme of the acquiring authority itself, or one to which the acquiring authority is a party. (iv) Compulsory acquisition of the claimant's land must form an 'integral part' of the scheme to be disregarded. (v) On the facts, and in the light of its earlier findings, the President was not justified in finding that the inundation of Cardiff Bay was 'dependent' on provision of the Gwent Levels nature reserve.

**[31]** Like the President, I find it impossible to address these questions satisfactorily, without first considering in some detail the basis of the law relating to disregarding the 'scheme' for compensation purposes.

THE NO-SCHEME RULE

**[32]** The *Pointe Gourde* rule (or no-scheme rule) has been recognised in numerous authorities at the highest level. However, for a rule which is so well-established, it is surprisingly difficult to find a clear exposition of its precise ambit. One finds a concise statement of the principle in the recent Privy Council case, *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846 at 861, 862, [1995] 2 AC 111 at 136 (per Lord Nicholls of Birkenhead):

> 'A landowner cannot claim compensation to the extent that the value of his land is increased by the very scheme of which [the compulsory acquisition]

forms an integral part ... A loss in value attributable to the scheme is not to enure to the detriment of a claimant ... The underlying reasoning is that if the landowner is to be fairly compensated, scheme losses should attract compensation but scheme gains should not. Had there been no scheme those losses and gains would not have arisen.'

[33] Central to that statement is the word 'scheme'. That raises an immediate question. Compensation is a statutory right to payment for the adverse effects of compulsory acquisition, not for the adverse effects of a 'scheme'. That is not a word which appears in any of the relevant statutes. So, what is the source of the rule? It is sometimes described as a 'common law principle' (see eg *Melwood Units Pty Ltd v Comr of Main Roads* [1979] 1 All ER 161 at 165, [1979] AC 426 at 435 per Lord Russell of Killowen: '... part of the common law deriving as a matter of principle from the nature of compensation for ... compulsory acquisition'). On the other hand, in Lord Pearson's view (*Rugby Joint Water Board v Foottit* [1972] 1 All ER 1057 at 1062, [1973] AC 202 at 214–215), it could not be a 'common law principle', because compulsory acquisition and compensation are entirely creations of statute; in his opinion, the rule was one of interpretation of the word 'value' in the relevant statutes. Neither of these explanations gives one any precise assistance as to the ambit of the rule.

[34] There is a further conceptual problem. Apart from any specific statutory provision, the landowner has no inherent right to compensation for the adverse effects of public projects (say, a new motorway blocking the view from his house), any more than the authority has a right to recoupment for their beneficial effects (for example, a new road opening up an area for private development). Compensation for losses due to public works is governed by detailed statutory schemes (such as Pt 1 of the Land Compensation Act 1973). Conversely, under the present law, recoupment of gains is left to general taxation, attempts at more comprehensive solutions (such as in the Town and Country Planning Act 1947 and the Community Land Act 1975) having been abandoned.

[35] Thus, a principle that 'scheme losses should attract compensation but scheme gains should not', attractive as it sounds, is not self-evident. In so far as the word 'scheme' is intended to refer to actions of public authorities going beyond the simple act of compulsory acquisition, it is an exception to the general principle that, under the modern system, the burdens and benefits of the activities of public authorities lie where they fall. The justification for such an exception, and its precise ambit must be found (if Lord Pearson's analysis is accepted) in something to be implied, as a matter of interpretation, in the relevant statutes.

[36] In most areas of the law, having arrived at such a point, one would turn for guidance to the relevant statutes. In this area of the law, unfortunately, that is not a speedy route to enlightenment. The statutory incursions into this field, notably s 5, r (3) of the Land Compensation Act 1961 (originally introduced in 1919), and s 6 with Sch 1 (introduced in 1959), have not had a happy history in the courts. As will be seen, the former has been interpreted so narrowly, that it is hard to find any case in which it has had any practical effect. The drafting of the latter is of such obscurity that it was described by Harman LJ, in a memorable passage, as 'a Slough of Despond' (see *Davy v Leeds Corp, Central Freehold Estates (Leeds) Ltd v Leeds Corp* [1964] 3 All ER 390 at 394, [1964] 1 WLR 1218 at 1224). Indeed, counsel needed some encouragement from the court in the present case to venture at all into its murky waters.

**[37]** The case law offers more attractions, taking one on an engrossing historical tour of the jurisdiction of the Judicial Committee of the Privy Council from its heyday at the beginning of the last century: railway-building in the jungles of Zanzibar (see *Secretary of State for Foreign Affairs v Charlesworth Pelling & Co* [1901] AC 373); hydro-electric works in Canada (see *Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569, [1914–15] All ER Rep 571 and *Fraser v Fraserville City* [1917] AC 187); anti-malarial works related to harbour development in India (see the Indian case [1939] 2 All ER 317, [1939] AC 302); a quarry needed to build a US naval base in Trinidad (see the *Pointe Gourde* case itself [1947] AC 565); a shopping centre in Queensland (see the *Melwood Units* case [1979] 1 All ER 161, [1979] AC 426); and, most recently, displacement of a steelworks to make way for a new town in Hong Kong (see the *Shun Fung* case [1995] 1 All ER 846, [1995] 2 AC 111).

**[38]** Not surprisingly, given the extraordinary variety of subject matter and location, the statements made in these cases are not always easily reconcilable with each other, nor readily transferable to the conditions of post-war Great Britain. Such statements must always be read in the factual context in which they occur. But the very diversity of the contexts encourages the hope that underlying it all is a principle of some robustness and universality.

**[39]** More surprising, perhaps, is the fact that the problems of reconciliation seem to have gone largely unnoticed in the higher courts. In the more modern cases, it has usually been considered sufficient to refer to the formulation of the rule by the Privy Council in the *Pointe Gourde* case itself (see eg *Davy*'s case [1965] 1 All ER 753 at 757–758, [1965] 1 WLR 445 at 452–453 per Viscount Dilhorne). Similarly, in *Wilson v Liverpool City Council* [1971] 1 All ER 628, [1971] 1 WLR 302, in which the Court of Appeal established the modern form of the rule, the only cases cited were the *Pointe Gourde* case and *Fraser*'s case, which were treated as identical in effect. The difficulty of reconciling the decisions in either case, with that of the Privy Council in the Indian case, seems generally to have escaped notice, until the problem was identified by the President in the present case. In the few cases where the Indian case has been cited, it has been treated as illustrating, and certainly consistent with, the *Pointe Gourde* principle (see the *Rugby Joint Water Board* case [1972] 1 All ER 1057 at 1062, [1973] AC 202 at 214; see also *Lambe v Secretary of State for War* [1955] 2 All ER 386, [1955] 2 QB 612, and, in the Canadian Supreme Court, *Fraser v R* (1963) 40 DLR (2d) 707 at 723–725).

**[40]** The government has recently accepted the need to 'consolidate, codify and simplify' the legislation in this area, and has referred certain issues to the Law Commission for consideration, including the rules relating to disregard of changes in value due to the 'scheme' (see the Department for Transport, Local Government and the Regions consultation paper *Compulsory Purchase and Compensation: Delivering a Fundamental Change* (December 2001)). The Law Commission is expected shortly to issue a consultative report on the law relating to compensation. For that purpose, it has undertaken a detailed historical review of the development of the no-scheme rule. This has been made available in draft to the parties and the court in this case. We, of course, have to decide this case in accordance with what the law is, rather than what it might become in the light of any recommendations made by the Law Commission. The historical analysis can, however, assist in finding a way through the complexities of the case law and statute, and setting the modern *Pointe Gourde* rule in its proper perspective.

DEFINING THE SCHEME

[41] A sound starting point for consideration of the content of the rule is the classic statement by Fletcher Moulton LJ in 1909, since cited with approval in the House of Lords (see eg the *Rugby Joint Water Board* case [1972] 1 All ER 1057 at 1061–1062, [1973] AC 202 at 214 per Lord Pearson). Having noted that compensation was based on value to the owner, not value to the purchaser, Fletcher Moulton LJ continued:

> '... hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.' (See *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16 at 29–30, [1908–10] All ER Rep 251 at 255.)

In that case, the extent of the 'scheme' was not in doubt; it was established by the scope of the particular Act of 1904, which authorised the construction of the reservoir (the facts are summarised later in this judgment).

[42] The *Pointe Gourde* case, which was decided in 1947 and gave its name to the rule, purported to be an application of the same principle. It concerned the acquisition of land for construction of a naval base during the war. The land included a quarry, from which stone could be used for the base. It was held that, in valuing the quarry, the extra value given by that potential use had to be disregarded, as part of the 'scheme underlying the acquisition'. (I shall return to the judgment, when discussing the issues raised by the Indian case.)

[43] Subsequent development of the no-scheme rule must be seen against the background of: first, the radical change of the planning system in this country, introduced by the Town and Country Planning Act 1947 and other legislation; and, secondly, (following a period when, under the 1947 Act, all development value had been in effect expropriated by the state) the restoration of 'market value' compensation by the Town and Country Planning Act 1959. In relation to the definition of the 'scheme', the change was explained in one of the more illuminating decisions in this field, that of the Lands Tribunal (under Sir Michael Rowe QC) in *Kaye v Basingstoke Corp* (1968) 20 P & CR 417. He observed (at 455):

> 'Before the 1939 war it is broadly, perhaps entirely, true to say that the application of the common law rule was comparatively simple in so far as discovering what "the scheme underlying the acquisition" was. There was usually an Act, public but more often private, or an Order which defined the scheme and the area wherein it was to operate. But in the post-war years a new conception of planning led to a series of measures which gave to local authorities, of one kind or another, planning powers of a much less detailed although more far-reaching character.'

(He referred to the 1947 Act itself, the New Towns Act 1949 and the Town Development Act 1952.)

[44] Under the new regime, one could not rely on a particular Act or order, to define the scope of the scheme; one needed to look for other evidence. This is illustrated by *Wilson v Liverpool City Council* [1971] 1 All ER 628, [1971] 1 WLR 302, which established the no-scheme rule in its modern form. It concerned the

acquisition of an area of 74 acres for housing development to meet the expanding needs of the city. The facts emerge most clearly from the Lands Tribunal decision, reported at [1969] RVR 741. The council had in February 1963 adopted a ten-year programme to provide 5,000 houses a year to meet the needs of its area. In March 1963 the development committee resolved to apply for permission for housing development of an area of 391 acres (including the 74 acres belonging to Mr Wilson), and gave authority to negotiate for acquisition of the whole area, using its general housing powers. Planning permission was granted by the minister in November 1963. By February 1964 the council had acquired by agreement all but 86 acres of the site, and it made a compulsory purchase order for the remainder, including Mr Wilson's land. Mr Wilson also owned land outside the council site, which he was able to sell privately for £6,700 per acre. That was taken as a base for valuing the subject land, but the tribunal made a deduction of £1,350 per acre under the *Pointe Gourde* rule on the basis that, had it not been for the council's scheme, development of this area would have been delayed for two years, and the owners would have had to bear the additional costs, such as for sewers and wayleaves.

**[45]** The Court of Appeal approved this approach. Having rejected the argument that s 6 of the 1961 Act provided a complete code, it held that the case fell directly within the *Pointe Gourde* rule. The court also rejected an argument for the claimant that the rule did not apply because the scheme was not sufficiently precise and definite at the valuation date. Widgery LJ ([1971] 1 All ER 628 at 635, [1971] 1 WLR 302 at 310), in a passage which is often cited, said:

> 'Whenever land is to be compulsorily acquired, this must be in consequence of some scheme or undertaking or project. Unless there is some scheme or undertaking or project compulsory powers of acquisition will not arise at all, and it would I think be a great mistake if we tended to focus our attention on the word "scheme" as though it had some magic of its own. It is merely synonymous with the other words to which I have referred, and the purpose of the so-called *Pointe Gourde* rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition. The extent of the scheme is a matter of fact in every case, as is shown by the decision of [*Fraser v Fraserville City* [1917] AC 187 at 194] ... It is for the tribunal of fact to consider just what activities—past, present or future—are properly to be regarded as the scheme within the meaning of this proposition.'

**[46]** As always, these comments need to be seen in the context of the facts of the case. Widgery LJ's comments on the word 'scheme' were directed to the appellant's argument by analogy with the law on 'building schemes' in relation to restrictive covenants, where the cases require both the area and the obligations of the scheme to be adequately defined (see eg *Reid v Bickerstaff* [1909] 2 Ch 305 at 319, [1908–10] All ER Rep 298 at 300). Relying on that analogy, the claimant had argued that there was no 'scheme' in the required sense, until January 1968 when the minister gave final clearance to the details of the development. The tribunal had held that the scheme was sufficiently established not later than November 1963, when outline planning permission was granted for the whole area.

[47] More difficult to explain, in the context of the case, and of the previous authorities, is another often-quoted passage in *Wilson*'s case, where Lord Denning MR referred to a scheme as 'a progressive thing' which 'starts vague and

known to few ... [but] becomes more precise and better known as time goes on' (see [1971] 1 All ER 628 at 634, [1971] 1 WLR 302 at 309). In so far as this implies that the 'scheme' may come into existence before any formal adoption by the authority concerned, it does not appear to be supported by authority, or consistent with principle. For example, in the *Lucas* case [1909] 1 KB 16, [1908–10] All ER Rep 251 it was the statutory authorisation of the scheme which was regarded as critical. By analogy, where the acquisition is made under general statutory powers, the scope of the scheme should be apparent from an appropriate resolution or decision which provides the basis for the use of compulsory powers. The first preparatory stages of a proposal may be 'vague and known to few', but they do not make it a 'scheme' of the authority as such. In *Wilson*'s case itself, as one would expect, there was a specific resolution of the relevant committee in March 1963 to authorise acquisitions for a clearly defined project, followed by grant of planning permission. The only argument was whether at that point the project was sufficiently detailed, not whether one should look behind it to the earlier, preliminary stages.

OTHER VALUATION ISSUES

**[48]** Before returning to the issues raised by the appeal, it is desirable to separate out for discussion the other related elements of the valuation exercise. In this case we are concerned solely with the rule as it applies for the protection of the acquiring authority against *increases* in value caused by the scheme. It is unnecessary, therefore, to consider, other than by way of analogy, the statutory rules for the protection of the claimant against the effects of the scheme, so far as reflected in *decreases* in value (see s 9 of the 1961 Act), or loss of planning potential (see s 14ff).

**[49]** On this footing, there are three tests which require separate discussion: (i) the 'market value' rule; (ii) 'special suitability' and s 5, r (3); (iii) s 6 of the 1961 Act. The first can be regarded as the baseline. The claimants' case ultimately will stand or fall on their being able to establish that, apart from any matters required to be disregarded by statute or judicial rule, 'barrage inhibition value' was part of the 'market value' of the land. The other two tests, and the *Pointe Gourde* rule itself, are exclusionary rules. They require to be left out of account what would otherwise be elements of market value. They can be seen as hurdles over which the claimants must pass to get back to base.

MARKET VALUE

**[50]** The starting point for assessing compensation is the market value of the land in question: 'the amount which the land if sold in the open market by a willing seller might be expected to realise' (see s 5, r (2) of the 1961 Act, originally r (2) of the 1919 rules (see the Acquisition of Land (Assessment of Compensation) Act 1919)). That does not mean simply existing use value. The willing seller expects to receive recognition of any additional value due to the potential of the land for development. This may mean a substantial addition, even if there is only one potential purchaser for that potential.

**[51]** This aspect of 'market value' is explained and illustrated by the Indian case, which, whatever the merits of its treatment of the no-scheme rule (to which I will come), remains authoritative on the interpretation of the 'market value' principle (for the relevant Indian statute of 1894, see [1939] 2 All ER 317 at 320, [1939] AC 302 at 310–311). The case concerned the compulsory acquisition of land, which contained a supply of good drinking water, required for anti-malarial

works in connection with development of a new harbour. The main issue was whether the valuation should take into account the potentiality of the site as a water supply, given that the only potential purchaser for that purpose was the harbour authority. One limb of the authority's argument was that, even if it were permissible to take account of the potential bid of the acquiring authority itself, the additional value would be negligible because the bidding would only rise above the existing use value ('the *poramboke* value') sufficiently to enable the land to be knocked down to that purchaser.

**[52]** In rejecting this argument, Lord Romer explained the application of 'market value' in the context of compulsory purchase ([1939] 2 All ER 317 at 321, [1939] AC 302 at 312):

> 'The compensation must be determined ... by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. This does not mean, however, that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth.'

**[53]** He explained that the valuation must take account, not only of its existing use, but also of 'the uses to which it is reasonably capable of being put in the future' (see [1939] 2 All ER 317 at 322, [1939] AC 302 at 313). Thus, agricultural land with potential for building use must be valued taking account of the possibility of its being used for building purposes, bearing in mind that 'it is the possibilities of the land, and not its realised possibilities, that must be taken into consideration'. Where the potential arises from unusual or unique features of the land, the arbitrator will have 'no market value to guide him', and he will have to ascertain 'as best he may from the materials before him', what a willing vendor might expect to obtain from a willing purchaser for that potential (see [1939] 2 All ER 317 at 321, [1939] AC 302 at 313). He rejected the authority's argument that, if there were only one potential purchaser for that potential use, the additional value would be negligible:

> '... if the potentiality is of value to the vendor if there happened to be two or more possible purchasers, it is difficult to see why he should be willing to part with it for nothing merely because there was only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion, and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it.' (See [1939] 2 All ER 317 at 324, [1939] AC 302 at 316–317, citing the English Court of Appeal in *IRC v Clay, IRC v Buchanan* [1914] 3 KB 466, [1914–15] All ER Rep 882.)

**[54]** The Indian case was unusual, at this level, in that the case was not simply sent back to the tribunal below, but the Privy Council, at the invitation of the parties, undertook the valuation on the correct basis. It is therefore of interest to see how the Privy Council dealt with the facts of the particular case. They agreed with the High Court that the harbour authority was 'the only really possible purchaser' for use as a water supply ([1939] 2 All ER 317 at 331, [1939] AC 302 at

327). The figure had to be set at the sum that the authority 'in a friendly negotiation' would have been willing to pay. The judge had arrived at a figure of (Rs 1,05,000) on the footing that the spring could have been made an income-earning concern from the date of valuation. In the view of Lord Romer, a substantial discount had to be made in view of the fact that the water could not be exploited by the appellant himself and that it would necessarily be some years before the water would become a profit-earning asset. On this basis the appropriate figure was fixed at Rs 40,000, as representing the figure that the harbour authority would have agreed to pay as 'willing purchasers' ([1939] 2 All ER 317 at 333, [1939] AC 302 at 330–331).

**[55]** It is not strictly correct, in my view, to describe this as a 'ransom' value, since this would imply, contrary to Lord Romer's statement, that the seller was able to exploit the purchaser's 'urgent necessity'. As he made clear, both parties must be regarded as 'willing'.

**[56]** Applying this approach to the present case, the requirement of land for a nature reserve, in connection with the barrage scheme, is in principle something to be taken into account in fixing the market value. If that requirement would have led any of the authorities involved in the scheme, in 'friendly negotiations' assuming no compulsory purchase, to offer something above agricultural value, then that can be taken into account, subject to overcoming the other hurdles. Clearly, the extent to which the subject land, as in the Indian case, was uniquely suited for that purpose, would be a very material factor in the valuation. To this extent it is difficult to separate this issue from the question under r (3) (see [58], below). On the other hand, the Indian case helps the claimants in establishing that the possibility of such additional value is not ruled out as an element of market value, even if there would have been no potential purchaser other than LAW itself.

**[57]** How, if it arises, that additional value should be assessed is not an issue before us. A modern application of this aspect of the Indian case, in a statutory context to which the no-scheme rule was not relevant, can be seen in *Mercury Communications Ltd v London and India Dock Investments Ltd* (1993) 69 P & CR 135 (Judge Hague QC). That judgment contains a useful discussion of the problems of valuation that can arise in such cases, in the absence of clear comparables, and illustrates (at 161) the potential difficulty of applying the *Stokes v Cambridge* approach, other than in situations where the benefit to the purchaser can be readily quantified.

SPECIAL SUITABILITY AND SECTION 5, RULE (3) OF THE 1961 ACT

**[58]** The first hurdle for the claimants was r (3). Although they have passed that hurdle, the route by which they did so is material to the other valuation issues. Furthermore Mr Holgate relies on r (3) and its background, as part of his argument against the President's 'public interest' test. It is necessary therefore to set r (3) in its historical context, and to consider the implications of the President's decision in favour of the claimant on this aspect of the case.

**[59]** The present r (3), set about above, is derived (with some amendment) from the 'rules' originally enacted in the Acquisition of Land (Assessment of Compensation) Act 1919. They followed recommendations of the 1918 Scott Committee (*Second Report on the Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes* (Cd 9229)). As the chairman later explained (by then, as Scott LJ), the main purpose of the committee's recommendations was—

'to mitigate the evil of excessive compensation which has grown up out of the theory, evolved by the courts, that, because the sale was compulsory, the seller must be treated by the assessing tribunal sympathetically as an unwilling seller selling to a willing buyer.' (See *Horn v Sunderland Corp* [1941] 1 All ER 480 at 490, [1941] 2 KB 26 at 40.)

**[60]** As already noted, the 1919 rules established the market value principle on which compensation has since been based, including the rule that the owner should be treated as a 'willing seller' (r (2)).

**[61]** Rule (3) was directed at the perceived problems caused by the 'special suitability' principle, as established in previous cases. The significance of 'special suitability' or 'special adaptability' is well-illustrated by *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, [1908–10] All ER Rep 251, which I have already mentioned as a leading case on the no-scheme rule. It concerned a proposal by the board to construct a storage reservoir between two existing reservoirs on the Linacre Brook. The proposal for the new storage reservoir was authorised by a local Act of 1904, which gave the board the necessary powers to carry out the necessary works on the brook, and to acquire land compulsorily for the purpose. The umpire had found that the site had 'peculiar natural advantages for a reservoir site', and also that there was 'competition for the supply of water within the district in question' (see [1909] 1 KB 16 at 19).

**[62]** The main problem which exercised the courts was the extent to which the umpire could take into account, in the valuation, the special suitability of the land for the purpose which the scheme had been designed to serve. At first instance, the judge (Bray J) had decided that he should do so, not only because there might be other possible buyers, but also because the board itself should be regarded as a possible purchaser who might give a special price for the land:

'The fact that they have obtained statutory powers must not be taken into consideration, but before any statutory powers [have] been given or even applied for it may well be that these lands would have a special value owing to the fact that it was likely that sooner or later the board would require another reservoir, and that this would form a most convenient site for one.' (See [1908] 1 KB 571 at 580.)

**[63]** There was a difference on this issue in the Court of Appeal. Vaughan Williams LJ agreed with the judge on both points. The umpire was required to take into account 'the fact that the board itself might become possible purchasers who would give a special price', regard being had to 'the value of the probability as it existed before the promoters had obtained their powers', but not 'the realized probability' ([1909] 1 KB 16 at 25, 28, [1908–10] All ER Rep 251 at 253, 254, 255). Fletcher Moulton LJ's agreement was more limited; the umpire was entitled to take into account the possibility of 'competition between rival public authorities', but not the interest of the acquiring authority itself, because that would offend the no-scheme rule. The third member of the court, Buckley LJ, agreed with Vaughan Williams LJ and the judge that the interest of the acquiring authority itself had to be taken into account, and indeed was evidence of 'enhanced value':

'The facts here are that not only is there a reasonable possibility of the site coming into the market, but that the site is wanted for the particular purpose, and is being acquired under compulsory powers for that purpose. The land is so situate in proximity to the reservoirs already existing that within a

a reasonable time it is reasonably certain that it will be required for this special purpose, with the result that it has acquired an enhanced value. That was a matter for the umpire to take into consideration.' (See [1909] 1 KB 16 at 37, [1908–10] All ER Rep 251 at 259.)

b [64] It is important to emphasise, in the context of the present case, that none of the judges thought it right to exclude altogether the public purpose of providing a water supply for the district, nor the possibility of other public bodies competing for the land for that purpose. The suitability of the land as a reservoir to serve the needs of Chesterfield was a proper element of the valuation. The issue was solely as to whether the board itself was to be treated as a potential purchaser. (On this, the majority's approach was later approved by the Privy c Council in the Indian case—see below). Fletcher Moulton LJ also commented that 'special adaptability' was not a very happy term, 'for special adaptability for some purpose or other is the very basis of the market value of all land ...' ([1909] 1 KB 16 at 30, [1908–10] All ER Rep 251 at 255). (See also, to similar effect, *Sidney v North Eastern Railway Co* [1914] 3 KB 629 at 640, [1914–15] All ER Rep 341 at 345 d per Shearman J.)

[65] The 'special suitability' principle clearly gave rise to considerable difficulty in practice in the period before the 1919 Act. In *Sidney*'s case, Shearman J complained of the 'the ingenuity of claimants' in finding 'special adaptability of some sort in any kind of land compulsorily taken ...' (see [1914] 3 KB 629 at 640, [1914–15] All ER Rep 341 at 345). It is to be remembered that at e this time, before the introduction of 'official arbitrators' by the 1919 Act, claimants had the right, over a certain figure, to an award by jury (see ss 22, 68 of the Land Clauses Consolidation Act 1845). The Scott Committee were concerned that under this principle 'merely theoretical and often highly speculative elements of value which had no real existence have crept into awards as if they were actual'. (Paragraph 8.)

f [66] The committee's view was that no account should be taken of the possibility of competition between statutory undertakers, which was only possible 'under an imperfect system for the granting of statutory powers'. The assumed market should be limited to those requiring the land for purposes for which statutory powers were not required. Accordingly, the recommendation, g which became the basis of r (3), was that—

> 'The owner should not be entitled to any increased value for his land which could only arise or could only have arisen by reason of the suitability of the land for a purpose to which it could only be applied under statutory powers.'

h [67] The word 'special' was not included in this recommendation. Its inclusion in r (3), as enacted, was presumably intended to provide a clearer link with the previous cases, such as the *Lucas* case. It is doubtful whether it was intended to do more than indicate a quality which was of particular utility, and therefore value, to a public authority. The natural corollary would be that, if j there were no 'special' suitability in this sense, there would be no additional value, and therefore the issue would not arise (not that the owner should have a more generous basis of valuation).

[68] However, as interpreted in cases binding on the Tribunal and this court, the word 'special' has been given a more restrictive meaning. It has been interpreted as requiring something 'exceptional in character, quality or degree' (see *Batchelor v Kent CC* (1989) 59 P & CR 357 at 362 per Mann LJ). Thus, the

President in the present case concluded that there was nothing 'exceptional' about the subject site, because there were other possibilities (notably the Redwick site) for meeting the need. That decision is not subject to challenge in this court.

**[69]** Accordingly, the claimants have passed over the r (3) hurdle. Any additional value of the land as part of the barrage scheme cannot be excluded under this rule. However, one cannot sensibly ignore the basis of the conclusion on r (3). It depends on the finding that their land is not unique for bird reservoir purposes. In a rational legal code, one would not expect that lack of uniqueness to lead to the land having greater value for compensation purposes.

SECTION 6 OF THE 1961 ACT

**[70]** The President in this case mentioned s 6, as one 'manifestation of a single principle', which also underlay the judicial rule, but he did not consider it in detail. As I have said, it has had an unhappy history in the courts, in which, following the lead given by cases such as *Davy v Leeds Corp* [1965] 1 All ER 753, [1965] 1 WLR 445 and *Wilson v Liverpool City Council* [1971] 1 All ER 628, [1971] 1 WLR 302, literal application has been abandoned. However, it is not clear by what legal principle we can simply ignore such a statutory regime, merely because it is obscure and, in some respects, flawed in conception. Furthermore, as will be seen, the section was reaffirmed by Parliament, as recently as 1980, in the specific context of urban development areas, such as was Cardiff Bay (and yet again in 1988, in relation to housing action trusts).

**[71]** In fact, once one finds a way through the obscurities of the language, the general approach of the draftsman is reasonably clear. He attempted to take account of the different circumstances in which compulsory purchase orders might be made under the post-war planning regime. Some would be for single, self-contained projects, others would be related to more extensive statutory designations, such as comprehensive development areas or new towns. Accordingly, different rules were laid down for disregarding the value attributable to development or prospective development on associated land, depending on whether the associated land was: within the same compulsory purchase order (Sch 1, case 1); within the same comprehensive development area (case 2); within an area designated under the New Towns Act 1946 (case 3); or within a town development area (case 4). The Local Government, Planning and Land Act 1980, which provided for the creation of urban development corporations, added, as case 4A, land within an urban development area. The Housing Act 1988 added, as case 4B, land within a housing action trust area (under Pt III of that Act).

**[72]** Under case 1, a relatively narrow version of the rule was adopted limited to the area of the compulsory purchase order itself. Changes in value, attributable to development (or the prospect of development) for the same purposes on other land within the same order, were to be disregarded, if the development would not have been likely to have been carried out if the authority 'had not acquired and did not propose to acquire any of that land' (see the 1961 Act, s 6(1)(a); Sch 1, case 1). Under the other cases there was in effect a two-stage application of the rule. Thus, for example, where the order was within a designated urban development area there were to be disregarded, not only changes in the value attributable to development for the purposes of the particular order, but also changes attributable to development of other land 'in

the course of the development or redevelopment of that area as an urban development area' (see s 6(1)(b); Sch 1, case 4A).

[73] In relation to urban development areas, the 1980 Act introduced by amendment of the 1961 Act (see Sch 1, Pt III) a further refinement, expressed to be 'for the avoidance of doubt'. The effect was that (inter alia) no increase was to be 'excluded from being left out of account', merely because it was attributable to development *before* the designation of the urban development area, or *outside* the urban development area, or by a *different authority* (see Sch 1, para 10). Furthermore, in recognition no doubt of the continued survival of the *Pointe Gourde* rule (as confirmed by cases such as *Wilson*'s case), the same provision was applied in respect of any increase to be left out of account 'by virtue of any rule of law relating to the assessment of compensation ...' (see Sch 1, para 11).

[74] Unfortunately, although the 1980 Act added to the complexity, it did nothing to address the serious substantive problems of the statutory code. There were two main difficulties. First, s 6 required the prospect of development to be disregarded in relation to '*other* land' within the same compulsory purchase order or designation (that is, land other than the 'relevant land' subject to the claim: see s 39(2)); but not, mysteriously, in relation to the relevant land itself. Lord Denning MR offered a possible explanation in *Viscount Camrose v Basingstoke Corp* [1966] 3 All ER 161 at 164, [1966] 1 WLR 1100 at 1107:

> 'The legislature was aware of the general principle that, in assessing compensation for compulsory acquisition of a defined parcel of land, you do not take into account an increase in value of that parcel of land if the increase is entirely due to the scheme involving the acquisition ... [referring to *Pointe Gourde*] ... It is left untouched by s. 6(1), but there might be some doubt as to its scope. So the legislature passed s. 6(1) and Sch. 1 in order to make it clear that you were not to take into account any increase due to the development of the other land, i.e., land other than the claimed parcel. I think that the decision in the *Pointe Gourde* case covers one aspect, and s. 6(1) covers the other ...'

[75] That explanation, with respect, seems to ignore two points. First, the *Pointe Gourde* case itself (see the facts below) was, in substance, a case about ignoring the development of 'other' land. The quarry was treated (at least for valuation purposes) as a separate parcel, and the issue was whether, in the valuation of that parcel, the prospective development of 'other' land (the naval base) should be disregarded. Thus, it covered the same ground as s 6. Indeed, the draftsman's fault may have been to model the statutory rule too closely on the particular facts of the *Pointe Gourde* case. Secondly, it assumes that the 'scheme' under the judicial rule is identical to the designations defined by Sch 1. On the facts of *Camrose*'s case itself, where most of the land required for town development was owned by one landowner, it was no doubt reasonable to regard the area of the 'scheme' as identical to the town development area. In other cases, for example, where the particular order is related to a limited project on a small site within an established new town, the answer might be very different.

[76] Section 6 of the 1961 Act cannot therefore be seen as simply an exercise in clarification of the established rule. The two-stage application of the rule, as applied to cases 2 to 4B, was entirely new. The section, as the Lord Chancellor explained at the time, was intended to enunciate *and extend* the judicial rule in the modern planning context (see 215 HL Official Report (5th series) col 582).

[77] The other substantive problem relates to the scope of the s 6 regime. It is in some respects too narrow and in others too wide. Case 1 is too narrow, in that it confines attention to the area of the particular compulsory purchase order. This makes sense in a case where all the land required for a particular project is included in one order; but not in a case (like *Wilson*'s case) where most of the land has been acquired by agreement, before the compulsory purchase order comes to be made. In such a case the order may relate to only a small part of the 'project' or 'scheme' as it would be defined by the *Pointe Gourde* rule. There is no obvious reason why the compensation rules applied to the remaining interests should be materially different, merely because the owners have held out for longer.

[78] Conversely, in relation to the other cases, the regime can be unrealistically wide, and unconfined in time. Where the original designation, say of a new town, has been made some years before the particular acquisition, the valuer is apparently required to conduct an exercise of rewriting history in a hypothetical world in which there was no new town. He must let his imagination 'take flight to the clouds' (see *Myers v Milton Keynes Development Corp* [1974] 2 All ER 1096 at 1102, [1974] 1 WLR 696 at 704 per Lord Denning MR). 'Reconstruction' of planning history in this way was not favoured by the House of Lords, in the analogous context of s 17 of the 1961 Act (certificates of alternative development), because of the impossibly speculative nature of the exercise (see *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment, Newell and ors (executors of JV Longmore (decd)) v Secretary of State for the Environment* [2000] 1 All ER 929 at 940, [2000] 2 AC 307 at 323–324 per Lord Hope of Craighead). However, at least until the matter is revisited by the House of Lords in the present context, the difficulty remains.

[79] In this case, as I have said, neither party has relied specifically on the terms of s 6 or Sch 1. However, they cannot simply be ignored. Apart from r (3), they are the only available indications of Parliament's intentions in relation to what is essentially an issue of policy: that is, in what circumstances does the public interest in promoting particular categories of development justify a departure from strict market value principles? Even if the judicial rule is needed to fill the gaps, and mitigate the anomalies, in a flawed statutory regime, it may still be appropriate to look to the statute for guidance as to the underlying policy.

[80] Thus, in the case of a self-contained compulsory purchase order, under case 1, s 6 can be seen as raising, at least, a presumption that the matters to be disregarded in such a case are confined to the area of the order. *Wilson*'s case itself is a necessary extension of the rule, to deal with circumstances (not apparently contemplated by the draftsman) where the order is not self-contained, but is an integral part of a larger project. On the other hand, where, as in the present case, the order arises out of development within case 4A, the presumption is in favour of a wide application of the rule. Part III, in particular, indicates a policy objective that land required for the purposes of an urban development area should be acquired at values which are not inflated by the designation.

THE ISSUES IN THE APPEAL

[81] I now return to the issues raised by the appeal, following the summary already given. The first raises the most fundamental issue, that is the President's view that the Indian case should not be regarded as good law.

THE INDIAN CASE

**[82]** I have already referred to the facts of the Indian case, in the context of the discussion of 'market value'. That part is, I think, uncontroversial. The more difficult aspect of the case is in Lord Romer's treatment of the no-scheme rule. The claimants' argument, as I understand it, is that, applying the approach of the Privy Council in the Indian case, the valuer can still take added value given by the barrage project into account, regardless of the no-scheme rule.

**[83]** As has been seen, the President, having raised the Indian case in argument, decided that it was inconsistent with later cases. The cases to which he referred have been mentioned earlier in this judgment. Mr Holgate fairly submits, however, that in none of them was the Indian case or *Lambe v Secretary of State for War* [1955] 2 All ER 386, [1955] 2 QB 612 expressly disapproved. Where the Indian case has been mentioned (as by the House of Lords in *Rugby Joint Water Board v Foottit* [1972] 1 All ER 1057, [1973] AC 202), it has been cited without comment as an illustration of the *Pointe Gourde* rule.

**[84]** The relationship of the Indian case with the no-scheme rule as stated in other cases is one of the many unresolved puzzles in this area of the law. It is helpful, in my view, to consider it in the context of the other two leading Privy Council cases, decided before and after it: *Fraser v Fraserville City* [1917] AC 187 and *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565. In doing so, it is essential to see the judgments in the factual contexts in which they were given. It is also necessary to bear in mind that, where in the past cases have come by way of case stated to the Privy Council, the factual context may not always have been as clear as one might expect in a modern case. As it happens, the issue in each of the cases has some parallels with the present case, in that each involved the relationship of a major development (a reservoir in *Fraser*'s case; a harbour in the other two cases) with a linked acquisition (a waterfall in *Fraser*'s case, a water supply in the Indian case, a quarry in the *Pointe Gourde* case.) By analogy, in this case the barrage is the major development, the nature reserve is the linked acquisition.

**[85]** In *Fraser*'s case the acquisition in question was of certain river falls (the Grand Falls), authorised by a byelaw of 1909. The authority had in 1907 adopted a byelaw authorising the construction of a reservoir higher up river, which was under construction at the time of the second acquisition. The arbitrator had apparently arrived at his award for the falls, by taking a proportion of the capitalised profits which would result from the extra power generated by the completion of both schemes (that is, a total of 1,200 hp, rather than the 300 hp attributable to the falls on their own: see the French text [1917] AC 187 at 193). The authority (at 188) argued the approach was flawed, first, because it was based on the value to the authority of the completed scheme, and, secondly, that in any event any enhanced value due to the reservoir project should be left out of account altogether, since '[t]he reservoir and the works upon the appellants' land were all one scheme, not two separate schemes' (see at 188). The Privy Council agreed with the court below that the matter had to be remitted on the first ground, because the arbitrator's approach was wholly erroneous. On the second issue, Lord Buckmaster (at 194) summarised the principle arising from *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, [1908–10] All ER Rep 251 and subsequent cases as follows:

> '... the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the

carrying out of the scheme for which the property is compulsorily acquired, *the question of what is the scheme being a question of fact for the arbitrator in each case.*' (My emphasis.)

**[86]** Unfortunately, the Privy Council did not itself indicate how the question was to be answered, nor give any further guidance to the arbitrator. The words in emphasis have been relied on in subsequent cases, including *Wilson v Liverpool City Council* [1971] 1 All ER 628, [1971] 1 WLR 302 (see above), as indicating that defining the scheme is an issue of pure fact. However, the context is important. The question was not an open-ended one, but simply as to whether two defined schemes, linked in purpose but authorised by separate statutory instruments, were to be regarded as one. However, the mere fact that the two instruments were separated in time was clearly not regarded as fatal to the argument that they were one scheme. As will be seen, this point is of some relevance in the present case.

**[87]** Passing over the Indian case for the moment, one comes to the *Pointe Gourde* case itself. The background was an agreement between the United Kingdom and the United States governments in March 1941, for leasing to the United States land required for naval and military bases. The particular land at Pointe Gourde in Trinidad was acquired for a naval base under powers in the Land Acquisition Ordinance 1941. Part of the land so acquired included a quarry with a large quantity of good limestone. As far as one can infer from the facts as stated (at 566), the quarry and the land for the base were included in the same compulsory acquisition. (Since the hearing I have obtained the Privy Council records of the case. They show that the acquisition from the company included 'two several parcels of land' one of 141 acres, and one of 10 acres, the latter being the quarry. The case stated does not reveal in terms what the 141 acres was to be used for, but, referring to the two parcels, states merely that the said lands were 'required by the United States for the establishment of a naval base'.)

**[88]** The stated case showed that the land had 'a special suitability or adaptability' for producing quarry products and had a market value for that purpose before the acquisition. A figure of $86,000 was awarded for the value of the quarry as a going concern. The issue which came to the Privy Council concerned an additional sum of $15,000 explained in the case as follows (at 567):

> 'The tribunal considered that the market value of the quarry land and business would be increased if the United States needs were supplied from this quarry land on a commercial basis as greater prospective profits might be expected.'

The figure of $15,000 represented (at 568) 'the measure of the loss of that element of prospective extra profit'. The only issue raised by the case stated was whether this additional value should be excluded under the equivalent of r (3). On this the Crown failed, the Privy Council holding that the rule was directed to the quality of the land itself, not the products of the land.

**[89]** However, they succeeded under the no-scheme rule, even though it seems not to have been discussed in any detail in argument (at 571). Lord MacDermott (at 572) restated the rule in the words which have become its most familiar formulation:

> 'It is well settled that compensation for a compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.'

The words 'scheme *underlying* the acquisition' were new; but it is clear from the context that they were not intended to differ from *Fraser*'s case ('the scheme for which the property is compulsorily acquired'). Lord MacDermott rejected the company's argument that the relevant scheme was simply the acquisition of the quarry land. He said (at 573):

> 'The case stated finds that the lands acquired were "required by the United States for the establishment of a naval base in Trinidad." That being so, the nature of the scheme of this acquisition is clear ...'

As I understand it, this is not to be read as implying that, simply because the quarry itself was being acquired for the purposes connected with the construction of the base, that was sufficient to justify exclusion of the additional value. The 'lands' to which he was referring were the whole of the lands comprised in the acquisition, which, as appeared from the case, included the land required for the base itself, as well as the quarry. Thus, both were included in a single act of acquisition.

**[90]** Historically, the Indian case comes between these two cases. I have already outlined the facts. The difficulty arises because, in one passage ([1939] 2 All ER 317 at 326–327, [1939] AC 302 at 319–320), Lord Romer seems to have adopted a very narrow interpretation of the 'scheme'. He was criticising the judgment of Fletcher Moulton LJ in the *Lucas* case on the issue of 'special suitability' (see above); and, in particular, his suggestion that, where special value existed only for the acquiring authority, it should be left out of account, because 'to do otherwise would ... allow the existence of the scheme to enhance the value of the land to be purchased under it'. Lord Romer regarded that contention as unsupported by authority. He continued:

> 'It must, of course, be conceded that the existence of the scheme must not be allowed to enhance the price, *if by "scheme" is meant the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality.* The valuation must always be made as though no such powers had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers. Their Lordships have some difficulty, however, in seeing why the taking into consideration of the fact that the special value exists for those purchasers only should be said to be allowing the existence of the scheme to enhance the value of the lands. The only difference which the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land, and that is a circumstance that is never allowed to enhance the value.' (My emphasis.)

On the other hand, Lord Romer rejected the use of the word 'scheme' to connote 'the intention formed by the acquiring authority of exploiting the potentiality of the land', since that would mean that, even if there were more than one potential purchaser, all their intentions would equally have to be disregarded.

[91] At first sight, this passage suggests a very narrow definition of the word 'scheme', as meaning no more than the obtaining of compulsory powers. If this was intended as a general statement, it would indeed, as the President said, be impossible to reconcile with other cases, before and since. Even if one goes back to one of the earliest cases on the no-scheme rule, *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37, it was not the compulsory acquisition itself which gave added value, but the authority's statutory power, having acquired the land, to convert it from a burial ground to secular use. Similarly, in more recent cases, the added value resulted from the project as a whole, not just the existence of compulsory powers: in the *Pointe Gourde* case, it was the potential use of the quarry products for the naval base; in *Wilson*'s case it was the authority's investment in infrastructure.

[92] In responding to the President's comment on the case, the first point to note is that, although *Fraser v Fraserville City* [1917] AC 187 was cited in the Indian case, and both were cited in the *Pointe Gourde* case, there was no suggestion in any of them that the Privy Council thought that it was applying a different principle. On the contrary, in the Indian case, Lord Romer cited Lord Buckmaster's statement (in *Fraser*'s case) of the no-scheme principle without comment, but observed ([1939] 2 All ER 317 at 327, [1939] AC 302 at 321) that there was 'no reference whatsoever to the present question'. The 'present question' was, not the scope of the no-scheme rule as such, but the difference of view between the majority and minority in the *Lucas* case over the application of the 'special suitability' principle.

[93] Secondly, on the facts of the Indian case itself, it was understandable that a very narrow view was taken of the 'scheme'. The harbour project had begun six years before the emergence of the malaria problems, which led in due course to the acquisition of the subject land to provide a fresh supply of water. As appears from the reported arguments ([1939] AC 302 at 306–307), the authority claimed that the scheme was the harbour project or the malarial scheme, while the claimant relied on the acquisition of the subject land as a separate scheme. Although Lord Romer did not in terms address that difference, he described the 'scheme' with some precision ('the acquisition ... of the shallow basin forming the catchment area of the spring, the site of the spring itself, and a narrow strip of land below the spring'); he distinguished that from the 'public purpose for which the land was needed', which was identified in the notification as 'the execution of anti-malarial works' ([1939] 2 All ER 317 at 320, [1939] AC 302 at 310). The implication, therefore, is that he accepted the claimant's case. It was reasonable, on the facts of that case, to speak of the 'scheme' being limited to the fact of compulsory acquisition, since, as his description makes clear, little else was needed to bring the water supply into use.

[94] In the *Pointe Gourde* case, by contrast, the quarry and the land for the naval base were acquired at the same time, as part of the same act of compulsory acquisition, and only a month after the agreement between the United States and United Kingdom governments. On those facts, it was not surprising that they were regarded as part of one scheme. *Fraser*'s case, on the facts, comes somewhere between the two, in that there were two separate acquisitions, separated in time, but the gap was much shorter than in the Indian case. It was a question of fact for the tribunal to determine whether they were to be treated as a single scheme for the purpose of the rule.

[95] In conclusion, it is not in my view necessary to follow the President along the unattractive course of treating a fully-argued Privy Council judgment, which

has stood without dissent for more than 60 years, as simply wrong. The statements must be taken in context. The cases can be reconciled, if they are seen as turning on their particular facts. This conclusion does not help the appellants in this case. Although I agree with them that the President went too far in treating the Indian case as no longer authoritative, it still leaves them on the wrong side of their highest hurdle, which is the President's conclusion as to the nature of the scheme on the facts of this case.

**[96]** Before leaving the Indian case, I should mention one further point raised by the respondents in this case. They suggest that, on the facts of the Indian case, a different decision would have been reached in this country by virtue of r (3) (which was not part of the Indian legislation). It is true that r (3) did not apply in India. However, assuming the narrow interpretation given to that rule by the Privy Council in the *Pointe Gourde* case (see above), it would not have assisted the Crown, since in both cases the suitability in question was that of a *product* of the land (in one, the quarry stone; in the other, the water), rather than of the land itself. (I should also add that I have not thought it necessary to refer in any detail to *Lambe v Secretary of State for War* [1955] 2 All ER 386, [1955] 2 QB 612, in which the Indian case was expressly followed by the Court of Appeal, because the facts were so different.)

PUBLIC INTEREST TEST

**[97]** The other issues raised by the appeal can be dealt with more shortly. First, the appellants criticise the President's formulation of a 'public interest' test which they say is not supported by authority. As I read the relevant passage of this part of the President's reasoning (quoted above in full), the test is better described as a 'public purpose' test, than a 'public interest' test. He said:

> 'The principle is that any effect upon the value of the land acquired arising from the public purpose, or public purposes, prompting the acquisition, whether from their adoption by the authority or from their implementation, is to be disregarded. A scheme or proposal is the embodiment of the public purpose, or public purposes, concerned.'

The public purpose which he identified was 'the purpose of providing the compensatory nature reserve'.

**[98]** On this point, I see some force in the appellants' criticism. Although, as the President later recognised, the 'public purpose' may be relevant in defining the scheme, it does not provide a substitute for the conventional test. The 'purpose' of any project may be defined at different levels. In the *Lucas* case [1909] 1 KB 16, [1908–10] All ER Rep 251, the immediate purpose of the acquisition was the authority's scheme to construct a reservoir; the ultimate purpose was to provide an improved water supply for the Chesterfield area. The immediate purpose was required to be left out of consideration, but not the ultimate purpose. Additional value attributable to the possibility of using the land to improve the water supply was held to be a proper consideration.

**[99]** So, in this case, the insertion of the word 'compensatory', in the President's definition of the purpose, seems to beg the relevant question. Clearly, if one has to ignore the use of the nature reserve for a 'compensatory' purpose, then it could be of no relevance to the barrage project, since that is the only purpose for which it is required. On the same approach, the purpose in the *Lucas* case might have been defined as that of 'providing a *water-supply* reservoir', with the result that the water needs of the area would have had to be left out of

account. However, that is not how the court dealt with the matter. As we have seen above, r (3) was intended to go further than the no-scheme rule itself, in that, where it applied, the public purpose would be excluded altogether. As Mr Holgate submitted, on the President's interpretation there would have been no need for r (3) at all.

**[100]** Thus, although identifying the purpose of the acquisition may be relevant to the definition of the 'scheme', it is not a substitute for it. However, since the President went on to consider the scope of the 'scheme', the criticism of the first part of his reasoning is not enough to get the appellants home.

NOT A SCHEME OF THE ACQUIRING AUTHORITY

**[101]** The argument here is that the only scheme which could be relevant is one of LAW itself, or one to which it is 'a party'.

**[102]** In considering this argument, it is necessary to bear in mind the somewhat unusual role of LAW, mentioned above, as a body whose main function was to acquire land. Thus, unlike most compulsory acquisitions, which are by public authorities for their own substantive purposes (such as provision of roads or housing), LAW's function was normally to acquire the land for the purpose of development projects initiated by others.

**[103]** It would be odd if this special role, which had more to do with the mechanics of acquisition than its substance, were to affect materially the basis on which compensation is assessed. One must also bear in mind that the *Pointe Gourde* principle works in reverse. If the value of land had been diminished by a public scheme for which LAW was acquiring the land, it would be unfair if the owner could be forced to sell at the blighted value, merely because the scheme was not that of LAW itself.

**[104]** The high-point of the appellant's case on this point seems to be the definition of the scheme, in one of the cases, as 'a project *on the part of the authority concerned* to acquire land ...' (see *Birmingham DC v Morris & Jacombs Ltd* (1976) 33 P & CR 27 at 33). This was cited with approval by the Court of Appeal in *Bird v Wakefield Metropolitan DC* (1978) 37 P & CR 478 at 487 per Browne LJ, where two authorities were involved, but the test was held to be satisfied because—

> 'although [the county council's project] was originally in form a scheme by an authority different from the acquiring authority, which also had a scheme of its own, it became, by what the tribunal calls "merger", though possibly that is not the right word, *a scheme to which the acquiring authority was party and not a scheme by a different authority.*' (My emphasis.)

**[105]** Here, it is said, the statute, and the agreement with the CBDC, made clear that LAW was neither a partner nor an agent of the Welsh Office or the CBDC. LAW was at pains, throughout the procedure, to preserve its independence from the other authorities involved. Accordingly, it could not be said have been a 'party' to the barrage scheme in any relevant sense.

**[106]** The President ([2001] 1 EGLR 185 at 194) rejected this submission:

> 'In neither of the cases relied upon by Mr Holgate was the court, in my judgment, holding that a project could only be a scheme for the purposes of the *Pointe Gourde* rule if it were the project of the acquiring authority alone.'

**[107]** As he observed, even in the *Pointe Gourde* case itself the acquisition was by the United Kingdom government, not for its own purposes, but for those of the United States Navy. He also gave the example of a large development

proposal, for which land assembly was carried out partly by the planning authority, and partly (in respect of the proposed roads) by the highway authority:

> 'I cannot see that whether the road element of the development is, or is not, a separate scheme must, as a matter of law, depend upon the particular acquisition route that is followed.'

**[108]** I agree. Mr Holgate submits that the tribunal has—

> 'disregarded the true nature of the relationship between the various bodies involved ...' including the extent to which the acquiring authority was anxious to preserve its independence from the other bodies.'

However, I do not see this as raising any question of law. As the President said, such issues were simply part of 'the considerations to be taken into account in the factual exercise of defining the scheme.'

INTEGRAL PART

**[109]** This seems to me the appellants' strongest point. The President's decision rested on his view of 'the essential nature of the acquisition as one element in the barrage scheme.' In so far as this was a conclusion of fact, it is not open to challenge in this court. However, Mr Holgate's submission is simple. If, as a matter of law, an essential feature of the 'scheme' is that the subject land should be 'an integral part' of it (see *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846, [1995] 2 AC 111), this could not have occurred before November 1995. That was when the decision was first made to proceed with a nature reserve which included the claimant's land. By that time, the barrage scheme had been approved by Parliament, and work had begun. The proposals for the nature reserve on the Gwent Levels site could not therefore be regarded as in any way 'integral' to that scheme. Although they arose out of the barrage scheme, they were a distinct project, and should be so regarded for compensation purposes.

**[110]** He also emphasises the unfairness of treating this as part of the original scheme, since the claimants were not involved in any way in that process, and therefore had no opportunity to object. He contrasts their position with the owners of farmland respectively at Wentlooge and Redwick, whose objections resulted in the proposals in those areas being abandoned. Although the claimants had a theoretical right to object at the inquiry in 1997, they did not pursue it, because by that time LAW had acquired 80% of the site, and the barrage scheme was too far advanced for there to be any realistic alternative. I should say immediately that this point, though attracting sympathy for the claimants, does not in my view have any relevance to the principles on which compensation is to be assessed.

**[111]** I agree with the submission that a prerequisite of the 'scheme' is the identification of the subject land as part of it. However, this does not, I think, impose a temporal limitation on the matters which can be regarded as included in the scheme. So to hold would be inconsistent with the decision in *Fraser*'s case. In that case, the acquisition of land for the reservoir had been authorised in 1907, and it was already under construction when the subject land was acquired under a separate instrument two years later. However, that fact was not held, as a matter of law, to exclude the possibility of their being treated as a single scheme when the second acquisition was made. Although the combined scheme cannot have come into existence until the subject land was identified as part of it in 1909,

it was open to the arbitrator thereafter to treat it as a single scheme for the purposes of the rule.

**[112]** Applying that thinking to the present case, the mere fact that the claimant's land was not identified until October 1995, when the barrage project was already under way, does not as a matter of law prevent it being treated thereafter as part of the same project. That being so, the decision on the facts was one for the President, and the appellant can show no error of law in his approach.

DEPENDENCY

**[113]** The passage of the President's decision to which this ground of appeal is directed is as follows:

> '... the implementation of the barrage scheme, as regards the permanent inundation of Cardiff Bay, was, I find, dependent upon the acquisition and development of land for the Gwent Levels nature reserve.'

**[114]** Mr Holgate says that this finding is inconsistent with the evidence. He refers for example to a statement made by the Secretary of State for Wales (Mr Hague) in the House of Commons on 6 December 1995 that the impoundment of the Bay was '*not conditional* upon completion of [a bird reserve, although] the *intention* [was to bring about that result]' (see 268 HC Official Report (6th series) written answers col 276; Mr Holgate's emphasis). He also submits that 'dependency' is not a relevant test.

**[115]** Mr Holgate's submission on this point seems to sit rather oddly with the assertion (in the particulars of the claims) of the land's 'indispensable status vis-à-vis the Cardiff Development Scheme'. In any event, I see no error of law in the President's approach. Mr Hague's statement was only one of many pieces of evidence as to the thinking of the various parties at this time. Taken overall, there was ample material on which the President could reasonably conclude that, if the United Kingdom government had defaulted on its commitment to provide compensatory land (for which by the end of 1995 Gwent Levels was the most likely contender), the Commission would have been expected to take enforcement action, which could well have included delaying impoundment. In any event, as I understand it, he was not using 'dependency' in any precise legal sense, but simply as emphasising the close factual link between the Gwent Levels project and the barrage.

CONCLUSION

**[116]** The right to compensation for compulsory acquisition is a basic property right. It is unfortunate that ascertaining the rules upon which compensation is to be assessed can involve such a tortuous journey, through obscure statutes and apparently conflicting case law, as has been necessary in this case. There can be few stronger candidates on the statute book for urgent reform, or simple repeal, than s 6 of and Sch 1 to the 1961 Act. The Human Rights Act 1998 does not impinge directly on the issues in this case, but it underlines the importance of coherence and certainty in this area of the law.

**[117]** However, in most cases, identifying the 'scheme' or 'project' should involve no particular difficulty if one bears in mind the analogy of the statutory authorisations in the early cases. Normally the nature and scope of the project will be evident from the formal resolution or decision of the authority responsible. This case is rather more complex, because of the different authorities involved, and the delays in identifying the relevant land. However, by the time

of Mr Hague's statement to the House in January 1996, the role of the claimants' land was clearly identified. It was open to the President to find on the facts that the nature reserve for which that land was needed was an integral part of the barrage project. Further, although the President did not rely on this point, the result is consistent with the policy of the 1961 Act. The project for the nature reserve is directly linked to the purposes of the urban development area, which is a case specifically selected by the Act for a wide application of the rule. The claimants accordingly are entitled to 'nature reserve value', but not to 'barrage inhibition value'.

**[118]** For all these reasons, the appeal fails.

**LAWS LJ.**

**[119]** I agree.

**SCHIEMANN LJ.**

**[120]** I also agree.

*Appeal dismissed.*

Kate O'Hanlon Barrister.

# Knight v Rochdale Healthcare NHS Trust and others

[2003] EWHC 1831 (QB)

QUEEN'S BENCH DIVISION

CRANE J

9, 23 JULY 2003

*Limitation of action – When time begins to run – Contribution proceedings – Patient bringing action against surgeon – Parties settling proceedings and subsequently embodying settlement agreement in consent order – Surgeon bringing contribution proceedings in respect of liability to patient – Whether time running for limitation purposes from date of agreement or date of consent order – Civil Liability (Contribution) Act 1978 – Limitation Act 1980, s 10.*

The claimant surgeon had been the defendant to proceedings for negligence brought against him by a former patient. Those proceedings were settled by an agreement, reached on 24 October 2000, under which the surgeon agreed to pay a sum of money to the former patient. Although the agreement did not require a consent order to be made before it took effect, the agreement was embodied in such an order on 8 November 2000. On 1 November 2002 the surgeon issued contribution proceedings under the Civil Liability (Contribution) Act 1978 against various defendants, seeking an indemnity in respect of his liability to the former patient. Section 10(1)[a] of the Limitation Act 1980 provided that, 'Where [under the 1978 Act] any person becomes entitled' to recover contribution in respect of any damage from any other person, there was a limitation period of two years from the date on which that right accrued. If the person in question were held liable in respect of that damage by a 'judgment' given in any civil proceedings, s 10(3) provided that the right had accrued on the date on which the judgment was given. Section 10(4) provided that if, in any case not within sub-s (3), the person in question agreed to make any payment to one or more persons in compensation for that damage, the date on which the right accrued was the 'earliest date on which the amount ... is agreed' between him and the person to whom the payment was to be made. On the hearing of a preliminary issue, the court was required to determine whether the limitation period ran from the date of the agreement, in which case the contribution proceedings would have been time-barred, or from the date of the consent order, in which case the proceedings would have been brought in time.

**Held** – Where a firm agreement was made time started to run, for the purposes of s 10 of the 1980 Act, at that moment unless the agreement required the making of a consent order before it took effect. Although Parliament could have decided that a consent order should restart the clock, there were insufficiently clear words to indicate that it had done so. Indeed, the words in sub-s (1), 'Where ... any person becomes entitled', and the words in sub-s (4), 'the earliest date on which the amount ... is agreed', suggested that the crucial moment was the first moment when liability arose. It was tidy to conclude that sub-ss (3) and (4) dealt

a Section 10 is set out at [15], below

separately with cases decided by a court and cases of agreement. Accordingly, the relevant date for any liability under the 1978 Act was the date of the agreement on 24 October 2000 (see [24], [26], below).

**Notes**

For the time limit for claiming contribution, see 28 *Halsbury's Laws* (4th edn reissue) paras 912–913.

For the Civil Liability (Contribution) Act 1978, see 13 *Halsbury's Statutes* (4th edn) (2000 reissue) 604.

For the Limitation Act 1980, s 10, see 24 *Halsbury's Statutes* (4th edn) (1998 reissue) 707.

**Case referred to in judgment**

*Onslow v IRC* (1890) 25 QBD 465, CA.

**Case referred to in skeleton arguments**

*Financial Services Authority v Rourke* [2001] All ER (D) 266 (Oct), [2001] 46 LS Gaz R 36.

**Applications**

Martin Knight, the claimant in proceedings brought against the defendants, Rochdale Healthcare NHS Trust, the National Health Service Litigation Authority and the Secretary of State for Health, under the Civil Liability (Contribution) Act 1978, applied for permission to amend his particulars of claim by abandoning the claim against the third defendant and by pleading a claim for breach of contract against the first defendant. The first and second defendants, supported by the claimant, applied for an order to try as a preliminary issue the question whether the claim under the 1978 Act was barred by the Limitation Act 1980. The second defendant applied to strike out the claim against it. The facts are set out in the judgment.

*George Thomas* (instructed by the *Medical Defence Union*) for the claimant.
*Angus McCullough* (instructed by *Capsticks*) for the first and second defendants.

*Cur adv vult*

23 July 2003. The following judgment was delivered.

**CRANE J.**

GENERAL

[1] In this action the claimant, a consultant orthopaedic surgeon, seeks an indemnity in respect of his liability to a former patient, Mrs Smettem-Minson. In previous proceedings she claimed damages for negligence from the claimant. That action was settled for a figure of £700,000 plus costs.

[2] The first application before me was an application by the claimant for permission to amend the particulars of claim. By that amendment the claim against the third defendant is abandoned. The claim for damages against the second defendant is abandoned. The other principal change is to plead a breach of contract by the first defendant as an alternative to his claim under the Civil Liability (Contribution) Act 1978. The defendants neither consented to nor

opposed the amendments. I gave permission, since the claimant should be able to put his claim in the alternative way.

[3] The second application was an application by the defendants, supported by the claimant, for an order that there be tried as a preliminary issue the question whether the claim under the 1978 Act is barred by the Limitation Act 1980. Although the amendment of the particulars of claim would leave the claimant with a claim not barred by the 1980 Act, the proposed issue is both important and eminently capable of separate resolution. I agreed with the parties that it should be tried as a preliminary issue and that I should try it forthwith, as both parties wished.

[4] The third application was that of the defendants to strike out the claim against the second defendant. I deal with that straight away.

[5] The claim against the second defendant is now, as a result of the amendment, simply one for a declaration that the treatment of Mrs Smettem-Minson fell within the category of treatment covered by the NHS Indemnity Scheme. Mr George Thomas, counsel for the claimant, explained that the claimant wished to establish for the future that the interpretation of the indemnity arrangements asserted by the second defendant was wrong. That would not offer any advantage to the claimant in the present action, but would be of potential benefit to him and perhaps other consultants in connection with other claims. I accept the arguments of Mr Angus McCullough, counsel for the defendants, in making this application. I agree that it is very difficult to discern a cause of action against the second defendant. Moreover, even if the court can in principle allow the action to continue and has a discretion to grant a declaration, I see no advantage to the claimant, or indeed anyone else, in the second defendant remaining a party. They will in any event continue to handle the litigation on behalf of the first defendant. The court will consider the availability of an indemnity in the circumstances of this case. In so far as the arrangements for the treatment of this patient were typical, the conclusions of the court will be available. To embody those conclusions in a declaration against the second defendant assists no one.

[6] Subject to any submissions of counsel as to the form of the order, I propose to strike out the statement of case as against the second defendant under CPR 3.4(2)(a) as disclosing no reasonable grounds for bringing a claim against the second defendant.

THE PRELIMINARY ISSUE

[7] An agreement to settle the original action was reached on 24 October 2000. A consent order was made, embodying the agreement, on 8 November 2000. The limitation period for claims under the 1978 Act is two years, by virtue of s 10 of the 1980 Act. The present claim was issued on 1 November 2002. It is therefore of crucial importance whether the limitation period runs from the date of the agreement or the date of the consent order.

[8] The agreement was recorded in a letter from Mrs Smettem-Minson's solicitors, which read:

> 'The claimant accepts your offer of settlement of £700,000 plus costs. The Certificate of Total Benefits shows that there are no deductible benefits. We have this morning notified the Court, Counsel and witnesses that the action has been settled. We enclose a draft Consent Order, which is based on a lump sum payment of damages. In the event that our client would be interested in a Structured Settlement (the matter in respect of which we are

not competent to advise her) would your clients be prepared to pay the whole or part of the damages in that way? We have arranged for our client to have independent advice and we await hearing from you further therefore.'

**[9]** The offer is not before me and it is not suggested that it is necessary to look at it. The suggestion of a structured settlement went no further. The consent order read:

'CONSENT ORDER

Upon reading the consent of solicitors for the claimant and solicitors for the defendant, it is hereby ordered, by consent as follows: 1. That the defendant do pay to the claimant's solicitors, within 21 days, the figure of £700,000 in full settlement of the claimant's claim for damages against the defendant. 2. That in addition, the defendant do pay the claimant's costs, to be agreed or made the subject of a detailed assessment on the standard basis. 3. That there be legal aid taxation of the client's costs. 4. That upon payment of the above written sums the defendant be discharged in respect of the claimant's claim herein.'

There follow the signatures of both solicitors. The order was duly initialled, presumably by the district judge. It is not suggested that the order as submitted differed from the draft enclosed with the letter (which I have not seen), but in any event Mr Thomas did not rely on any difference between the agreement as embodied in the letter and the precise terms of the consent order.

**[10]** The history of the legislation is of interest.

**[11]** Section 4(2) of the Limitation Act 1963, dealing with the time limit for contribution between tortfeasors, read:

'For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to a tortfeasor (in this subsection referred to as "the relevant date") shall be ascertained as follows, that is to say—(a) if the tortfeasor is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date on which the judgment is given, or the date of the award, as the case may be; (b) if, in any case not falling within the preceding paragraph, the tortfeasor admits liability in favour of one or more persons in respect of that damage, the relevant date shall be the earliest date on which the amount to be paid by him in discharge of that liability is agreed by or on behalf of the tortfeasor and that person, or each of those persons, as the case may be; and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the tortfeasor.'

**[12]** The 1978 Act made new provision for contribution 'from any other person liable in respect of the same damage' (see s 1(1)). Section 1 provided for liability arising from an agreement and for liability arising from a judgment, in the following terms:

'(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without

regard to whether or not he himself is or ever was liable in respect of that damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

(5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.'

**[13]** Mr Thomas accepted that the inclusion of the word 'determined' in sub-s (5) implies a decision of a court. Thus a judgment entered by consent would not be within sub-s (5). Although at first sight there would be as much reason for such a judgment to be conclusive as there would be for a judgment resulting from a court's decision, it is understandable that cases of consent should fall within sub-s (4) because of the requirement in that subsection of bona fides.

**[14]** Schedule 1, para 6 of the 1978 Act, substituted a new s 4 for s 4 of the 1963 Act. The new s 4 was in most respects identical for present purposes with s 10 of the 1980 Act.

**[15]** Section 10 of the 1980 Act is headed 'Special time limit for claiming contribution'. It reads (my emphases):

'(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.

(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.

(3) *If the person in question is held liable in respect of that damage*—(a) *by a judgment given in any civil proceedings*; or (b) by an award on any arbitration; *the relevant date shall be the date on which the judgment is given*, or the date of the award (as the case may be). For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.

(4) *If, in any case not within subsection (3) above, the person in question* makes or *agrees to make any payment to one or more persons in compensation for that damage* (whether he admits any liability in respect of the damage or not), *the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him* (or his representative) *and the person* (or each of the persons, as the case may be) *to whom the payment is to be made.*

(5) An action to recover contribution shall be one to which sections 28, 32 and 35 of this Act apply, but otherwise Parts II and III of this Act (except sections 34, 37 and 38) shall not apply for the purposes of this section.'

**[16]** Mr McCullough submitted that this consent order was not a 'judgment' within the meaning of sub-s (3). Mr Thomas submitted the contrary. I shall return to this issue.

[17] Mr McCullough also relied on wording within the section. He pointed out that sub-s (1) speaks of a person becoming entitled and both sub-ss (1) and (2) speak of the right accruing. He submitted that this requires the court to concentrate on the first moment that the right accrues. He relied particularly on the words 'held liable' and 'a judgment given' as suggesting a decision of a court. Although he conceded that a default judgment might fall within the subsection, such a judgment would rest not on the consent of the parties, but on a conclusion of the court, albeit one based on a failure by one party to comply with the rules. The same may well apply in my view to a judgment entered under CPR 14.4. Although the reference to an award does not include equivalent words to 'a judgment given', the words 'held liable' apply to awards.

[18] Mr Thomas relied particularly on the words in sub-s (4) 'in any case not within subsection (3) above'. He argued that the court must ask itself whether there was an agreement within the remainder of sub-s (4). If there was, the court must ask itself whether the case is nevertheless one that falls within sub-s (3); if it does, the case is taken out of sub-s (4). Mr McCullough submitted that the initial words of sub-s (4) simply mean 'in all other cases'.

[19] I must consider first whether this was a 'judgment' within the meaning of s 10(3). I was referred to *Supreme Court Practice* (1979 edn) vol I, p 659 (para 42/1/5) and the equivalent passage in the current White Book (*Civil Procedure* (April 2003 edn)) vol I, pp 919–920 (para 40.1.1). In both those paragraphs the suggestion appears to be made that even by about 1890 it was doubtful whether there was still a distinction between a judgment and an order. However, the judgment of Lord Esher MR in *Onslow v IRC* (1890) 25 QBD 465 seems to me to maintain the distinction. In the recent White Book, it is stated that the definitions in the Supreme Court Act 1981 and the County Courts Act 1984 tended to maintain the distinction, but the actual definitions do not appear to do so. It is true, however, that the RSC maintained the distinction, although not entirely systematically, and that the different words have been carried over into the CPR. I accept that this has been done 'apparently unthinkingly', as the White Book suggests.

[20] I was referred to *Stroud's Judicial Dictionary of Words and Phrases* (6th edn, 2000) and to *Words and Phrases Legally Defined* (3rd edn, 1988), but it was not suggested that the relevant entries are of much assistance. Neither counsel referred me to any authority or textbook, apart from these and the passages in the editions of the White Book.

[21] One important reason for distinguishing a judgment from an order disappeared when the definition of 'judgment' for the purposes of enforcement came to include 'any judgment or order' (see s 12(1) of the Administration of Justice Act 1920). However, that definition does not assist the claimant here, precisely because it was inserted to ensure that the problem was circumvented.

[22] I accept that in 1978, when the section from which the present s 10 of the 1980 Act was derived was passed, a 'judgment' in such an Act would not necessarily include any court order. The use of the word, especially in conjunction with the words 'held liable' and 'given', clearly points to the kind of order by which liability is imposed. However, that conclusion does not dispose of the matter because it is accepted by both counsel that the description 'consent order' is not necessarily conclusive. In other words, if this was in reality a 'judgment', it would not cease to be so by calling it an 'order'. Although a consent order in the form used here is the usual form in such circumstances, the parties could have agreed that judgment be entered by consent and so drafted the

document placed before the court. In my view this consent order, a final order in the litigation, could properly described as a 'judgment' for the purposes of sub-s (3). a

[23] Thus while I place some weight on the words 'held liable' and 'given' I do not, for the reasons I have given, regard the use of the word 'judgment' as in itself conclusive. At one stage of the hearing I was impressed by the argument based on the words 'in any case not within subsection (3) above' and not wholly convinced by Mr McCullough's suggested meaning, since that suggestion seemed to give rise to the same problem. If sub-ss (3) and (4) are mutually exclusive, there seems to be little need for the words 'in any case not within subsection (3) above'. b

[24] However, in the end I prefer Mr McCullough's interpretation of s 10. My principal reason for doing so is if a firm agreement is made, as here, time undoubtedly starts to run at that moment. It would be different if the agreement required the making of a consent order before it took effect. Neither party so contends here. Although Parliament could have decided that a consent order should restart the clock, there are insufficiently clear words to indicate that. Indeed the words in sub-s (1) 'Where ... any person becomes entitled' and the words in sub-s (4) 'the earliest date on which the amount ... is agreed' suggest that the crucial moment is the first moment when liability arises. It is tidy to conclude that sub-ss (3) and (4) deal separately with cases decided by a court (or arbitrator) and cases of agreement. c d

[25] This conclusion produces the result that in most circumstances the contrast between sub-ss 1(4) and (5) of the 1978 Act is mirrored in what are now sub-ss 10(3) and (4) of the 1980 Act. e

[26] My conclusion on the preliminary issue is that the relevant date for any liability under the 1978 Act was the date of the agreement on 24 October 2000. I invite agreement or submissions from counsel as to the form of the orders required. f

*Order accordingly.*

James Wilson Barrister (NZ).

# Adamson v Halifax plc

[2002] EWCA Civ 1134

COURT OF APPEAL, CIVIL DIVISION

POTTER LJ AND SIR MURRAY STUART-SMITH

16, 30 JULY 2002

*Damages – Measure of damages – Breach of statutory duty – Mortgage – Duty of building society mortgagee to exercise power of sale with reasonable care ensuring best price reasonably obtainable – Sale at undervalue by first mortgagee – Mortgagor awarded damages for breach of statutory duty – Whether amount of damages including secured sum owed by mortgagor to second incumbrancer but unclaimed by second incumbrancer.*

The claimant took out a mortgage on her flat with the building society predecessor of the defendant bank. Another bank obtained judgment against her for a debt of some £5,000 and obtained a charging order on the flat. The claimant fell into arrears with her mortgage payments and the defendant took possession of the flat and sold it for £17,000. It accounted to the bank for £22, which was all that was left from the proceeds of sale after satisfying its own claim. In the exercise of its power of sale the defendant had a duty under para 1(1)(a)[a] of Sch 4 to the Building Societies Act 1986 to take reasonable care to ensure that the price at which the flat was sold was the best price that could reasonably be obtained. The claimant considered that the defendant had sold the flat at an undervalue and brought proceedings against it in the county court. The judge held that the defendant had been in breach of its statutory duty and that the true value of the flat, at the time of sale, had been £23,000. However, he awarded the claimant only £1,000 on the basis that had the flat been sold for its true value the defendant would have had to satisfy the bank, as second incumbrancer, before accounting to the claimant. The bank had not made any attempt to enforce its judgment against the claimant nor had it made any claim against the defendant for damage to its own interest in consequence of the sale at an undervalue. At the date of the county court judgment some five months of the limitation period during which the bank could claim against the defendant remained unexpired. The period expired on 24 November 2001. The claimant appealed against the measure of damage, and before the date of the hearing the limitation period expired. She submitted that if for any reason a second incumbrancer chose not to sue a first mortgagee for breach of its statutory duty, the mortgagor was entitled to sue and recover all the loss caused by the first mortgagee's breach; that a first mortgagee could recover no more than its own debt; and that it was not right that the defendant could retain £5,000 to meet a claim by the bank that had not been made, had been very unlikely to be made, and could no longer be made.

**Held** – The prima facie measure of damage for breach of a building society mortgagee's statutory duty on the exercise of its power of sale to take reasonable care to obtain the best price that it reasonably could was the reduction in value of the equity of redemption. The assessment of damages was to be made at the time of trial with the benefit of the knowledge of what had happened up to that point.

a Paragraph 1, so far as material, provides

In the instant case, although there had been a theoretical possibility at the date of the judgment in the county court that the bank might have sued the defendant, the judge might well have concluded that the likelihood of it doing so was so small that it could be ignored. Alternatively, if he had considered that the possibility could not be discounted he could have ordered £5,000 to be paid into court and paid out to the claimant on the expiry of the limitation period. There was no longer any risk of the defendant being sued by the bank and the claimant was entitled to recover all the loss caused by the defendant's breach of duty. Accordingly, the appeal would be allowed (see [9], [11], [19], [20], below).

**Notes**

For a mortgagee's duty to obtain best price, see 4(3) *Halsbury's Laws* (4th edn reissue) para 564.

The Building Societies Act 1986, Sch 4 was repealed by virtue of the Building Societies Act 1997, ss 12(1)(a), 46(2), Sch 9.

**Cases referred to in judgments**

*Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626, [1993] AC 295, [1993] 2 WLR 86, PC.

*Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299, [1999] 1 WLR 1507, CA.

*Roache v News Group Newspapers Ltd* [1998] EMLR 161, CA.

**Appeal**

The claimant, Janet Adamson, appealed with permission granted by Kay LJ on 23 April 2001, from the decision of District Judge Freeman in the Manchester County Court on 14 June 2001 awarding her damages of £1,000 against the defendant, Halifax plc, for breach of statutory duty (by its building society predecessor) under the Building Societies Act 1986, Sch 4, para 1(1)(a). The facts are set out in the judgment of Sir Murray Stuart-Smith.

*Michael Mulholland* (instructed by *CP Morley*, Manchester) for the claimant.

*Katherine McQuail* (instructed by *Walker Morris*, Leeds) for the defendant.

*Cur adv vult*

30 July 2002. The following judgments were delivered.

**SIR MURRAY STUART-SMITH** (giving the first judgment at the invitation of Potter LJ).

INTRODUCTION

[1] This is an appeal from the judgment of District Judge Freeman sitting in the Manchester County Court and given on 14 June 2001.

[2] The claimant Janet Adamson entered into a mortgage deed with the defendant, Halifax plc, then a building society, in September 1991 in order to purchase her flat, Flat 3 Manor Park, Manor Avenue, Urmston. She fell into arrears with the payments and on 31 August 1995 the defendant took possession of the flat. It did so without a court order. One of the claims made by the claimant was that the defendant had wrongfully taken possession; she alleged that she was still in possession. She claimed that the defendant had wrongfully disposed of her possessions valued at £2,000 and she claimed aggravated damages. The judge

dismissed this claim; he did not accept the evidence of the claimant or her mother. He accepted the evidence of Mr Delaney, called on behalf of the defence, which was corroborated by the contemporaneous documents, to the effect that she had vacated the flat. There is no appeal on this issue; but it has relevance to the question of interest and costs, the judge's award on these matters being subject to appeal and an application for permission to cross-appeal.

DAMAGES

[3] The main issue in the appeal related to the claimant's claim that the defendant, after repossessing the property, sold at a substantial undervalue. The flat was sold for £17,000. The judge held that the true value of the property in the condition it was, which was a poor one, was £23,000. Again there is no dispute on this aspect of the case, or as to the judge's finding that the defendant was in breach of the duty to take reasonable care to ensure the best price that can reasonably be obtained (imposed by Sch 4, para 1(1)(a) to the Building Societies Act 1986, but subsequently repealed in s 12 of the Building Societies Act 1997).

[4] The judge did not award the claimant £6,000, the difference between the sale price and the proper price, but only £1,000. That came about in this way. The claimant was indebted to the Royal Bank of Scotland (the bank) in the sum of £4,736·27. It appears to have been an unsecured debt. On 17 December 1993 the bank obtained a judgment for this sum. On 4 May 1994 the bank entered a caution on the register of title. On 14 February 1995 the bank obtained a charging order nisi on the flat, which was made absolute on 3 April. The charging order is not recorded on the office copy of the register of title before the court; but this is because the copy is dated 6 February 1995. It existed as a subsequent incumbrance to the defendant's mortgage and the defendant was aware of it. What is now clear is that, after the sale, the defendant accounted to the bank for £22, which was all that was left from the proceeds of sale after the satisfaction of the defendant's claim.

[5] It is common ground that if the defendant had sold the property at £23,000 shortly after 24 November 1995 (when contracts were exchanged) it would have accounted to the bank as a subsequent incumbrancer for £5,000 (the amount of the judgment plus costs rounded up to £5,000) and to the claimant as mortgagor (see s 105 of the Law of Property Act 1925) for £1,000. However, the situation was that the bank had never made any attempt to enforce its judgment (beyond the £22) against the claimant, no doubt for the very good reason that it did not consider that she had any money. Neither had it made any claim against the defendant for damage to its own interest as a subsequent incumbrancer by selling at an undervalue. In the light of the judge's judgment, it is clear that it could have done so. But it can do so no longer, because its claim is now barred by limitation, six years having elapsed since 24 November 1995. At the time the district judge gave judgment, namely on 14 June 2001, the six years had not yet expired; but the bank had shown no signs whatever of making a claim against the defendant. So far as the claimant was concerned she gave evidence that the bank had 'written off' the debt. It is probable that by this she meant no more than that the bank had not pursued her. There was certainly no formal release and nothing that could give rise to an estoppel. No action can now be brought to enforce the bank's judgment against the claimant (see s 24 of the Limitation Act 1980). But a writ of execution to enforce the judgment can be issued with the permission of the court, even though six years has elapsed from the date of judgment (see RSC Ord 46, r 2 and similar provisions for warrants of execution in the county court (CCR Ord 26, r 5)).

[6] The judge decided that the claimant should recover no more than £1,000 because he considered that that was the extent of her loss. Had the defendant sold for the full market value it would have had to satisfy the bank, before accounting to her. That being so, the judge considered that she should not obtain a 'windfall' of £5,000 because the bank had taken no steps to recover its money.

[7] Mr Mulholland who appeared in this court on behalf of the claimant, but not in the court below, submitted that the judge was in error. He submitted that the claimant's damage consisted in the diminution in value of the equity of redemption; damage should be assessed at the time of trial. If the full £6,000 is paid to the claimant, she remains at risk of enforcement proceedings at the suit of the bank. Mr Mulholland recognised that, at the time the judge gave judgment, there was a possibility of a claim being made by the bank against the defendant; in these circumstances he submitted that a possible alternative course would have been for the judge to have ordered £5,000 to be paid in to court to abide any claim by the bank. If it made no claim against the defendant before 24 November 2001, the money then should be paid out of court to the claimant.

[8] In support of his submission Mr Mulholland referred the court to the advice of Lord Templeman to the Privy Council in *Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626 at 634, [1993] AC 295 at 311–312:

> 'The owner of property entering into a mortgage does not by entering in to that mortgage cease to be the owner of that property any further than is necessary to give effect to the security he has created. The mortgagor can mortgage the property again and again. A second or subsequent mortgage is a complete security on the mortgagor's interests subject only to the rights of prior incumbrancers. If a first mortgagee commits a breach of his duties to the mortgagor, the damage inflicted by that breach of duty will be suffered by the second mortgagee, subsequent incumbrancers and the mortgagor, depending on the extent of the damage and the amount of each security. Thus if a first mortgagee in breach of duty sells property worth £500,000 for £300,000, he is liable at the suit of any subsequent incumbrancer or the mortgagor. Damages of £200,000 will be ordered to be taken into the accounts of the first mortgagee or paid into court or to the second mortgagee who, after satisfying, as far as he can, the amount of any debt outstanding under his mortgage, will pay over any balance remaining to the next incumbrancer—or to the mortgagor if there is no subsequent incumbrancer. In practice the incumbrancer who first suffers from the breach of duty by the first mortgagee and needs the damages payable by the first mortgagee to obtain repayment of his own debt will sue the first mortgagee. If the incumbrancers do not suffer because they have been able to obtain repayment of their debts without recourse to the damages, then it will be the mortgagor who will sue.'

[9] Mr Mulholland submitted that if for any reason the second incumbrancer chooses not to sue the first mortgagee, the mortgagor is entitled to sue and recover all the loss caused by the first mortgagee's breach of duty. The first mortgagee can recover no more than its debt. It is not right that it can retain £5,000, the amount of its liability for its own breach of duty, to meet a claim that has not been made, is very unlikely to be made, and now cannot be made, by the bank.

[10] Miss McQuail disputed these submissions. She contended that if the defendant had done what it ought to have done, the claimant would have recovered no more than £1,000. On the sale at the proper valuation of £23,000, the

defendant would have satisfied its own debt, paid £5,000 to the bank and accounted to the claimant for £1,000; she could get no more now.

[11] In my judgment Mr Mulholland's submissions are to be preferred. The court had to award damages for breach of statutory duty, the prima facie measure of damage being the reduction in the value of the equity of redemption. The assessment of damages is to be made at the time of trial with the benefit of the knowledge of what has happened theretofore. Although theoretically at the time the judge gave judgment, there was a possibility that the bank might have sued the defendant, I think the judge might well have concluded that the chance of it doing so before the limitation period expired was so small that such chance could be ignored. The bank had shown no interest in the litigation and probably considered that it was not worthwhile pursuing a claim. Alternatively, if the judge considered that the possibility could not be discounted, he could have ordered the £5,000 to be paid into court. If no claim was made against the defendant by 24 November 2001, the money should be paid out to the claimant. The claimant still remains vulnerable to an application by the bank for permission to issue a warrant of execution. But, so far as the defendant is concerned, there is no longer any risk of it being sued by the bank.

INTEREST

[12] The judge awarded no interest to the claimant. Unhappily there is no official transcript of this part of the judgment or that on costs. The two solicitors' notes do not agree as to the reason given by the judge for depriving the claimant of all interest. The defendant's solicitor's note records that it was 'the enormous delay in bringing the evidence as to the charging order nisi'. The claimant's solicitor's note indicates that is was 'the delay in issuing the proceedings and counsel did not object'. The former is not a good reason. Both parties knew of the charging order, neither saw fit to include the relevant documentation in the bundle. It was only after the judge had decided as a matter of principle that the amount of the bank's judgment should not be recoverable, that the order was produced. In my judgment it was an irrelevant consideration, and if the judge based his decision upon it, he was wrong.

[13] Delay in issuing the proceedings can be a valid reason for reducing the period for which interest is awarded, though rarely, if at all, for depriving a successful party of all interest. The proceedings were not issued until nearly four-and-a-half years after the cause of action arose; it came on for trial about a year later. Although the action was started well within the limitation period, four-and-a-half years was a long delay for which there was no satisfactory explanation. It had the incidental effect that the claimant is, in my judgment, very likely to obtain the full £6,000 without accounting to the bank for its 1993 judgment. There was no delay in prosecuting the action; but the delay in starting it justifies some reduction in the interest awarded. Mr Mulholland concedes that the claimant should not be awarded interest on the £5,000 until 24 November 2001. In my judgment the claimant is entitled to interest on her damages as to £1,000 from 24 November 1997 (two years after the cause of action arose) and as to £5,000 from 24 November 2001.

COSTS

[14] Cross-appeal. The judge's order for costs was that—

> 'the defendant should pay half of the claimant's costs save that it should pay the entirety of such sum in respect of the claimant's surveyor's fees as shall be found reasonable, such costs and fee to be subject to a detailed assessment in default of agreement'.

The judge refused permission to appeal on costs, and the single Lord Justice adjourned the question of permission to the full court.

**[15]** Miss McQuail submits that the proper order for costs is that there should be no order for costs. That is because the defendant was successful on the issue of wrongful eviction which took half of the volume of the pleadings, preparation for trial and the time for the hearing. The defendant she submitted should have been entitled to the costs on this issue; but that would effectively equal the costs on the undervalue claim, so the proper order is that the court should make no order for costs. She also submitted that the court should make an adverse order to the claimant to mark her conduct in bringing a mendacious claim on the wrongful eviction issue.

**[16]** Costs are in the discretion of the trial judge and this court will only interfere with the exercise of that discretion on well-defined principles. As I said in *Roache v News Group Newspapers Ltd* [1998] EMLR 161 at 172:

> 'Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.'

That statement was approved in *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299 at 314, [1999] 1 WLR 1507 at 1523 per Lord Woolf MR. Although that decision was before the Civil Procedure Rules came into force, it is clear that the court applied the same principle in relation to interfering with the trial judge's discretion.

**[17]** The claimant was the successful party in the litigation in the sense she had to come to court to recover anything. It may be that the defendant could not have made a payment into court because of the problem of the bank's judgment; but it could have made a written offer; and if the offer had equalled or bettered the judgment, then the defendant would have been the successful party.

**[18]** It is clear that the judge did take into account the fact that the claimant had failed on the wrongful eviction claim. He also took into account the fact that he had 'severe doubts about her credibility'; though he did not go so far as to say that the whole of that claim was a knowingly fraudulent one. In my view he took into account the relevant considerations and exercised his discretion in accordance with CPR 44.3 (see particularly r 44.3(2)(a) and (4)(b)). Even if this court were inclined to make an order that would be somewhat more favourable to the defendant, I am clear that we should not do so. Moreover since we are allowing the appeal, I see no reason to think now that the order for costs was too favourable to the claimant. I would refuse permission to cross-appeal.

**[19]** In the result I would allow the appeal, the judgment should be varied in that judgment be given for the claimant for £6,000; interest at the appropriate rate should be awarded on £1,000 from 24 November 1997 and on £5,000 as from 24 November 2001. The order for costs below is not varied.

**POTTER LJ.**

**[20]** I agree.

*Appeal allowed.*

Melanie Martyn Barrister.

# R (on the application of Giles) v Parole Board

[2003] UKHL 42

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD HUTTON AND LORD SCOTT OF FOSCOTE

18–19 JUNE, 31 JULY 2003

*Sentence – Custodial sentence – Imposition of custodial sentence longer than that commensurate with seriousness of offence – Lawfulness of detention – Whether convention right requiring periodic review of lawfulness of continued detention of offender who had served commensurate element of sentence – Criminal Justice Act 1991, s 2(2)(b) – Powers of Criminal Courts (Sentencing) Act 2000, s 80(2)(b) – Human Rights Act 1998, Sch 1, Pt I, art 5(1)(a), (4).*

The claimant was sentenced to a total of seven years' imprisonment for two violent offences. When imposing sentence, the judge exercised the power conferred upon him by s 2(2)(b)[a] of the Criminal Justice Act 1991, subsequently re-enacted in identical terms in s 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000. Under those provisions, which applied where the court was passing a custodial sentence, not fixed by law, for a violent or sexual offence, the sentence was to be for such term longer than that commensurate with the seriousness of the offence (but not exceeding the permitted maximum) as was necessary in the opinion of the court to protect the public from serious harm from the offender. The claimant was refused permission to appeal against the sentence. After serving half of his sentence, the claimant became eligible for release on the recommendation of the Parole Board. When the review of his sentence was approaching, the claimant asked the board to confirm that he would be treated at the review in the same way as a discretionary life prisoner in being granted an oral hearing, and in the application of the same test to decide whether he should continue to be detained. The board gave no such confirmation, and the claimant applied for judicial review. Drawing an analogy with discretionary life prisoners, he contended that, once the commensurate term had been served, public protection was the only ground for the continued detention of those sentenced under s 2(2)(b) of the 1991 Act or s 80(2)(b) of the 2000 Act, and that such detention should be the subject of review, with their participation, to ensure that they were no longer detained on that ground when they had ceased to be a danger to the public. In so contending, the claimant relied on art 5(4)[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provided that everyone who was deprived of his liberty by detention was entitled to take proceedings by which the lawfulness of his detention would be decided speedily by a court. The judge granted the application, but his decision was reversed by the Court of Appeal. On the claimant's appeal to the House of

a Section 2, so far as material, is set out at [2], below

b Article 5, so far as material, is set out at [3], below

Lords, their Lordships considered whether, having regard to the jurisprudence of the European Court of Human Rights, a sentence imposed under s 2(2)(b) of the 1991 Act was subject to the general rule that detention in accordance with a determinate sentence imposed by a court was justified, as lawful detention, under art 5(1)(a) of the convention, without the need for further reviews of detention under art 5(4) (the general rule).

**Held** – The general rule applied to determinate sentences imposed under s 2(2)(b) of the 1991 Act, and accordingly there was no requirement in such cases for further reviews of detention under art 5(4) of the convention. There was a distinction between detention for a period whose length was embodied in the sentence of the court on the one hand and the transfer of decisions about a prisoner's release to the Executive. In the latter case, there was a risk that the factors which informed the original decision would change with the passage of time, and the review which art 5(4) required could not be said to be incorporated in the original decision by the court. A further review in judicial proceedings was needed at reasonable intervals if the detention was not to be at risk of becoming arbitrary. Where, however, the prisoner had been lawfully detained within the meaning of art 5(1)(a) following the imposition of a determinate sentence after his conviction by a competent court, the review required by art 5(4) was incorporated in the original sentence passed by the sentencing court. Once the appeal process had been exhausted, there was no right to have the lawfulness of the sentence reviewed by another court. In the instant case, the review required by art 5(4) had been incorporated in the sentence imposed by the judge because he had fixed the period of the sentence which was needed to protect the public from serious harm. He had been able to take that decision in the light of the information before him and, in the exercise of his ordinary sentencing powers, to decide on the total length of the sentence which was appropriate in all the circumstances. As he had been able to take that decision at the outset, there was no risk that detention for the minimum period fixed by the sentence would become arbitrary. The claimant had no further right under art 5(4) to have his detention for the minimum period fixed by that sentence judicially reviewed. Accordingly, the appeal would be dismissed (see [10]–[13], [40], [51]–[53], [70]–[72], [74], [80], [81], below).

*De Wilde v Belgium (No 1)* (1971) 1 EHRR 373 followed.

*Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, *E v Norway* (1990) 17 EHRR 30 and *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666 not followed.

Decision of the Court of Appeal [2002] 3 All ER 1123 affirmed.

**Notes**

For the right to take proceedings to determine the lawfulness of detention and for criteria for determining the length of custodial sentences, see respectively 8(2) *Halsbury's Laws* (4th edn reissue) para 127 and Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1202A.

For the Criminal Justice Act 1991, s 2, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 1287. Section 2 was replaced, with effect from 25 August 2000, by s 80 of the Powers of Criminal Courts (Sentencing) Act 2000.

For the Human Rights Act 1998, Sch 1, Pt I, art 5, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 553.

**Cases referred to in opinions**

*De Wilde v Belgium (No 1)* (1971) 1 EHRR 373, [1971] ECHR 2832/66, ECt HR.
*E v Norway* (1990) 17 EHRR 30, [1990] ECHR 11701/85, ECt HR.
*Hussain v UK* (1996) 22 EHRR 1, [1996] ECHR 21928/93, ECt HR.
*Iribarne Perez v France* (1995) 22 EHRR 153, [1995] ECHR 16462/90, ECt HR.
*Mansell v UK* App No 32072/96 (2 July 1997, unreported), E Com HR.
*McLeod v UK* [1999] 1 FCR 193, [1998] ECHR 24755/94, ECt HR.
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**Appeal**

Terry Giles appealed with permission of the Court of Appeal (Kennedy, May and Tuckey LJJ) from its decision on 4 July 2002 ([2002] EWCA Civ 951, [2002] 3 All ER 1123, [2003] 2 WLR 196) allowing an appeal by the respondents, the Parole Board and the Secretary of State for the Home Department, from the order of Elias J on 5 October 2001 ([2001] EWHC Admin 834, [2002] 1 WLR 654) whereby, in granting an application for judicial review brought by the appellant against the respondents, he made the following declaration: 'Where a person has been sentenced pursuant to s 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 (or its statutory predecessor), once he is detained in circumstances where he would have been released but for the imposition of the additional element of the sentence imposed by virtue of that subsection, his continuing period of detention shall be subject to art 5(4) of [the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)] such that it will need to be reviewed periodically at reasonable intervals by a procedure compliant with art 5(4) to determine whether the continued detention remains necessary to protect the public from serious harm.' The facts are set out in the opinion of Lord Bingham of Cornhill.

*Edward Fitzgerald QC* and *Phillippa Kaufmann* (instructed by *Irwin Mitchell*, Sheffield) for the appellant.

*David Pannick QC* and *Eleanor Grey* (instructed by the *Treasury Solicitor*) for the respondents.

Their Lordships took time for consideration.

31 July 2003. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

**[1]** My Lords, at issue in this appeal is the impact of art 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) on a sentence imposed under s 2(2)(b) of the Criminal Justice Act 1991 (since re-enacted as s 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000).

**[2]** The appellant pleaded guilty in the Crown Court at Nottingham to two offences, committed on different occasions, against ss 20 and 47 of the Offences against the Person Act 1861. On 10 January 1997 he was sentenced to consecutive terms of four and three years' imprisonment. In passing that sentence the judge expressed the opinion that it was necessary to pass a custodial sentence which was longer than the sentence which would be commensurate with the

seriousness of the offences in order to protect the public and one of the appellant's victims in particular from serious harm from him. The judge was exercising the power conferred by s 2(2)(b) of the 1991 Act and following the procedure laid down by that section which, so far as relevant, provided:

> **2.** *Length of custodial sentences.*—(1) This section applies where a court passes a custodial sentence other than one fixed by law.
>
> (2) The custodial sentence shall be—(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it; or (b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.
>
> (3) Where the court passes a custodial sentence for a term longer than is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it, the court shall—(a) state in open court that it is of the opinion that subsection (2)(b) above applies and why it is of that opinion; and (b) explain to the offender in open court and in ordinary language why the sentence is for such a term.'

The appellant sought leave to challenge that sentence but was refused leave to do so by the single judge and, on 13 June 1997, by the Court of Appeal for detailed reasons which give rise to no issue before the House. On 17 May 2001 the appellant was released on licence.

[3] Article 5(4) of the convention provides:

> 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

This provision, part of a very important article directed to protection of the right to liberty and security, reflects principles long cherished in this country by lawyers and the public alike: that no one shall be deprived of his liberty save on lawful authority; that anyone challenging the lawfulness of his detention shall have access to a court with power to decide whether his detention is lawful or not; and that if his detention is not held to be lawful his release shall be ordered. No one is to be detained arbitrarily or (other than very temporarily) at the direction of the Executive. Article 5(4) must be read with art 5(1), which begins:

> 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court ...'

[4] The appellant does not challenge the imposition upon him of punitive sentences of imprisonment. Nor does he challenge in principle the extension of a sentence beyond the term necessary to punish an offender where such extension is properly directed towards protection of the public against serious harm caused by a violent or sexual offender. His contention, based on art 5(4), is in essence this: that once a defendant sentenced under s 2(2)(b) of the 1991 Act or s 80(2)(b) of the 2000 Act has served the part of his sentence imposed purely for

purposes of punishment (that is, the term 'commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it') and is about to begin serving the balance of the sentence imposed for purposes of public protection ('such longer term ... as in the opinion of the court is necessary to protect the public from serious harm from the offender') he should enjoy the substantive and procedural rights held to be necessary where discretionary life sentence prisoners have served the punitive (or tariff) term imposed by the trial judge or, on appeal, by the Court of Appeal. The underlying rationale of this argument is clear. The sentence passed on a discretionary life sentence prisoner has two components, the first punitive, the second protective. The only justification for continued detention of a prisoner who has served the punitive part of his sentence is the need to protect the public. But a prisoner's danger to the public, however evident at the time of sentence, may diminish or disappear. Thus his danger to the public, and the justification for continued detention, should be the subject of periodic review (in which the prisoner should have the right to participate) to ensure that a prisoner is not detained on the ground of his danger to the public when he is no longer such a danger. A similar regime, it is argued, should apply to those sentenced under s 2(2)(b) of the 1991 Act or s 80(2)(b) of the 2000 Act: once the commensurate term has been served, the only ground for continued detention is public protection; but by the end of the commensurate term the prisoner may no longer be a danger to the public; therefore his continued detention should be the subject of review, with his participation, to ensure that he is no longer detained on the ground of his danger to the public when he is no longer such a danger.

**[5]** In December 2000, with the first review of his case approaching, the appellant's solicitors sought confirmation from the Parole Board that at the review he would be treated in the same way as a discretionary life sentence prisoner (a) in being granted an oral hearing, and (b) in application of the same test to decide whether he should continue to be detained. The board gave no such confirmation and the appellant applied for permission to seek judicial review, basing his application on the argument summarised in [4], above. On 23 May 2001 ([2001] EWHC Admin 463) Sir Oliver Popplewell granted the appellant permission, giving detailed reasons favourable to the appellant for doing so. By this time the application was strictly moot, since the appellant had already been released on licence, but the application was rightly held to raise an important point of principle. At the substantive hearing of the application in October 2001 ([2001] EWHC Admin 834, [2002] 1 WLR 654), Elias J granted the application, accepting the appellant's argument based on the convention. On the Secretary of State's appeal, the Court of Appeal ([2002] EWCA Civ 951, [2002] 3 All ER 1123, [2003] 2 WLR 196) (Kennedy, May and Tuckey LJJ) reached a different conclusion.

**[6]** In domestic law the sentences imposed on the appellant took effect as a single composite term of seven years' imprisonment (see s 51(2) of the 1991 Act). He was a 'long-term' prisoner within the meaning of s 33(5) of the 1991 Act, since he was serving a sentence of four years or more. As a long-term prisoner the appellant was eligible for release on the recommendation of the Parole Board after serving one-half of his sentence (see s 35(1) of the 1991 Act) and was entitled to release on licence after serving two-thirds of his sentence (see s 33(2) of the 1991 Act). There is no provision in domestic law for release of a long-term prisoner, save on compassionate grounds, before half of the single composite

term has been served. If effect were given to the appellant's contention that release of a long-term prisoner should be considered at the end of the commensurate term which would have been imposed under s 2(2)(a) of the 1991 Act or s 80(2)(a) of the 2000 Act, this would plainly conflict with the domestic regime described above in any case where the protective extension ordered under ss 2(2)(b) or 80(2)(b) exceeds the commensurate term which would have been ordered under ss 2(2)(a) or 80(2)(a). There is nothing in any statute which indicates that the protective extension should not be longer than the commensurate term, and there are reported cases in which the Court of Appeal has approved longer terms (see *R v Chapman* [2000] 1 Cr App R 77; *R v Smith* [2001] 2 Cr App R (S) 160; *R v Wilson* [2000] Crim LR 503; *R v Barker* [2002] EWCA Crim 1508, [2003] 1 Cr App R (S) 212). In a case where the index offence does not merit the imposition of a life sentence but the offender is recognised to represent a serious risk to the public, imposition of a protective extension longer than the commensurate term may well represent the best means of reconciling the need to protect the public with the need to do justice to the individual offender.

[7] Section 34 of the 1991 Act, since repealed and replaced by s 28 of the Crime (Sentences) Act 1997, required the sentencing judge, when imposing a discretionary life sentence, to specify the period to be served before the prisoner might require the Secretary of State to refer his case to the Parole Board. This was the punitive or tariff term of the sentence. Thus in such a case there could never be doubt when the punitive phase of the prisoner's detention had come to an end. From that time onwards the continued detention of the prisoner could be justified on grounds of public protection alone. By contrast, a judge who imposes a longer than commensurate sentence under s 2(2)(b) of the 1991 Act or s 80(2)(b) of the 2000 Act is not required by either statute to indicate what part of the total sentence or sentences is commensurate within ss 2(2)(a) or 80(2)(a) and what part represents the protective extension. The Court of Appeal has not required sentencing judges to disclose the make-up of the sentence in that way. While in practice some judges have chosen to disclose the basis on which they have calculated the length of the sentence or sentences imposed, others have not, as the judge in this case did not, and it may be doubted whether sentencing judges necessarily base their overall sentence or sentences on a detailed calculation of the length of the component parts. It follows that in any case in which the commensurate term had not been expressly identified, the Parole Board and the Prison Service would have difficulty in knowing when the commensurate term ended. There would not, as in the case of discretionary life sentence prisoners, be a precise date on which the first phase of the sentence would end and the second begin.

[8] These considerations make plain, in my opinion, not only that our domestic sentencing and release regime does not envisage the process of review for which the appellant contends, but that it is inconsistent with it. Mr Fitzgerald QC, representing the appellant, did not suggest otherwise. He founded his argument on art 5(4) of the convention as interpreted and applied by the Strasbourg institutions. It is of course the duty of the House under s 2(1) of the 1998 Act to take account of judgments, decisions and opinions given or made by the Strasbourg institutions (so far as they are relevant) and to give effect to convention rights (see s 6(1) of the 1998 Act) unless precluded from doing so by primary legislation, in which case a declaration of incompatibility may be made (see s 4 of the 1998 Act).

[9] I need not repeat the detailed account which my noble and learned friend Lord Hope of Craighead has given of the Strasbourg jurisprudence to which the House was referred. I agree with his analysis and I fully share his conclusions. As May LJ pithily put it in his judgment in the Court of Appeal ([2002] EWCA Civ 951 at [18], [2002] 3 All ER 1123 at [18], [2003] 2 WLR 196):

> 'All the European authorities to which Kennedy LJ has referred, which conclude that art 5(4) of the (convention) requires an appropriate procedure allowing a court to determine the continued lawfulness of detention, concern sentences which were indeterminate *and* where otherwise the decision whether to release the prisoner lay with the executive. Neither applies to sentences under section 2(2)(b) of the 1991 Act.'

Mr Fitzgerald accepted the accuracy of that summary. To conclude that the Strasbourg decisions have only applied art 5(4) to cases having features different from the present does not, however, conclude the issue which the appellant raises unless those differences are such as should lead to a different result.

[10] That brings one back to consideration of the core rights which art 5(4), read with art 5(1), is framed to protect. Its primary target is deprivation of liberty which is arbitrary, or directed or controlled by the Executive. In the present case there was nothing arbitrary about the sentence, which was announced and explained in open court and upheld by the Court of Appeal when refusing leave to appeal against sentence. Since the first offence involved what the sentencing judge described as 'a savage attack' and the appellant had threatened further violence against his first victim, the term imposed does not appear in any way excessive. The sentence left nothing to the executive, since the Parole Board, whose duty it is to consider release at the half-way stage of the sentence, is accepted to be a judicial body. Again, May LJ put the point succinctly ([2002] 3 All ER 1123 at [18], [2003] 2 WLR 196 at [19]):

> 'Although the sentence is longer than it otherwise would have been because the sentencing judge is of the opinion that it is necessary to protect the public from serious harm from the offender, (i) the length of the sentence is, and is intended to be, determined by the judge at the time of sentence; (ii) it is not intended to be reviewed, other than on appeal; and (iii) in particular, it is not intended to confer on the executive the responsibility for determining when the public interest permits the prisoner's release ...'

[11] I conclude that the sentence passed on the appellant fell squarely within art 5(1) of the convention and did not attract the operation of art 5(4). On the review of his case by the Parole Board he was entitled to the same rights as any other long-term prisoner serving a determinate sentence, but no other or greater rights. In considering his release at the half-way stage the board was bound to apply the same criteria to him as to any other long-term prisoner serving a determinate sentence. The suggested analogy between prisoners sentenced under s 2(2)(b) of the 1991 Act or s 80(2)(b) of the 2000 Act and discretionary life sentence prisoners is in my opinion false.

[12] For these reasons as well as for those given by Lord Hope of Craighead and Lord Hutton I would dismiss this appeal.

**LORD STEYN.**

[13] My Lords, I have read the opinions of Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hutton. For the reasons they have given I would also dismiss the appeal.

**LORD HOPE OF CRAIGHEAD.**

[14] My Lords, as my noble and learned friend Lord Bingham of Cornhill has explained, the appellant was sentenced by the judge in the Crown Court at Nottingham to a total of seven years' imprisonment. He had pleaded guilty to two violent offences, for which he received sentences of four and three years' imprisonment respectively. The total of seven years' imprisonment resulted from the fact that the judge ordered that these two periods of imprisonment were to be served consecutively.

[15] When he was giving his reasons for imposing this sentence the judge said that he was of the opinion that it was necessary to pass a custodial sentence which was longer than the sentence which would be commensurate with the seriousness of the offences in order to protect the public and one of the appellant's victims from serious harm from him. He said that he had formed that opinion on the basis of all the matters disclosed in reports which were before him, which he directed should go to the prison authorities. It appears from the judge's remarks that the appellant's attitude to re-offending was governed by his personality disorder for which he required treatment if that was possible. Although he did not say so in terms, it is plain that in passing this sentence the judge was exercising the power conferred on him by s 2(2)(b) of the Criminal Justice Act 1991.

[16] Section 2(2) of the 1991 Act, which has now been re-enacted as s 80(2) of the Powers of Criminal Courts (Sentencing) Act 2000, was designed to provide a statutory basis for determining the length of a custodial sentence other than one fixed by law. The primary rule is that set out in s 2(2)(a) of the 1991 Act. It provides that the custodial sentence shall be for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it. This is the principle of 'just desserts' referred to in the White Paper published in February 1990, *Crime, Justice and Protecting the Public* (Cm 965) p 5 (para 2.3), which requires the court to pass a sentence which is in proportion to the seriousness of the offence. Section 2(2)(b) of the 1991 Act provides an alternative approach which the court may adopt where the offence is a violent or sexual offence. In such a case the custodial sentence shall be for such longer term (not exceeding the permitted maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender. Under this paragraph the court is required to apply its mind to the question whether sufficient grounds exist for passing a sentence which is longer than a sentence which would be proportionate to the offence. As Kennedy LJ said in the Court of Appeal ([2002] EWCA Civ 951 at [5], [2002] 3 All ER 1123 at [5], [2003] 2 WLR 1965)), a sentence which is passed under this paragraph is in substitution for, not additional to, the sentence which would otherwise have been passed under sub-s (2)(a).

[17] Although s 2(2) of the 1991 Act divided the sentencing exercise into these two parts, every custodial sentence which a judge imposes shares the following characteristics irrespective of the part of the subsection under which it is passed.

These are: (a) the decision as to the length of the sentence is taken by a judge as part of the overall sentencing exercise; (b) the judge's decision as to the length of the sentence is based on all the information before him at the time when he imposes it; (c) unless the judge decides to impose a discretionary life sentence under sub-s (2)(b), the length of the sentence is fixed by him at the time when he imposes it; and (d) his decision is subject to appeal, but the minimum period of detention that results from a determinate sentence is not open to review by the executive. Where the judge decides to sentence the offender to a term which is longer than one which is commensurate with the seriousness of the offence or the combination of the offence with one or more offences associated with it, he must give his reasons for doing so in open court (see s 2(3) of the 1991 Act; see now s 80(3) of the 2000 Act).

**[18]** The approach to sentencing which the statute lays down is therefore, from start to finish, a judicial exercise. It is subject to all the guarantees which are afforded by art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

**[19]** The advantages which flow from this structured approach to the sentencing exercise should not be allowed to conceal the fact that the need to protect the public from serious harm had always been regarded as a factor to which a judge could have regard when he was arriving at a custodial sentence which was appropriate to the circumstances. This can be illustrated by reference to the practice which is still followed in Scotland, where there are no statutory rules about the general approach which is to be taken to the length of custodial sentences. The matter is regulated by the practice of the court and by the common law. The need to protect the public from harm caused by further offending is a factor that can legitimately be taken into account by the judge as part of the sentencing exercise, if there are sufficient grounds for doing so in the information which is before the court.

**[20]** In *Torbet v HM Advocate* 1999 SLT 113, the appellant had committed offences while released on licence from a life sentence for murder. When he was sentencing him for these offences the trial judge took into account the fact that he posed a moderate risk of future violence to women with whom he had had an intimate relationship. The length of the sentence was held to be excessive on appeal by the High Court of Justiciary. But the judge's approach to the matter was approved, as the Lord Justice General (Rodger) explained (at 115–116):

> 'Although a court will be aware that a particular offender has been recalled by the Secretary of State, who will need to bear in mind the safety of the public in considering his future release from custody under the life sentence, the duty of the court in sentencing him for the particular offence of which he has been convicted is to approach the matter in the usual way. The court will therefore choose the sentence which is appropriate, having regard to the nature of the offence, the previous convictions of the offender and all the other factors which a judge normally takes into account. Among those factors may be the need to choose a period which the court considers will give the public appropriate protection from any risk of reoffending.'

THE ISSUE

**[21]** The question is whether a decision by a judge to take account of the factor mentioned in s 2(2)(b) of the 1991 Act when he imposes a determinate sentence

is compatible with art 5(4) of the convention read together with art 5(1)(a). If he selects a discretionary life sentence, he is required by s 28(2)(b) of the Crime (Sentences) Act 1997 to specify the period for which the offender will have to remain in prison before becoming eligible for consideration for release on parole by the board. The period which the judge selects for this purpose is a period which is commensurate with the seriousness of the offence or the combination of the offence and other offences associated with it. The question whether the offender should then be released, bearing mind the need to protect the public, is for the board. It must direct release when it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined (see s 28(6)(b) of the 1997 Act). But if the judge selects a determinate sentence, as the judge did in this case, there is no such requirement. The date when the offender becomes eligible for consideration by the board is fixed by statute. Section 35 of the 1991 Act provides that, after a prisoner who is serving a sentence of imprisonment for a term of four years or more (a 'long-term prisoner') has served half his sentence, the Secretary of State may, if recommended to do so by the board, release him on licence.

[22] For the appellant Mr Fitzgerald QC submits that a longer than commensurate sentence which is imposed under s 2(2)(b) of the 1991 Act contains two distinct components. The first is the punitive component. The second is, as he put it, the preventative one. On his analysis the second part commences when the punitive part of the sentence expires. His argument is that the lawfulness of the preventative part of the sentence depends on whether the prisoner continues to present an unacceptable risk to the public throughout this period. He submits that, as dangerousness is liable to change over time, this is not something that a judge can predict at the time of sentencing. So, if the sentence is not to be regarded as arbitrary during the preventative part, its lawfulness requires to be re-determined by the Parole Board periodically in accordance with art 5(4) of the convention as soon as the punitive part of it has been served.

[23] For the Parole Board Mr Pannick QC submits that the requirements of art 5(4) are fully satisfied where the prisoner is serving a determinate sentence which has been fixed by the judge at the time of sentencing. According to his argument there is nothing arbitrary about a sentence which has been imposed for a fixed period by a judge even if the period has been selected partly by reference to factors that may change over time. This is because the decision about the length of the sentence is a judicial decision which is taken in open court in the light of all the information available to the judge at the time of sentencing. It is the judicial nature of the decision which distinguishes these cases from those where decisions as to the length of the detention are in the hands of the Executive.

ARTICLE 5

[24] The relevant provisions of art 5 of the convention are the following:

'1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court ...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be

decided speedily by a court and his release ordered if the detention is not lawful.' a

[25] The general rule is that detention in accordance with a determinate sentence imposed by a court is justified under art 5(1)(a), without the need for further reviews of detention under art 5(4) (see David Feldman *Civil Liberties and Human Rights in England and Wales* (2nd edn, 2002) p 446). Article 5(1)(a) is concerned with the question whether the detention is permissible. Its object and purpose is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion, and its provisions call for a narrow interpretation (see *Winterwerp v Netherlands* (1979) 2 EHRR 387 at 402 (para 37)). The conviction does not have to be lawful in order to satisfy this requirement, but the detention must be. This means (i) that it must be lawful under domestic law, (ii) that it must conform to the general requirements of the convention as to the quality of the law in question—its accessibility and the precision with which it is formulated and (iii) that it must not be arbitrary because, for example, it was resorted to in bad faith or was not proportionate (see *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 4 All ER 15 at 29–30, [2001] 2 AC 19 at 38; *McLeod v UK* [1999] 1 FCR 193 at 105 (para 41)). Detention in accordance with a lawful sentence of imprisonment imposed by a judge on the prisoner for an offence of which he has been convicted satisfied these requirements. b c d

[26] Article 5(4), on the other hand, is concerned with the need for the detention to be reviewed in order that it may be determined whether it is lawful both in terms of domestic law and in terms of the convention. Its purpose is to ensure that a system is in place for the lawfulness of the detention to be decided speedily by a court and for release of the detainee to be ordered if it is not lawful. The general rule, as I have said, is that detention in accordance with a determinate sentence imposed by a court is regarded as justified under art 5(1)(a) without the need for any further reviews of the detention to be carried out under art 5(4). The question which Mr Fitzgerald has raised is whether that rule, which undoubtedly applies to determinate sentences imposed under s 2(2)(a), can be applied also to determinate sentences imposed under s 2(2)(b) of the 1991 Act. It was agreed that the answer to it is to be found in the jurisprudence of the European Court of Human Rights, to which I now turn. e f

THE STRASBOURG JURISPRUDENCE g

[27] The European Court of Human Rights has made it clear from the earliest days that a clear distinction exists between decisions depriving a person of his liberty which are made by an administrative body on the one hand and by a court on the other. In *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373 at 407 (para 76) the court said: h

> 'At first sight, the wording of Article 5 (4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty ... Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5 (4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case, the supervision required by Article 5 (4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is j

pronounced after "conviction by a competent court" (Art. 5 (1) (*a*) of the Convention).'

[28] In *Winterwerp v Netherlands* (1979) 2 EHRR 387 at 408 (para 55), the court observed that the European Commission of Human Rights (the Commission), citing its own case law, had put forward the view that, as it stood, the conclusion by the court in *De Wilde*'s case could not be sustained in the case of confinement of persons of unsound mind, at any rate when the confinement was for an indefinite period. This was because the reasons initially warranting confinement of persons on the ground of unsound mind might cease to exist. Consequently, it would be contrary to the object and purpose of art 5 to interpret para 4 of that article as making this category of confinement immune from subsequent review of lawfulness merely provided the initial decision issued from a court. The very nature of the deprivation of liberty under consideration appeared to require a review of lawfulness to be available at reasonable intervals. The Commission's views were upheld by the court in that case. But it was made clear (at 408 (para 57)) that the detention of persons of unsound mind constituted a special category. By virtue of art 5(4) therefore a person of unsound mind who is compulsorily detained in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court for the determination of the lawfulness of his detention (see *X v UK* (1981) 4 EHRR 188 at 207 (para 52)).

[29] The European Court of Human Rights has recognised that offenders sentenced to discretionary life imprisonment also fall into a special category. In *Weeks v UK* (1988) 10 EHRR 293 the applicant, who was aged 17, had been convicted of armed robbery and sentenced to life imprisonment in the interests of public safety because he was considered both by the trial judge and the Court of Appeal to be dangerous. The court said (at 310 (para 46)):

> 'The Court agrees with the Commission and the applicant that the clearly stated purpose for which [the] sentence was imposed, taken together with the particular facts pertaining to the offence for which he was convicted, places the sentence in a special category.'

Later in the same paragraph (at 311) the court observed that, in substance, Mr Weeks was being put at the disposal of the state because he needed continued supervision in custody for an unforeseeable length of time and, as a corollary, periodic reassessment in order to ascertain the most appropriate way of dealing with him, and added:

> 'The grounds expressly relied on by the sentencing courts for ordering this form of deprivation of liberty against Mr. Weeks are by their very nature susceptible of change with the passage of time, whereas the measure will remain in force for the whole of his life. In this, his sentence differs from a life sentence imposed on a person because of the gravity of the offence.'

In *Wynne v UK* (1995) 19 EHRR 333 at 347 (para 35) the court held that the mandatory life sentence belonged to a different category because it is imposed automatically as punishment for the offence of murder irrespective of conditions pertaining to the dangerousness of the offender. It saw this as an essential distinction between the two types of sentence.

**[30]** In *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666 the applicants had each received discretionary life sentences. They complained about the lack of a regular judicial scrutiny of the lawfulness of their detention and, in the case of the second and third applicants, their re-detention. The court said (at 693 (para 73)) that it was not persuaded that it was impossible to disentangle the punitive and security components of such sentences:

> 'Although the dividing line may be difficult to draw in particular cases, it seems clear that the principles underlying such sentences, unlike mandatory life sentences, have developed in the sense that they are composed of a punitive element and subsequently of a security element designed to confer on the Secretary of State the responsibility for determining when the public interest permits the prisoner's release.'

Having examined the judgments of the sentencing courts in each case the court concluded (at 694 (para 76)) that in each of them the punitive period of the discretionary life sentence had expired.

> 'Having regard to the foregoing, the Court finds that the detention of the applicants after the expiry of the punitive periods of their sentences is comparable to that at issue in *Van Droogenbroeck v Belgium* ((1982) 4 EHRR 443) and *Weeks v UK* ((1988) 10 EHRR 293): the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at this phase in the execution of their sentences, the applicants are entitled under Article 5(4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court.'

**[31]** There is an obvious link between the analysis of the discretionary life sentence which was undertaken in that case and a determinate sentence which is longer than one which is commensurate with the offence passed under s 2(2)(b) of the 1991 Act. In both cases, it can be said, there is a punitive element and a protective or security element. In both cases, it can be said, the factors which justified the protective or security element are susceptible to change with the passage of time. That, in essence, is the basis of Mr Fitzgerald's argument. As he puts it, determinate sentences which are partly punitive and partly preventative are in the same category. He says that they too require a determination, once the preventative phase is entered, as to whether that characteristic is still there and a review of that question thereafter at reasonable intervals.

**[32]** But there is one other point about the discretionary life sentence which emerges from these judgments which a determinate custodial sentence does not share. As the court observed, the effect of a discretionary life sentence was to put the prisoner at the disposal of the state (see *Weeks v UK* (1988) 10 EHRR 293 at 311 (para 46)). This was because it conferred on the Secretary of State the responsibility of determining when the public interest permitted the prisoner's release (see *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666 at 693 (para 73)).

**[33]** The procedure for periodic review of the public safety element has now been changed, following the decision of the European Court of Human Rights in *Hussain v UK* (1996) 22 EHRR 1, in which it was held that there had been a violation of art 5(4) because the applicant who had been detained at Her Majesty's pleasure was unable, after the expiry of his punitive period, to bring the

case of his continued detention before a court. The court said (at 25 (para 54)) that he was entitled under art 5(4) to have the issue of his dangerousness to society, a characteristic susceptible to change with the passage of time, decided by a court at reasonable intervals (see also *Stafford v UK* (2002) 13 BHRC 260 at 282 (para 87)). A review of the protective element at reasonable intervals conducted by a judicial body at an oral hearing under the rules of the Parole Board satisfies the requirement which these decisions of the European Court identified. But does art 5(4) give rise to the same requirement where, as happens in the case of a determinate sentence, the length of the sentence is determined by the sentencing court at the outset—where, in other words, the length of time that is needed to satisfy the protective element is incorporated in the court's decision and is not left to the Executive?

**[34]** In order to find an answer to this question it is necessary to go back in time to *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 and *E v Norway* (1990) 17 EHRR 30, as these decisions formed an important part of the jurisprudence which the court examined in *Thynne*'s case and in *Weeks*' case.

**[35]** In *Van Droogenbroeck*'s case the applicant was sentenced by the criminal court to two years' imprisonment for theft and attempted theft. He had a previous conviction for aggravated theft and he was thought to have manifested a persistent tendency to crime. So he was ordered to be placed at the government's disposal for ten years on the ground that he was a recidivist. Under Belgian law this disposal, which was provided for by the Social Protection Act 1964 in the case of recidivists and habitual offenders and was subject to appeal, was classified not as a security measure but as a penalty which formed an inseparable whole together with the principal penalty. But it also conferred a wide measure of discretion on the Minister of Justice in deciding how the penalty should be implemented. The measures which were at his discretion under the statute included the offender's conditional release either at the end of the principal sentence or during the course of his detention.

**[36]** Before the Commission it was argued for the respondent government under reference to *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373 that the applicant's detention, which was imposed by virtue of a court sentence, was simply an execution of that sentence and that it could not form the subject of proceedings under art 5(4) distinct from those which were embodied in the court's conviction and sentence. As the Commission noted (see report of the Commission, 9 July 1980, p 26 (para 62)), this raised the question whether the principle stated by the court 'of the incorporation of the control' provided for in art 5(4) in the original court decision can be applied in circumstances where neither the law nor the court specified a minimum or normal duration for the deprivation of liberty. Having regard to the nature of the deprivation of liberty and to factors which might affect its lawfulness subsequent to the original court decision, the Commission upheld the complaint. The key to its reasoning, for present purposes, is to found at p 27 (para 64):

> 'The most significant feature of detention ordered in connection with placing at the government's disposal is, as has already been pointed out, the relative indetermination of its duration. Depending on the case and the relevant administrative decisions, it may vary from nothing to ten years. No minimum duration is fixed by the law *or the court*; the detention may continue for a maximum period of ten years, without the court which ordered the measure exercising the least control over it. In fact, the

administration is responsible for adjusting the penalty to the circumstances of the individual.' (My emphasis.)

[37] The approach which the court adopted ((1982) 4 EHRR 443 at 456 (para 38)) was to look beyond the appearances and the language used and concentrate on the realities of the situation. Considering first the question whether there had been a violation of art 5(1)(a), the conclusion which it drew, adopting the language used by the Commission's delegate, was that the court decision does not 'order' the detention of recidivists and habitual offenders but 'authorises' it. The task which it then set itself was to consider whether there was a sufficient connection between that decision and the deprivation of liberty. It answered this question in the affirmative, since the minister's discretion was exercised within a framework set both by the statute and by the sentence pronounced by the court. So there was no violation of art 5(1)(a). But it took a different view of the question whether there had been a violation of art 5(4). It noted that, in practice, the court's decision provided the Minister of Justice with initial authority for detention for a period whose actual duration was striking for its relatively indeterminate character and could vary, in principle, according to the treatment required by the offender and the demands of the protection of society. This system, it held (at 460 (para 47)), was fundamentally different from that of the conditional release of prisoners 'sentenced by a court to a period of imprisonment *imposed by the court* as being appropriate to the case' (my emphasis).

[38] Turning to the complaint under art 5(4), the court pointed out (at 458 (para 45)) that when it referred in its judgment in *De Wilde*'s case to 'the decision depriving a person of his liberty' it did not purport to deal with an ensuing period of detention in which new issues affecting the lawfulness of the detention might subsequently arise. It recalled (at 461 (para 48)) that for the purposes of art 5(4) the lawfulness of an arrest or detention had to be determined in the light not only of domestic law but also of the text of the convention, the general principles embodied in it and the aim of the restrictions permitted by art 5(1).

> 'Quite apart from conformity with domestic law, "no detention that is arbitrary can ever be regarded as 'lawful'" for the purposes of paragraph 1. This is the limit which the Minister of Justice must not exceed in the exercise of the wide discretion he enjoys in executing, or implementing, the initial court decision. This requirement is rendered all the more compelling by the seriousness of what is at stake, namely the possibility that the individual may be deprived of his liberty for up to 10 years ... or even longer ... This type of detention would no longer be in conformity with the Convention if it ceased to be based on reasons that are plausible and consistent with the objectives of the Social Protection Act; for the purposes of Article 5, it would become "unlawful".'

The court concluded (at 462 (para 49)) that the convention required an appropriate procedure allowing a court to determine speedily, on the prisoner's application, whether the Minister of Justice was entitled to hold that detention was still consistent with the object and purpose of the 1964 Act. This was not just a question of expediency. It bore on the very 'lawfulness' of the deprivation of liberty.

[39] In *E v Norway* (1990) 17 EHRR 30 the applicant had suffered serious brain damage and was an untreatable psychopath. He was convicted of numerous

violent offences and sentenced to a period of imprisonment. He was also sentenced to preventive detention under the Norwegian Penal Code, as result of which he was detained in mental hospitals. The effect of this sentence was to enable the Ministry of Justice to monitor his progress and to release or detain him when this would prove appropriate. It gave the ministry a wide discretion in deciding which of various possible security measures was to be imposed and for how long. The court observed (at 51 (para 52)) that this system shared a number of features with the Belgian system in regard to recidivists and habitual offenders which was at issue in *Van Droogenbroeck*'s case:

> 'Under such systems the courts cannot at the time of their decisions do more than assess how the person concerned will develop in the future. The authorities, on the other hand, through and with the assistance of their officers, can monitor that development more closely and at frequent intervals.'

However, there was a risk, as in *Van Droogenbroeck*'s case, that with the passage of time the link between the ministry's decision not to release or to re-detain and the initial judgment might be broken with the result that it would be transformed into a deprivation of liberty that was arbitrary.

**[40]** The important point which emerges from these two decisions for present purposes is that a distinction is drawn between detention for a period whose length is embodied in the sentence of the court on the one hand and the transfer of decisions about the prisoner's release or re-detention to the executive. The first requirement that must be satisfied is that according to art 5(1) the detention must be 'lawful'. That is to say, it must be in accordance with domestic law and not arbitrary. The review under art 5(4) must then be wide enough to bear on the conditions which are essential for a determination of this issue. Where the decision about the length of the period of detention is made by a court at the close of judicial proceedings, the requirements of art 5(1) are satisfied and the supervision required by art 5(4) is incorporated in the decision itself. That is the principle which was established in *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373. But where the responsibility for decisions about the length of the period of detention is passed by the court to the Executive, the lawfulness of the detention requires a process which enables the basis for it to be reviewed judicially at reasonable intervals. This is because there is a risk that the link between continued detention and the original justification for it will be lost as conditions change with the passage of time. If this happens there is a risk that decisions which are taken by the Executive will be arbitrary. That risk is absent where the length of the period of detention is fixed as part of its original decision by the court.

**[41]** Elias J ([2002] 1 WLR 654 at [19], [28]) understood the effect of the Strasbourg jurisprudence to be that the detention was lawful only if it continues to achieve the object for which it was imposed, and that no distinction was to be drawn in this respect between sentences which were determinate and indeterminate. In my opinion however that is not the decisive factor. The critical distinction is that which the European Court of Human Rights has made between cases where the length of the detention is fixed by the court and those where decisions about its length are left to the Executive. It is in the latter case only that new issues of lawfulness may arise in the course of the detention which were not incorporated in the original decision by the court.

[42] In *Mansell v UK* App No 32072/96 (2 July 1997, unreported), the judge imposed a longer than commensurate sentence in an indecent assault case to protect the public under s 2(2)(b) of the 1991 Act. The applicant complained that he should have been entitled to a review of the lawfulness of his detention as he was in the same position as a discretionary life prisoner because his sentence contained a preventative part as well as a punitive part. The Commission held that the application was manifestly unfounded. It recalled that the supervision required by art 5(4) is normally incorporated in the decision where a sentence of imprisonment is pronounced after conviction by a competent court (see *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373 at 407 (para 76)). It then said that there was no question of the sentence being imposed because of the presence of factors which 'were susceptible to change with the passage of time, namely mental instability and dangerousness' (see *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666 at 692 (para 70)). So the case did not fall into that special category. Rather there was, it said, 'an element of "simple" punishment as well as an element of deterrence'. The fact that what it described as 'the latter part' of the sentence had been imposed to protect the public from serious harm was accepted. But it did not affect the basic point which the Commission then sought to identify:

> 'Such an "increased" sentence is, however, no more than the usual exercise by the sentencing court of its ordinary sentencing powers, even if the "increase" has a statutory basis. In particular, nothing in the sentencing procedure indicates that the fixed term sentence of five years' imprisonment was anything other than a sentence which was imposed as punishment for the offences committed.'

[43] Mr Fitzgerald said that the Commission had misunderstood the nature of the sentence which the judge had passed in that case. It was also a decision by the Commission and not by the court. He submitted that, as it was not part of the clear and constant part of the court's jurisprudence, it should be treated with caution especially as there was no avenue for redressing what he said was its erroneous understanding of the nature and rationale of the sentence.

[44] It is true that it was a decision by the Commission only, and I note that in the Court of Appeal Kennedy LJ ([2002] 3 All ER 1123 at [17], [2003] 2 WLR 196 at [18]) said that he had difficulty in following some of the reasoning. But it seems to me that on all the essential points its reasoning was consistent with the court's jurisprudence. The Commission's observation that there was no question of the sentence being imposed because of factors that were susceptible to change has to be read in the light of the previous sentence in which the sentence is described as a 'fixed term sentence' and the discussion in the previous paragraph of the cases to which the normal rule in *De Wilde*'s case does not apply. The point is then made that what the Commission described as 'the increased sentence' was no more than the usual exercise by the sentencing court of its ordinary sentencing powers. That provides the context for the final observation that there was nothing to indicate that the fixed-term sentence was anything other than a sentence which was imposed as punishment for the offences committed. It was to be contrasted, in other words, with an indeterminate sentence where the circumstances which were thought by the court initially to warrant detention might cease to exist. As Kennedy LJ said, the case was one where a period of time

was fixed precisely because the sentencing judge considered that he was in a position to fix it.

**[45]** I do not accept Mr Fitzgerald's criticism of this decision, although I agree that it might have been better expressed. Properly understood, it seems to me to fit in well with the other cases and to be consistent with what I take from the court's jurisprudence to be the guiding principles.

**[46]** In *Silva Rocha v Portugal* (1996) 32 EHRR 333 the applicant went to trial on charges of aggravated homicide and illegal possession of weapons. The facts were found to have been established, but the court also found that his mentally disturbed state prevented a finding of criminal responsibility. It held that he was a dangerous person who could not be responsible for his actions and ordered him to be detained in a psychiatric asylum. In accordance with the Portuguese Criminal Code this security measure was to remain in force for a minimum period of three years. The Portuguese government said that this period had been fixed for general deterrence reasons. The applicant challenged the lawfulness of his detention under art 5(1) and maintained that there had been a violation of art 5(4) because there was no provision for judicial supervision of his confinement. The Commission held that the case could not be distinguished from the cases of *Winterwerp v Netherlands* (1979) 2 EHRR 387 and *X v UK* (1981) 4 EHRR 188 and declared his complaint admissible. But the court held, by six votes to three, that there was no violation.

**[47]** The court held that the applicant had been lawfully detained within the meaning of art 5(1). It gave the following reasons for its decision that there had been no violation of art 5(4) ((1996) 32 EHRR 333 at 344):

> '28 The case involved a homicide committed by a person who could not be held responsible for his actions and who was at the same time dangerous. The seriousness of the offences together with the risk that he represented for himself as well as for others could reasonably justify his being removed from society for at least three years.
>
> 29 For that period the review required by Article 5(4) of the Convention was incorporated in the detention decision taken in this instance by the Oporto Criminal Court.
>
> 30 It was therefore not until those three years had elapsed that the applicant's right to "take proceedings by which the lawfulness of his detention shall be decided ... by a court" at reasonable intervals took effect. In this respect the Court notes that the legislation applied to Mr Silva Rocha (Article 93 of the Criminal Code), provided for a periodic and automatic judicial review after two years and made it possible for the person detained to apply to the court at any moment to have the detention measure lifted.'

The court concluded (at 344 (para 31)) that the intervals between the reviews were not excessive in these circumstances and noted that Mr Silva Rocha was discharged as soon as he had ceased to be dangerous.

**[48]** Mr Pannick said that this judgment recognised that, where a person had been detained by a judicial decision for a fixed period, the fact that this was by reason of a factor which might change over time did not give rise to a right for the sentence to be further reviewed by a court during that period. Mr Fitzgerald, on the other hand, submitted that the ratio of the case was concerned solely with the length of time which could elapse between reviews. The court's finding, he said, was simply that it was not unreasonable in the case of a person who had

committed such a serious offence for the first review to be delayed for at least two years from the actual time of sentence. The context was that of a period which had been selected for reasons of general deterrence, not the characteristics of the offender.

**[49]** I think that it would be unwise to draw any firm conclusions from this judgment other than that the court was seeking to find an answer to the question raised by the unusual facts of the case which was in keeping with the jurisprudence established by the earlier cases. The reasons for the decision in the court's judgment are far from elaborate. Three of the judges in the majority took the unusual step of annexing concurring opinions to the court's judgment, and a dissenting opinion by the minority was also annexed to it. The President, Judge Ryssdal, who was in the majority, said (at 345) that the facts as assessed by the competent domestic courts showed that the applicant's mental disorder and his danger to society persisted throughout the period of three years and that on the facts there had been no violation. It was indeed the fact that there had been a series of reviews at reasonable intervals, and the applicant was discharged as soon as he had ceased to be considered dangerous. The case is best seen as a decision on its own facts which does not add to or detract from the guidance which is to be obtained from the other cases.

**[50]** A convenient summary of the guidance which is to be obtained from the Strasbourg jurisprudence is to be found in *Iribarne Perez v France* (1995) 22 EHRR 153. The applicant's complaint in that case was that, having been convicted and sentenced in Andorra, no provision had been made for the lawfulness of his detention to be reviewed in France where he had chosen to serve his sentence. The court, holding that there had been no violation, said (at 173–174 (para 30)):

> 'The Court refers to its case law on this question. The review required by Article 5(4) is incorporated in the decision depriving a person of his liberty when that decision is made by a court at the close of judicial proceedings; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" within the meaning of Article 5(1)(a) of the Convention. Only the "initial decision" is contemplated, not "an ensuing period of detention in which new issues affecting the lawfulness of the detention might subsequently arise". [Reference is made in footnotes to *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373 and *X v UK* (1981) 4 EHRR 188 at 206 (para 51).] However, Article 5(4) sometimes requires the possibility of subsequent review of the lawfulness of detention by a court. This usually applies to the detention of persons of unsound mind within the meaning of paragraph 1(e), where the reasons initially warranting confinement may cease to exist: "... it would be contrary to the object and purpose of Article 5 ... to interpret paragraph 4 thereof ... as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court". [Reference is made in a footnote to *Winterwerp v Netherlands* (1979) 2 EHRR 387 at 407–408 (para 55) and to *X v UK* (1981) 4 EHRR 188 at 206–207 (para 52).] The same principle applies to the detention "after conviction by a competent court" mentioned in paragraph 1(a), but only in certain quite specific circumstances. These include, for example, the placing of a recidivist at the Government's disposal in Belgium, the continuing detention of a person sentenced to an "indeterminate" or "discretionary" life sentence in Great Britain and the detention for security reasons of a person with an

underdeveloped or permanently impaired mental capacity in Norway.' [Reference is made in footnotes to *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443; *Weeks v UK* (1988) 10 EHRR 293; *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666; and *E v Norway* (1990) 17 EHRR 30.]

CONCLUSION

[51] It is plain from this summary that the basic rule which the court laid down in *De Wilde*'s case continues to apply. Where the prisoner has been lawfully detained within the meaning of art 5(1)(a) following the imposition of a determinate sentence after his conviction by a competent court, the review which art 5(4) requires is incorporated in the original sentence passed by the sentencing court. Once the appeal process has been exhausted there is no right to have the lawfulness of the detention under that sentence reviewed by another court. The principle which underlies these propositions is that detention in accordance with a lawful sentence passed after conviction by a competent court cannot be described as arbitrary. The cases where the basic rule has been departed from are cases where decisions as to the length of the detention have passed from the court to the Executive and there is a risk that the factors which informed the original decision will change with the passage of time. In those cases the review which art 5(4) requires cannot be said to be incorporated in the original decision by the court. A further review in judicial proceedings is needed at reasonable intervals if the detention is not to be at risk of becoming arbitrary.

[52] I would hold that the present case falls within the basic rule. The review which art 5(4) requires was incorporated in the sentence which the judge passed under s 2(2)(b) of the 1991 Act. This is because he fixed the period of the sentence which was needed to protect the public from serious harm. He was able to take this decision in the light of the information before him and, in the exercise of his ordinary powers of sentencing, to decide on the total length of the sentence which in all the circumstances was appropriate. As he was able to take this decision at the outset there is no risk that detention for the minimum period fixed by the sentence will become arbitrary. The appellant has no further right under art 5(4) to have his detention for the minimum period fixed by that sentence reviewed judicially.

[53] For these reasons, and for those given by my noble and learned friend Lord Bingham of Cornhill, I would dismiss the appeal.

**LORD HUTTON.**

[54] My Lords, on 10 January 1997, following pleas of guilty, the appellant was sentenced to four years' imprisonment for an offence of unlawful wounding and, consecutively, to a period of three years' imprisonment for an offence of assault occasioning actual bodily harm. The total sentence of seven years' imprisonment was imposed pursuant to the powers contained in s 2 of the Criminal Justice Act 1991 which provides:

'(1) This section applies where a court passes a custodial sentence other than one fixed by law.

(2) The custodial sentence shall be—(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it; or (b) where the offence is a violent or

sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.

(3) Where the court passes a custodial sentence for a term longer than is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it, the court shall—(a) state in open court that it is of the opinion that subsection (2)(b) above applies and why it is of that opinion; and (b) explain to the offender in open court and in ordinary language why the sentence is for such a term.

(4) A custodial sentence for an indeterminate period shall be regarded for the purposes of subsections (2) and (3) above as a custodial sentence for a term longer than any actual term.'

[55] In passing sentence in the Crown Court at Nottingham Judge Bennett stated:

'I am satisfied that the offences that you have committed led to physical injury to persons and are, accordingly, offences of violence within the law and I am of the opinion that it is necessary to pass a custodial sentence which is longer than the sentence which would be commensurate with the seriousness of the offences in order to protect the public and Mr Johnson in particular from serious harm from you.'

[56] In his judgment on the appeal by the Secretary of State to the Court of Appeal from the decision of Elias J ([2001] EWHC Admin 834, [2002] 1 WLR 654), May LJ accurately summarised the nature of the sentence imposed on the appellant as follows (omitting sub-para (c) which refers to judgments of the European Court of Human Rights) ([2002] EWCA Civ 951 at [18], [2002] 3 All ER 1123 at [18], [2003] 2 WLR 196):

'(a) A sentence under s 2(2)(b) of the Criminal Justice Act 1991—now s 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000—is a single determinate sentence, the product of a judicial decision. (b) Although the sentence is longer than it otherwise would have been because the sentencing judge is of the opinion that it is necessary to protect the public from serious harm from the offender, (i) the length of the sentence is, and is intended to be, determined by the judge at the time of sentence; (ii) it is not intended to be reviewed, other than on appeal; and (iii) in particular, it is not intended to confer on the executive the responsibility for determining when the public interest permits the prisoner's release ... (d) Section 2(2)(b) applies to violent or sexual offences where the court is of the opinion that it is necessary to protect the public from serious harm from the offender. In some such combined circumstances, an indeterminate sentence may be an available alternative. Even if that is not so, and although the sentence requires an element of judicial prediction, the choice of sentence is a judicial decision that a longer term necessary to protect the public should be determined at the time of sentence.'

[57] The appellant submits that his continued detention under the sentence passed upon him after the punitive period of the sentence had expired constituted an infringement of his rights under art 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provides:

> 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

The appellant contends that the period of his sentence imposed to protect the public and not for the purpose of punishment constituted arbitrary detention because he did not have the right, after he had served the punitive part of his sentence, to apply to a court to decide whether it was still necessary to detain him in order to protect the public.

**[58]** At first sight this would seem to be a difficult argument to advance because the sentence of seven years which the appellant served would appear to fall squarely within sub-para (a) of art 5(1) of the convention which provides:

> 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court …'

Moreover in *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373 at 407 (para 76) the European Court of Human Rights stated:

> 'Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5 (4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case, the supervision required by Article 5 (4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" (Art. 5(1)(*a*) of the Convention).'

**[59]** However Mr Fitzgerald QC, for the appellant, submits that the jurisprudence of the European Court establishes that where a sentence of imprisonment consists of a punitive period at the outset followed by a further period designed to protect the public from the danger arising from the defendant's propensity to violence, the factor of the defendant's propensity to violence which influenced the sentencing judge to impose the additional period of imprisonment may change over the passage of time, and therefore the defendant is entitled to require a court to decide whether he should continue to be detained, and the denial of such a right makes the second period of his detention arbitrary.

**[60]** This argument is set out in the appellant's written case:

> 'A longer than commensurate determinate sentence comprises two distinct components. The first is punitive and on the expiration of this part the second, preventative phase of the sentence commences. The lawfulness of detention in this phase depends on whether the prisoner continues to pose an unacceptable risk. Dangerousness is a characteristic susceptible to change over time. The pronouncement of sentence by the sentencing judge is not, and is not capable of being, decisive as to the lawfulness of detention throughout the preventative phase. This is because the court can do no more than estimate for how long the offender may continue to pose an

unacceptable risk. To prevent arbitrary detention the court can only *authorise* detention in the preventative phase as long as the offender continues to pose a danger. The lawfulness of detention falls to be re-determined in accordance with art 5(4) by reference to the question of ongoing dangerousness as soon as the punitive phase ceases to govern detention, and by reason of the changeable quality of dangerousness, at reasonable intervals thereafter ...'

**[61]** In courts throughout the United Kingdom it has been common for a sentencing judge, where he or she thinks it right to do so, to increase within reasonable bounds a sentence for a crime of violence in order to protect the public against the violent propensities of the accused. In *R v Sargeant* (1974) 60 Cr App R 74 at 77–78, Lawton LJ, a judge of great experience in the sphere of criminal law, stated:

'What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing ... We come now to the element of prevention. Unfortunately it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period.'

**[62]** One year earlier the same judge delivered the judgment of the Court of Appeal in *R v King, R v Simpkins* (1973) 57 Cr App R 696. In that case two men carried out a number of offences, including going equipped for stealing, burglary, possessing an imitation pistol, and carrying offensive weapons, which included an unloaded revolver for which they had no ammunition. They pleaded guilty to the charges against them. Their counsel read out a statement by them expressing anarchical views which included the passage (at 700–701):

'The police uphold the laws, which in turn ensure the safety of the capitalist exploiters and their system. Therefore the police, police stations and Courts are legitimate targets for acts of violence which are necessary to bring about badly needed changes in the structure of our society. Other legitimate targets are government ministers, officials and buildings, prisons and prison staff and troops.'

The judge was clearly influenced very considerably by this statement and it led him to impose the maximum sentence on each count to which the defendants had pleaded. In the Court of Appeal Lawton LJ observed that the offences for which the judge had passed these sentences were clearly not the worst of their kind and that therefore the maximum sentences should not have been imposed. He then said (at 702–703):

'The learned judge increased the sentences because of the statement read to the Court, and because of his view, for which there was ample evidence, that these young men were enemies of society. But the Court has to bear in

mind that in our system of jurisprudence there is no offence known as being an enemy of society. The Court is concerned with the offences charged in the indictment. It may well be that at a trial the evidence establishes that those who have committed the offences charged are dangerous men. When the evidence establishes that the Court has no reason for mitigating the penalties in any way. If the evidence does establish that the accused are dangerous men, then it is no good their saying that they have no previous convictions, or that they are still young men. The evidence cancels out such mitigation as there is. But the fact remains that the correct principle for sentencing is to sentence for the offences charged and on the facts proved or admitted. In those circumstances the Court adjudges that these sentences will have to be altered.'

[63] In *R v King, R v Simpkins* the accused had not committed crimes of violence against other persons and the sentences imposed upon them by the judge were, in reality, sentences of preventive detention. Therefore I consider that the observations of Lawton LJ in that case and in *R v Sargeant* were not in conflict but were reflecting the distinction referred to by Mason CJ in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 473:

'It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.'

[64] The question to be determined in the present case is whether the effect of art 5 of the convention, interpreted in accordance with the jurisprudence of the European Court, is that the appellant's post-punitive period of imprisonment pursuant to the determinate sentence passed upon him under s 2(2)(b) of the 1991 Act constituted detention which violated his rights under art 5(4).

[65] Mr Fitzgerald relies on the judgments of the European Court in *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, *E v Norway* (1990) 17 EHRR 30 and *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666. In the former case the applicant was sentenced to two years' imprisonment for theft and attempted theft and the court also ordered that he be 'placed at the Government's disposal' for ten years pursuant to s 23 of the Social Protection Act of 1 July 1964, the court noting that the applicant was a recidivist who had been sentenced by a criminal court on 9 April 1968 to two years' imprisonment for aggravated theft and who manifested a persistent tendency to crime. The court held that there had been a violation of art 5(4) because the applicant was entitled to a review of his detention once he had served his sentence of two years' imprisonment and had been placed at the government's disposal. An important part of the reasoning of the court is set out at 457 (para 40):

'In fact, sight must not be lost of what the title and general structure of the 1964 Act, the drafting history and Belgian case law show to be the objectives of this statute, that is to say not only "to protect society against the danger presented by recidivists and habitual offenders" but also "to provide [the

Government] with the possibility of endeavouring to reform [them]". Attempting to achieve these objectives requires that account be taken of circumstances that, by their nature, differ from case to case and are susceptible of modification. At the time of its decision, the court can, in the nature of things, do no more than estimate how the individual will develop in the future. The Minister of Justice, for his part, is able, through and with the assistance of his officials, to monitor that development more closely and at frequent intervals but this very fact means that with the passage of time the link between his decisions not to release or to re-detain and the initial judgment gradually becomes less strong. The link might eventually be broken if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5.'

[66] The court also stated (at 460–461 (paras 47–48)):

'In practice, the court's decision provides the Minister of Justice "with initial authority for detention for a period ... whose actual duration"—"from nothing to 10 years"—is striking for its relatively indeterminate character and will vary, in principle, according to the treatment required by the offender and the demands of the protection of society ... As the Commission pointed out in paragraph 66 of its report, this system is fundamentally different from that—on which the Court does not have to express an opinion on this occasion—of the conditional release of prisoners sentenced by a court to a period of imprisonment imposed by the court as being appropriate to the case. The discretion enjoyed by the Minister of Justice under the 1964 Act implies that he should, throughout the period of application of the measure, direct his mind to the need to deprive or continue to deprive the person concerned of his liberty or to the absence or disappearance of such a need. "Persistent tendency to crime" and "danger to society" are essentially relative concepts and they involve monitoring the development of the offender's personality and behaviour in order to adapt his situation to favourable or unfavourable changes in his circumstances. To a certain extent this was recognised both by the Belgian legislature when it made it possible for the Court of Appeal to grant release from the effects of the initial judgment and by the Government when they set up the Recidivists Board and associated "medical officers specialised in psychology" with the decisions taken by the Minister. It must therefore be asked whether the very logic of the Belgian system does not require subsequent judicial review, at reasonable intervals, of the justification for the deprivation of liberty. If one were to consider such justification to have been established once and for all at the moment of conviction, this would amount, in a way, to a presumption that the detention would produce no useful result ... Quite apart from conformity with domestic law, "no detention that is arbitrary can ever be regarded as 'lawful'" for the purposes of paragraph 1. This is the limit which the Minister of Justice must not exceed in the exercise of the wide discretion he enjoys in executing, or implementing, the initial court decision. This requirement is rendered all the more compelling by the seriousness of what

is at stake, namely the possibility that the individual may be deprived of his liberty for up to 10 years (s. 23 of the Act) or even longer (s. 22). This type of detention would no longer be in conformity with the Convention if it ceased to be based on reasons that are plausible and consistent with the objectives of the Social Protection Act; for the purposes of Article 5, it would become "unlawful".'

[67] In *E v Norway* (1990) 17 EHRR 30 at 40–41 (para 34) the applicant was an untreatable psychopath who had been convicted of numerous offences of violence. He was sentenced to a term of imprisonment and the court also made an order under art 39 of the Penal Code which provided:

'1. If an otherwise punishable act is committed ... by someone with an underdeveloped or permanently impaired mental capacity and there is a danger that the offender, because of his condition, will repeat such an act, the court may authorise the prosecuting authority, as a security measure, to ... (e) place him, whenever this is possible, in a mental hospital, sanatorium, nursing home or security ward, in accordance with the general provisions promulgated by the King; (f) keep him in detention in prison.'

Pursuant to this order the applicant had been detained in various mental hospitals and prisons for a considerable number of years. He alleged a breach of art 5(4) in that, while in detention, he had not had access to a court as required by para (4). The European Court applied the principle it had stated in *Van Droogenbroeck*'s case and held that art 5(4) was applicable to the applicant's detention under art 39 of the Penal Code. The court stated (at 51 (para 52)):

'Under Article 39 of the Penal Code the Ministry of Justice has a wide discretion in deciding which security measure is to be imposed and for how long. In fact, this system shares a number of features with the Belgian system in regard to recidivists and habitual offenders which was at issue in the *Van Droogenbroeck* case.'

[68] In *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666 discretionary life sentences had been imposed on the applicants because, in addition to the need for punishment, they had each been considered by the court as dangerous and suffering from a mental or personality disorder which required treatment. Therefore their sentences each contained a punitive element and a preventative element, and the final decision on the prisoner's release rested with the Home Secretary. The court held that as the punitive period of detention had expired in each case the applicants were entitled to subsequent judicial control of their detention by virtue of art 5(4) and that there had been a violation of that paragraph of the article in the case of all three applicants. The court stated (at 693 (para 73)):

'it seems clear that the principles underlying such sentences, unlike mandatory life sentences, have developed in the sense that they are composed of a punitive element and subsequently of a security element designed to confer on the Secretary of State the responsibility for determining when the public interest permits the prisoner's release.'

And at 694 (para 76):

'Having regard to the foregoing, the Court finds that the detention of the applicants after the expiry of the punitive periods of their sentences is comparable to that at issue in (*Van Droogenbroeck v Belgium* (1982) 4 EHRR 443) and (*Weeks v UK* (1988) 10 EHRR 293): the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at this phase in the execution of their sentences, the applicants are entitled under Article 5(4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court.'

**[69]** Mr Fitzgerald submits that as stated by the European Court in *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 at 461 (para 48): 'no detention that is arbitrary can ever be regarded as "lawful" for the purposes of paragraph 1 [of art 5]', and that detention under the post-punitive part of a determinate sentence passed pursuant to s 2(2)(b) of the 1991 Act is arbitrary because the dangerous propensity of the prisoner which existed at the time of the sentence may have changed with the passage of time and may require reassessment.

**[70]** I am unable to accept this submission because I consider that the judgments of the European Court on which Mr Fitzgerald relies do not support it and are distinguishable from the present case. I am further of opinion that there are decisions of the European Commission of Human Rights (the Commission) and of the European Court which are directly contrary to the submission. I consider that the essential element in the reasoning in *Van Droogenbroeck*'s case, in *E*'s case and in *Thynne*'s case is that after the expiration of the period of detention for punishment the decision as to the further period for which the prisoner should be detained was handed over to the government. It is expressly stated in *Van Droogenbroeck*'s case (at 444 (para 9)) that the applicant was 'placed at the Government's disposal'. The applicant submitted (at 455 (para 36)) that 'the deprivations of liberty complained of stemmed not from a sentence imposed by a "competent court" but from decisions taken by the Minister of Justice' and it is clear that the court accepted this submission. It was for this reason that the court stated (at 457 (para 40)) that because the Minister of Justice could monitor how the prisoner was developing—

'with the passage of time the link between his decisions not to release or to re-detain and the initial judgment gradually becomes less strong. The link might eventually be broken if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives.'

**[71]** The same reasoning informs the judgment of the European Court in *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666 at 693 (para 73). The court stated in relation to a life sentence that, after the punitive period, there is 'a security element designed to confer on the Secretary of State the responsibility for determining when the public interest permits the prisoner's release'. Making a clear reference to this responsibility conferred on the Secretary of State, the court then states (at 694 (para 76)):

'Having regard to the foregoing, the Court finds that the detention of the applicants after the expiry of the punitive periods of their sentences is

comparable to that at issue in the *Van Droogenbroeck* and *Weeks* cases: the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention.'

[72] The present case is distinguishable from *Van Droogenbroeck*'s case, *E*'s case and *Thynne*'s case because here no discretion or responsibility was given to a government minister to decide when the prisoner should be released after he had served the punitive part of his sentence. The time when a prisoner serving a sentence of imprisonment for a term of four years or more becomes eligible for release (after having served one-half of his sentence) is fixed by s 35 of the 1991 Act, and he may only be released after that time on the recommendation of the Parole Board which acts as a judicial body. At all times the appellant was detained pursuant to the single sentence of the court and there was no breaking of the link between the initial judgment of the court and the continued detention of the appellant.

[73] It is also relevant to observe, as Mr Pannick QC for the respondents submitted, that there are a number of factors as to a defendant's future prospects, intentions and circumstances, such as his employment prospects or his family circumstances, in addition to his dangerous propensities, which a judge may properly take into account in deciding on the appropriate length of sentence, but the fact that those factors may change during the course of the sentence does not make the sentence arbitrary.

[74] In my opinion the jurisprudence of the Commission and the European Court has recognised that art 5(4) has no application where a prisoner is serving or has served a fixed-term sentence such as a sentence passed pursuant to s 2(2)(b) of the 1991 Act. In *Mansell v UK* App No 32072/96 (2 July 1997, unreported)) the applicant had served a determinate sentence imposed under s 2(2)(b) of the 1991 Act and he was thus in the same position as the appellant. He had been convicted on 17 December 1992 on three counts of indecent assaults on men, and he had been previously convicted in 1986 for an indecent assault and kidnapping of another man. In sentencing the applicant the judge stated that although a sentence of two-and-a-half years would normally be appropriate for an act of indecent assault, in his judgment, for reasons of protection of the public, the proper sentence was five years' imprisonment. The applicant claimed that there had been a violation of his rights under art 5(4) because his 'longer than normal' sentence should have attracted a special form of parole review from the moment that he served the period he would have served under a normal punitive sentence. The Commission held that the application was manifestly ill founded and declared it inadmissible. In its decision the Commission stated:

'In the present case, the Commission must determine whether the applicant was entitled, under art 5(4) of the convention, to a further review of the lawfulness of his detention after the expiry of the first two-and-a-half years of his sentence. The sentence imposed on the applicant was a fixed-term sentence of five years. There is no question of the sentence being imposed because of the presence of factors which "were susceptible to change with the passage of time, namely mental instability and dangerousness" (above mentioned *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666 at 692 (para 70)). Rather, there was an element of "simple" punishment as well as an element of deterrence. It is true that the latter part

of the sentence was imposed pursuant to s 2 of the 1991 Act, which provides for sentences in the case of violent or sexual offences to be longer than "normal" in order to protect the public from serious harm. Such an "increased" sentence is, however, no more than the usual exercise by the sentencing court of its ordinary sentencing powers, even if the "increase" has a statutory basis. In particular, nothing in the sentencing procedure indicates that the fixed-term sentence of five years' imprisonment was anything other than a sentence which was imposed as punishment for the offences committed. It follows that the judicial control required by art 5(4) of the convention was incorporated in the original conviction and sentence, and that art 5(4) of the convention does not apply to the parole proceedings in which the applicant was denied an oral hearing.'

[75] Mr Fitzgerald contends that this decision was erroneous because the Commission made no reference to the judgments in *Van Droogenbroeck*'s case and *E*'s case, but I consider, for the reasons which I have given, that those decisions are clearly distinguishable and that the Commission did not err in omitting any reference to them.

[76] Counsel further submitted that the Commission erred in stating that there was no question of the sentence being imposed because of a factor such as dangerousness which was susceptible to change with the passage of time and that the sentence merely contained an element of 'simple' punishment. However the words 'It is true' in the relevant passage show that the Commission was fully aware that a sentence imposed under s 2(2)(b) of the 1991 Act is longer than a normal punitive sentence, and whilst the Commission's statement that there was nothing to indicate that the five-year sentence 'was anything other than a sentence which was imposed as punishment for the offences committed' can be criticised as less than fully accurate, I consider (as did Kennedy LJ in the Court of Appeal ([2002] 3 All ER 1123 at [17], [2003] 2 WLR 196 at [18]) that what the Commission was stressing was that the 'increased' sentence was 'no more than the usual exercise by the sentencing court of its ordinary sentencing powers'; in other words the Commission was recognising, as did Lawton LJ in *R v Sargeant* (1974) 60 Cr App R 74, that protecting the public from a violent criminal is a proper part of the ordinary process of sentencing.

[77] In my opinion the decision in *Silva Rocha v Portugal* (1996) 32 EHRR 333 also supports the respondents' submission that art 5(4) does not apply to a determinate sentence passed under s 2(2)(b) of the 1991 Act. In that case the applicant had killed a neighbour and was charged with aggravated homicide and illegal possession of weapons. The Oporto Criminal Court found that on account of his mentally disturbed state the applicant was criminally irresponsible and dangerous and ordered his detention in a psychiatric institution for the minimum period of three years which was expressly required by art 91(2) of the Portuguese Criminal Code. The European Court, by a majority, rejected the applicant's allegation that there had been a violation of art 5(4) because he had been unable to have the lawfulness of his continued detention reviewed by a court at reasonable intervals. The court stated (at 344):

'28 The case involved a homicide committed by a person who could not be held responsible for his actions and who was at the same time dangerous. The seriousness of the offences together with the risk that he represented for

himself as well as for others could reasonably justify his being removed from society for at least three years.

29 For that period the review required by Article 5(4) of the Convention was incorporated in the detention decision taken in this instance by the Oporto Criminal Court.

30 It was therefore not until those three years had elapsed that the applicant's right to "take proceedings by which the lawfulness of his detention shall be decided ... by a court" at reasonable intervals took effect. In this respect the Court notes that the legislation applied to Mr Silva Rocha (Article 93 of the Criminal Code), provided for a periodic and automatic judicial review after two years and made it possible for the person detained to apply to the court at any moment to have the detention measure lifted.

31 In the present case, after the judgment of 13 July 1990 judicial reviews took place between 21 March and 29 June 1992 in February 1993 between 19 March and 3 May 1993 and over a period from the summer of 1993 to 9 January 1994. The Court considers that the intervals between the different reviews were not excessive. It notes that Mr Silva Rocha was discharged as soon as he had ceased to be regarded as dangerous.'

**[78]** Mr Fitzgerald submits that the ratio of the decision was not that art 5(4) does not apply to a fixed-term sentence imposed by a criminal court on a dangerous offender. He contends that the essential reasoning in the judgment was that in the case of a dangerous and mentally disordered offender who had taken another person's life, it was not unreasonable to delay the first judicial review for two years (the three-year period having commenced on remand and not with the order of the criminal court). He relies on paras 30 and 31 of the judgment. I am unable to accept that submission. Paragraph 23 of the court's judgment expressly records (at 342):

'The applicant complained that in any event he could be discharged only after three years even if it was established before the expiry of that period that he was no longer dangerous. Under the rules in issue there was therefore, he argued, no judicial review of the lawfulness of the detention before the expiry of the period, and that could not be regarded as reasonable under the Court's case law.'

This complaint was clearly rejected in paras 28 and 29 of the judgment and I consider that the second sentence in paras 30 and 31 on which Mr Fitzgerald relies relate to the period of detention after the three-year period required by art 91(2) of the Portugal Criminal Code had expired.

**[79]** Mr Fitzgerald submits in the alternative that the case is distinguishable from the present one because under Portuguese law the issue of general deterrence would justify the postponement of the first judicial review required by art 5(4) for a period of three years even though the object of the detention measure was primarily preventive. However, whilst this is a point of distinction from the present case, I consider that paras 28 and 29 constitute the central part of the reasoning of the judgment and support the respondents' case.

**[80]** Accordingly, I am of opinion that the decisions of the Commission and the European Court lead to the conclusion that there was no violation of art 5(4) in the present case and for the reasons which I have given, and also for those given by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead, I would dismiss this appeal.

**LORD SCOTT OF FOSCOTE.**

[81] My Lords, I have had the advantage of reading the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hutton. For the reasons they have given, with which I agree, I too would dismiss this appeal. *a*

*Appeal dismissed.*

Dilys Tausz Barrister.

# Harrow London Borough Council v Qazi

[2003] UKHL 43

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD MILLETT AND LORD SCOTT OF FOSCOTE

9, 10 JUNE, 31 JULY 2003

*Housing – Local authority – Possession – Local authority bringing automatic possession proceedings after secure tenancy terminated by operation of law – Whether automatic possession proceedings in breach of right to respect for home – Human Rights Act 1998, Sch 1, Pt I, art 8.*

The appellant housing authority let one of its houses under a secure tenancy to the respondent tenant and his then wife as joint tenants. The wife moved out of the house and served on the authority a valid notice to quit, which had the effect in law of bringing the tenancy to an end. The respondent did not vacate the premises, in which he had lived for eight years, and the housing authority brought automatic possession proceedings in the county court. The respondent defended the proceedings, contending that in seeking a possession order the housing authority had failed to give effect to his right to respect for his home as required by art 8[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), that the housing authority's interference with his right had not been justified under art 8(2) of the convention; and that making a possession order would therefore be contrary to art 8. The judge, making the possession order, held that the effect of the notice to quit had been to determine the secure tenancy; that the tenancy had come to an end by the act of one of the joint tenants; that after the expiry of the notice period the respondent had no legal or equitable right or interest in the house and that accordingly the house had not been his home within the meaning of art 8(1) of the convention so that art 8 was not engaged. The respondent's appeal, on the basis that the judge had adopted too restrictive a definition of the word 'home', was successful in the Court of Appeal. The housing authority appealed to the House of Lords. The central question before the court was whether, having regard to the provisions of art 8(1), it was unlawful for a public authority landlord to recover possession from a former tenant by a procedure which led to possession being granted automatically when a tenancy had been terminated by operation of law. The respondent contended that the premises had not ceased to be his 'home' within art 8(1) simply because it had become unlawful for him to reside in it; that art 8(1) was therefore engaged; and that the appellants had therefore to justify their claim for possession.

**Held** – (1) The concept of 'home' for the purposes of art 8 was not limited to premises which were lawfully occupied; it depended on the existence of sufficient and continuous links with the premises. In the instant case those links existed so the fact that the respondent's tenancy had come to an end did not mean that the premises had ceased to be his home. The effect of an order for possession would

a Article 8 is set out at [35], below

be to require the respondent to leave the premises which were his home and art 8 was therefore engaged (see [11], [29], [63], [66], [68], [70], [71], [95], [99], [147], below); *Buckley v UK* (1996) 23 EHRR 101 applied.

(2) (Lord Bingham of Cornhill and Lord Steyn dissenting) Such interference with the right to respect for the home as flowed from the application of the law which enabled a public authority landlord to exercise its unqualified right to recover possession, following service of a notice to quit which terminated the tenancy, with a view to making the premises available for letting to others on its housing list, did not violate the essence of the right to respect for the home under art 8(1). In the instant case the appellants' right to immediate possession was unqualified in domestic law and the premises, once recovered, would be available for letting to others who were in need of housing in the appellants' area. Accordingly, the appeal would be allowed (see [77], [83], [84], [110], [152], below); *Ure v UK* App No 28027/95 (27 November 1996, unreported) applied.

**Notes**

For the right to respect for private and family life, home and correspondence generally, for respect for home in particular, and for what consitutes respect and interference, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149, 152, 154, 155.

For the Human Rights Act 1998, Sch 1 Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue).

**Cases referred to in opinions**

*Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR.
*Buckley v UK* (1996) 23 EHRR 101, [1996] ECHR 20348/92, ECt HR and E Com HR.
*Chapman v UK* (2001) 10 BHRC 48, ECt HR.
*Di Palma v UK* (1988) 10 EHRR 149, E Com HR.
*Di Palma v Victoria Square Property Co Ltd* [1984] 2 All ER 92, [1984] Ch 346, [1984] 2 WLR 761; *affd* [1985] 2 All ER 676, [1986] Ch 150, [1985] 3 WLR 207, CA.
*Gillow v UK* (1986) 11 EHRR 335, [1986] ECHR 9063/80, ECt HR.
*Hatton v UK* [2003] All ER (D) 122 (Jul), ECt HR.
*Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, [1997] AC 655, [1997] 2 WLR 684, HL.
*JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2002] 3 All ER 865, [2003] 1 AC 419, [2002] 3 WLR 221; *rvsg* [2001] EWCA Civ 117, [2001] Ch 804, [2001] 2 WLR 1293.
*James v UK* (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECt HR.
*Khatun v UK* (1998) 26 EHRR CD 212, E Com HR.
*Lambeth London BC v Howard* [2001] EWCA Civ 468, (2001) 33 HLR 636.
*Larkos v Cyprus* (1999) 7 BHRC 244, ECt HR.
*Mabey v UK* (1996) 22 EHRR CD 123, E Com HR.
*Marckx v Belgium* (1979) 2 EHRR 330, [1979] ECHR 6833/74, ECt HR.
*Marzari v Italy* (1999) 28 EHRR CD 175, E Com HR.
*Minister of Home Affairs v Fisher* [1979] 3 All ER 21, [1980] AC 319, [1979] 2 WLR 889, PC.
*O'Rourke v UK* App No 39022/97 (26 June 2001, unreported), ECt HR.
*P v UK* App No 14751/89 (12 December 1990, unreported), E Com HR.
*Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.

*R (on the application of Gangera) v Hounslow London BC* [2003] EWHC 794 (Admin), [2003] All ER (D) 200 (Apr).

*R (on the application of McLellan) v Bracknell Forest BC, Reigate and Banstead BC v Benfield* [2001] EWCA Civ 1510, [2002] 1 All ER 899, [2002] QB 1129, [2002] 2 WLR 1448.

*Runa Begum v Tower Hamlets London BC* [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 WLR 388.

*S v UK* (1986) 47 DR 274, E Com HR.

*Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4, [2002] LGR 467.

*South Bucks DC v Porter, Chichester DC v Searle, Wrexham County BC v Berry* [2003] UKHL 26, [2003] 3 All ER 1, [2003] 2 WLR 1547.

*Stretch v UK* [2003] All ER (D) 306 (Jun), ECt HR.

*Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 All ER 46, [2002] 1 AC 301, [2001] 3 WLR 806.

*Ure v UK* App No 28027/95 (27 November 1996, unreported), E Com HR.

*Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.

*Wood v UK* (1997) 24 EHRR CD 69, E Com HR.

**Cases also referred to in list of authorities**

*Akdivar v Turkey* (1996) 23 EHRR 143, ECt HR.

*Brent London BC v Sharp* [2003] All ER (D) 238 (Apr), CA.

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*Gallagher v Castle Vale Action Trust Ltd* [2001] EWCA Civ 944, (2001) 33 HLR 810.

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*Harrogate BC v Simpson* (1984) 17 HLR 205, CA.

*Howard v UK* (1985) 52 DR 215, E Com HR.

*Karner v Austria* App No 40016/98 (11 September 2001, unreported), ECt HR.

*Kensington and Chelsea Royal London Borough v O'Sullivan* [2003] EWCA Civ 371, [2003] 1 FCR 687.

*Lloyd v Sadler* [1978] 2 All ER 529, [1978] QB 774, [1978] 2 WLR 721, CA.

*Mentes v Turkey* (1997) 26 EHRR 595, ECt HR.

*North Hertfordshire DC v Carthy* [2003] EWCA Civ 20, [2003] All ER (D) 93 (Jan).

*R (on the application of Bempoa) v Southwark London BC* [2002] EWHC 153 (Admin), [2002] All ER (D) 178 (Feb).

*R (on the application of Mays) v Brent London BC* [2003] EWHC 481 (Admin), [2003] All ER (D) 12 (Mar).

*Southwark London BC v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537

*Wandsworth London BC v A* [2000] LGR 81, [2000] 1 WLR 1246, CA.

*Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461, [1984] 3 WLR 1254, HL.

*Wiggins v UK* (1978) 13 DR 40, E Com HR.

*X v Germany* (1956) 1 Yearbook 202.

**Appeal**

The appellants, Harrow London Borough Council, the freehold owners of land and premises known as 31 Hutton Lane, Harrow Weald, Middlesex, HA3 6RE (the property), appealed with permission of the Appeal Committee given on 10 June 2002 from the order of the Court of Appeal (Peter Gibson, Mantell and Arden LJJ) on 3 December 2001 ([2001] EWCA Civ 1834) allowing in part the appeal of the respondent, Tarik Mahmood Qazi, the occupier of the property, from the order of Mr Recorder Williamson on 8 June 2001 in the Watford County Court granting possession of the property to the appellants. The facts are set out in the opinion of Lord Hope of Craighead.

*Anthony Arden QC* and *David Matthias* (instructed by *Gerald Balabanoff*, Harrow) for the appellants.

*Jan Luba QC* and *Edward Fitzpatrick* (instructed by *Sweetman Burke & Sinker*) for the respondent.

Their Lordships took time for consideration.

31 July 2003. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

[1] My Lords, by art 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) 'Everyone has the right to respect for ... his home'. This appeal concerns the meaning of that provision and its application to the facts of this case.

[2] Those facts are simple. The respondent, Mr Qazi, lived with his then wife Mrs Saman Qazi and their daughter in a two-bedroomed house at 31 Hutton Lane, Harrow Weald, Middlesex. The London Borough of Harrow, the appellants, were (as they still are) freehold owners of the house, and let it to Mr Qazi and Mrs Saman Qazi as joint tenants under a secure tenancy beginning in January 1992. In 1998 Mrs Saman Qazi and their daughter went to live elsewhere, and in February 1999 Mrs Qazi gave the council four weeks' written notice to quit in accordance with the express terms of the tenancy agreement. This notice, it is common ground, had the effect of bringing the tenancy to an end on 22 March 1999. The council informed Mr Qazi that the tenancy had come to an end and invited him, if he wished, to apply for a sole tenancy of the house, making it clear that the application might not succeed. He did apply, but his application was refused by the council in July 1999 on the ground that he was not, as a single person, entitled to family-sized accommodation. In November 1999 the council again told Mr Qazi that he would not be granted a tenancy of the house, and he was further told that possession proceedings would be begun if he failed to vacate the house.

[3] Mr Qazi did not vacate the house and in March 2000 the council issued proceedings seeking possession. In the course of the proceedings Mr Qazi made it known that he had lived in the house with Mrs Abida Qazi and her five-year old son since June or July 2000, that they had been married in an Islamic ceremony in October 1999 and that the marriage had been solemnised in a civil ceremony in July 2000. Mr Qazi sought a review by the council of its decision not to grant him

a sole tenancy of the house, but unsuccessfully. Mrs Abida Qazi, pregnant with another child born in December 2000, applied to the council for the grant of a new tenancy to herself and Mr Qazi, but no such grant was made.

[4] In the possession proceedings Mr Qazi based his defence (so far as now relevant) on the contentions that (a) in seeking a possession order the council had failed to give effect to his right to respect for his home as required by art 8 of the convention; (b) the council's interference with his right was not justified under art 8(2) of the convention; and (c) the making of a possession order would be a breach of art 8. The action came on for trial in the Watford County Court sitting at Luton before Mr Recorder Williamson. He held that the effect of Mrs Saman Qazi's notice to quit had been to determine the whole of the previous joint tenancy; that the tenancy had not come to an end because of any decision made by a public authority but by the act of one of the joint tenants; that since expiry of the notice Mr Qazi had had no legal or equitable right or interest in the house and thus had none at the time when action had been brought; and that accordingly the house was not Mr Qazi's home within the meaning of art 8(1) of the convention and that article was not engaged. The recorder did not therefore consider the issue of justification raised under art 8(2) of the convention and made the possession order sought.

[5] Mr Qazi challenged the recorder's decision successfully in the Court of Appeal, where Arden LJ gave the leading judgment, Peter Gibson LJ agreed giving brief reasons of his own and Mantell LJ concurred: [2001] EWCA Civ 1834, [2002] HLR 276. Arden LJ (at [47]) defined the question of law before the court as being 'whether a former tenant whose tenancy has come to an end by operation of law can, after that time, have a right to a home for the purposes of Article 8 of the convention'. After a close examination of the Strasbourg jurisprudence she gave an affirmative answer to that question, rejecting the argument that art 8 is not engaged where a former tenant lacks any legal or equitable right or interest in the house. She concluded (at [57]) that Mr Qazi 'did have a right to a home for the purposes of Article 8 when the possession proceedings were served on him'.

[6] I would respectfully question whether Arden LJ was quite right to define the issue in terms of 'a right to a home', since the European Court of Human Rights has made clear that art 8 does not in terms give a right to be provided with a home and does not guarantee the right to have one's housing problem solved by the authorities: see *Chapman v UK* (2001) 10 BHRC 48 at 72 (para 99); *Marzari v Italy* (1999) 28 EHRR CD 175 at 179; *O'Rourke v UK* App No 39022/97 (26 June 2001, unreported). Thus in the present case the two questions which in my opinion arise are (1) whether (when proceedings were issued and possession was ordered) the house at 31 Hutton Lane was Mr Qazi's home within the meaning of that expression as used in art 8 of the convention; and, if so, (2) whether what the council or the court did or proposed to do infringed his right to respect for his home. If both questions are answered in Mr Qazi's favour there arises the issue of justification, which the recorder did not have to address and which the Court of Appeal remitted to the county court. If that stage is reached, the issue of justification turns on the application of art 8(2) of the convention:

> 'There shall be no interference by a public authority with the exercise of this right [here, the right to respect for one's home] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' a

[7] It is convenient to begin by considering the two questions as formulated above.

THE FIRST QUESTION

[8] The European Convention for the Protection of Human Rights and Fundamental Freedoms was an attempt to identify the rights and freedoms most central to the enjoyment of human life in civil society and to give those rights and freedoms an appropriate measure of protection among member states of the Council of Europe. Not surprisingly, the need for some protection of the home was recognised in the convention, since few things are more central to the enjoyment of human life than having somewhere to live. On a straightforward reading of the convention, its use of the expression 'home' appears to invite a down-to-earth and pragmatic consideration whether (as Lord Millett put it in *Uratemp Ventures Ltd v Collins* [2001] UKHL 43 at [31], [2002] 1 All ER 46 at [31], [2002] 1 AC 301) the place in question is that where a person 'lives and to which he returns and which forms the centre of his existence', since 'home' is not a legal term of art and art 8 is not directed to the protection of property interests or contractual rights. b c d

[9] This approach to the meaning of 'home' is, I think, fortified by consideration of art 8(1) as expressed in other languages: 'son domicile', 'proprio domicilio', 'su domicilio' and 'seiner Wohnung', for example, all direct attention to the place where a person lives. Save in one case mentioned below (at [10]) this has been the approach of the Strasbourg institutions also. In *Gillow v UK* (1986) 11 EHRR 335 at 348–349 (para 46), the court held that the house in question was the applicants' home because although they had been absent from Guernsey for many years they had not established any other home elsewhere in the United Kingdom and had retained 'sufficient continuing links' with the house for it to be considered their home for the purposes of art 8. This test was repeated and elaborated by the Commission in *Buckley v UK* (1996) 23 EHRR 101 at 115 (para 63): e f

> '"Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a "home" which attracts the protection of Article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links. The factor of "unlawfulness" is relevant rather to considerations under paragraph 2 of that provision of "in accordance with law" and to the balancing exercise undertaken between the interests of the community and those of the individual in assessing the necessity of any interference.' g h

The Commission repeated the substance of this passage in *Mabey v UK* (1996) 22 EHRR CD 123 at 124, and in *O'Rourke v UK* App No 39022/97 (26 June 2001, unreported) the court once again insisted on an individual's need to show sufficient and continuing links with a place in order to establish that it is his home for purposes of art 8. j

[10] In none of these cases, as Mr Arden QC for the council correctly submitted, were the facts indistinguishable from those of this case. In some the applicant had a proprietary interest in a house (*Gillow v UK*) or land (*Buckley v UK*,

*Mabey v UK*), but could not lawfully live in the house or on the land. In *O'Rourke v UK* the applicant claimed as his home a hotel room which he had occupied for less than a month at the discretion of the proprietors before being evicted: in this case the court had 'significant doubts over whether or not the applicant's links with the hotel room were sufficient and continuous enough to make it his "home" at the time of his eviction'. The general approach of the Strasbourg institutions has however been to apply a simple, factual and untechnical test, taking full account of the factual circumstances but very little of legal niceties. The exception, properly relied on by the council, is *S v UK* (1986) 47 DR 274. In this case, where the applicant was not entitled in domestic law to succeed to a tenancy on the death of her partner, the Commission attached importance to this fact and ruled in para 4 of its opinion:

> 'The Commission notes that the applicant was occupying the house, of which her partner had been the tenant, without any legal title whatsoever. Contractual relations were established between the local authority and the deceased partner and that contractual agreement may or may not have permitted long-term visitors. The fact remains, however, that on the death of the partner, under the ordinary law, the applicant was no longer entitled to remain in the house, and the local authority was entitled to possession so that the house could no longer be regarded as "home" for the applicant within the meaning of Article 8.'

It is, however, noteworthy that this ruling was made before formulation of the sufficient continuing links test in *Gillow v UK*, that it has not been relied on by the court or the Commission in any of the later cases I have cited, and that after the passage quoted above the Commission went on to review the issue of justification under art 8(2) on the assumption that the applicant's right to respect for her home had been the subject of interference. Arden LJ ([2002] HLR 276 at [55]) concluded that *S v UK* no longer offered guidance to be taken into account in deciding the issue before the Court of Appeal.

**[11]** I agree with that conclusion. When the possession proceedings were issued Mr Qazi had lived at 31 Hutton Lane continuously for eight years. The house had been his home and he had no other. The expiry of his wife's notice to quit brought his right to occupy the house as a tenant to an end, but it did not bring his occupation to an end. The house continued to be the place where he lived and so his home. Any other conclusion would not, in my opinion, reflect the clear thrust of Strasbourg authority. I would accordingly give an affirmative answer to this first question.

THE SECOND QUESTION

**[12]** Mr Arden submitted, in a written summary of his argument, that—

> 'art 8 is not engaged at all [where rights either have never existed at all (ie squatters) or have ended other than by the action of the public authority (eg notice to quit by tenant)] and when the landlord asks the tenant to leave what was let as a qualified or limited home, whether for an identified period or in some other way, eg employment-related, short life use pending development, homelessness accommodation, sub-leasing arrangements, accommodation during works, ie there is no disrespect inherent in declining to grant, continue or extend what was not let as an indefinite or unqualified right to use premises as a home (as opposed to taking away what would

otherwise be an indefinite or unqualified right, such as that enjoyed by a secure tenant).' a

My initial reaction to this submission is, I must acknowledge, one of resistance. The simple, untechnical test of 'home' which I have described above is easily understood and easily applied to facts arising in the different member states. I would expect a similarly simple and untechnical test to be applied to 'respect' and 'interference'. Details of the bargain made between owner and occupier, and the provisions of national law governing that bargain, are likely to be crucial in deciding the issue of justification under art 8(2) if that stage is reached, but it would seem to me to undermine the broad international application at which the convention aims if matters of this kind are treated as determinative when considering whether there has been interference or a lack of respect. b c

**[13]** Initial reactions are not however a safe guide to resolution of an important issue such as this, and regard must be paid to the Strasbourg jurisprudence for such help as it can give. Both parties to the appeal accept (as is indeed clear) that no conclusive answer is to be found. But both seek to derive support from it. d

**[14]** In *Di Palma v UK* (1988) 10 EHRR 149 the applicant's lease was forfeited on her non-payment of a service charge and possession was ordered. Her primary claim was made (unsuccessfully) under art 1 of the First Protocol to the convention. But she also complained that her eviction from her home constituted an unjustified interference with the right to respect for her home protected by art 8. The Commission held this complaint to be manifestly ill-founded because (at 155) 'any interference with [her] right to respect for her home which the forfeiture of her lease engendered was in conformity with Article 8(2)'. The Commission did not expressly rule whether the forfeiture or eviction were an interference. e

**[15]** In *P v UK* App No 14751/89 (12 December 1990, unreported) the applicants had been evicted, following the service of notice to quit, from a caravan site where they had lived for many years. Her Majesty's government admitted that the eviction constituted an interference with the applicants' right to respect for their home (although they had by that stage no rights in relation to it) but the Commission made no ruling: f

> 'The Commission has considered whether the termination of the applicants' occupation of the site in accordance with the tenancy agreement can be considered as an interference with their rights under art 8(1) ... of the convention. Even assuming that it could constitute an interference, however, the commission finds that it would be justified under art 8(2) ... of the convention ...' g h

The Commission pointed out that the applicants could not derive from art 8 an unconditional right to remain on the site.

**[16]** The application in *Ure v UK* App No 28027/95 (27 November 1996, unreported) was founded on facts legally indistinguishable from the present. The applicant's tenancy came to an end on expiry of a notice to quit given by his wife, formerly a joint tenant with him, and possession was ordered. The Commission held that his complaint under art 8 was manifestly ill-founded because the alleged interference with the applicant's rights under the article was justified under para (2) of the article. j

[17] *Wood v UK* (1997) 24 EHRR CD 69 arose from the repossession of the applicant's house by a mortgagee when she defaulted on her payments due under the mortgage. The Commission held the application to be manifestly ill-founded, observing (at 70–71):

> 'In so far as the repossession constituted an interference with the applicant's home, the Commission finds that this was in accordance with the terms of the loan and the domestic law and was necessary for the protection of the rights and freedoms of others, namely the lender. To the extent that the applicant is deprived of her possessions by the repossession, the Commission considers that this deprivation is in the public interest, that is the public interest in ensuring payment of contractual debts, and is also in accordance with the rules provided for by law.'

[18] In *Larkos v Cyprus* (1999) 7 BHRC 244 a tenant who had lived for many years in a house rented from the government was ordered to vacate the house following revocation of his tenancy. Because he had been a tenant of the government he was not, under domestic law, entitled to the security which he would have enjoyed against a private landlord. His complaint was made under art 14 of the convention in conjunction with art 8, not under art 8 alone: it related to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home guaranteed under art 8. The court observed (at 251):

> 'Mr Larkos has not contended that there has been a breach of art 8 on account of the fact that, being a government tenant, he is faced with the threat of eviction from his home. However, it suffices for the purposes of the application of art 14 that the facts relied on in the instant case fall within the ambit of art 8 and the relevance of that Article cannot be denied in view of the judgment of the District Court of Nicosia ordering Mr Larkos to leave his home.'

It was, it seems, that order, which under domestic law the national court was bound to make, which constituted the required interference or lack of respect.

[19] The applicant in *Marzari v Italy* (1999) 28 EHRR CD 175 was evicted by court order on the application of his public authority landlord following his failure to pay rent. It appears that his complaint under art 8 may well have been based on lack of respect for his private life, but it is not clear that such was his only complaint under the article. The court ruled (at 180):

> '... that the applicant's eviction from his apartment interfered with his rights under Article 8(1). The Court therefore has to examine whether the interference was justified under the terms of paragraph 2 of Article 8.'

In the result, the court did not find 'any appearance of a breach' of art 8 on account of the authorities' decision to proceed with the applicant's eviction from his apartment.

[20] It seems to me that these authorities, although inconclusive, give somewhat more help to Mr Qazi than to the council. They reveal a tendency to assume an interference or lack of respect and then to consider justification, an issue decided against the applicant in all the cases except *Larkos*'s case, where the complaint was of discrimination in conjunction with art 8. It is noteworthy that although, in all the five cases held to be manifestly ill-founded, the applicant had,

under domestic law, no arguable legal right to remain in the property from which he or she had been evicted, the adverse decision was never based on that short (and, if correct, obvious) ground.

**[21]** Strasbourg authority is of course the primary source of guidance on the interpretation and application of the convention. But the House was helpfully referred to three recent decisions of the Court of Appeal of which mention should be made. *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48 concerned a possession order made against an assured shorthold tenant. Under the Housing Act 1988 the landlord could not obtain possession without an order of the court, but the court was bound to make an order if the tenancy was subject to s 21(4) of that Act and proper notice had been served. Both these conditions were satisfied. The argument turned on art 8, coupled with art 6, of the convention. The Secretary of State for the Environment, Transport and the Regions exercised his right to intervene, and counsel instructed on his behalf submitted that although the possession proceedings constituted an interference with the tenant's home, the interference was justified under art 8(2). The court (Lord Woolf CJ, May and Jonathan Parker LJJ) held (at [67]) that eviction from her home would impact on the tenant's family life. But it found (at [67]–[72]) that the interference was justified.

**[22]** *R (on the application of McLellan) v Bracknell Forest BC, Reigate and Banstead BC v Benfield* [2001] EWCA Civ 1510, [2002] 1 All ER 899, [2002] QB 1129 concerned the termination of introductory tenancies in accordance with procedures introduced under the Housing Act 1996. In both of these appeals, heard together, the Secretary of State was again represented by counsel who asserted that art 8 was engaged (see [36]). The submission made by Mr Arden QC, then representing the Reigate and Banstead Borough Council, was recorded in the leading judgment of Waller LJ (with whom Latham and Kay LJJ agreed) at [37]:

> 'Mr Arden's argument in short was this. He suggested that since a tenant would know the basis on which he or she had become a tenant, ie on the basis that the statutory provisions and procedures of the introductory tenancy scheme applied to it, the rights of the tenant to occupy the premises were simply in accordance with that scheme. Thus if the council complied with the provisions of the introductory tenancy scheme in order to bring the tenancy to an end, that involved no want of respect for the tenant's home. So it is argued the question whether the scheme had been complied with would be the first question which, if answered in favour of the council, would lead to the conclusion that art 8(1) was not engaged. It would then follow that the question whether the eviction could be justified under art 8(2) would not arise.'

The argument was rejected:

> '[42] In my view the terms of art 8(2) demonstrate that Mr Arden's approach is not a proper approach to art 8. It is not a preliminary question whether the tenancy has been properly terminated in accordance with its terms. It is under art 8(2) that the question to be considered is whether an eviction was in accordance with the law, and whether it was necessary for the protection of the rights and freedoms of others. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* the Court of Appeal

decided that Poplar was a public authority and thus that art 8(2) was directly applicable, but it seems to me that even if it had been a private landlord seeking to evict a tenant under an assured shorthold tenancy, the court as a public authority would have had to approach s 21(4) of the Housing Act 1988 (the section under consideration in that case) in much the same way. It would have concluded that s 21(4) did not infringe any art 8 right but not because art 8 did not apply at all, but because the eviction was in accordance with the law and because it was not disproportionate to allow the tenancy to be brought to an end in accordance with the rights of the landlord. The wording of art 8(2) is apposite to allow consideration not only of the tenant's rights, and not only the rights of persons other than the landlord and the tenant, ie other tenants for example, but the rights of the landlord as well. In *S v UK* (1986) 47 DR 274 at 278 the commission put their conclusion in these terms:

> "Further, even if the applicant's right to respect for her home, as guaranteed by article 8, could be regarded as having been interfered with by order of the county court for possession against her, the Commission considers that such interference was clearly in accordance with the law and was also necessary for the protection of the contractual rights of the landlord to have the property back at the end of the tenancy."

[43] I would accordingly reject Mr Arden's argument that art 8 has no application.'

**[23]** The third decision of the Court of Appeal, in *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4, [2002] LGR 467, was made after, and followed, the decision now under appeal. The appeals arose from possession orders made on the application of housing authorities following the termination of non-secure tenancies. Laws LJ, giving the leading judgment with which Thorpe and Kay LJJ agreed, did not accept the argument advanced by counsel for the housing authorities summarised (at [24]) in this way:

> 'Mr Underwood submitted that there is no *prima facie* violation of art 8(1) by action taken for possession in cases such as these. Essentially the argument (if I may venture to summarise it in my own words) runs as follows. The Convention recognises that there is a balance to be struck between public interest and private right; and all these considerations which I have enumerated, taken together, lead to the conclusion that the statutory regime for the accommodation of homeless persons, including the right of the local authority to serve and act on a notice to quit relating to such a person's non-secure tenancy, involves no actual or potential violation of art 8(1) because the necessary balance has effectively been struck by the legislation itself. So long as the council's decision to seek possession, and the decision's implementation, comply with conventional public law standards, and the legal process undertaken to obtain possession complies with the relevant private law requirements, there can be no interference with the tenant's art 8(1) right to respect for his or her home.'

Having referred to the Commission's ruling on the meaning of 'home' in para 63 of the decision in *Buckley v UK* (1996) 23 EHRR 101 and to the Court of Appeal's decision in this case, Laws LJ continued ([2002] LGR 467 at [26]–[27]):

'Clearly the present cases are not concerned with any issues of legal or equitable interest. But the approach taken in *Buckley*, and approved as a matter of domestic human rights law in *Qazi* goes some distance to support my view that there is *prima facie* a violation of art 8(1) in these cases. "Home" is an autonomous concept for the purpose of ECHR, and does not depend on any legal status as owner. Thus in these cases, the premises in Sheffield and Sunderland were without question the women's homes. Since the effect of the possession orders would be to throw them out, I think it inescapable that those orders amounted to an interference with the appellants' right of respect of their homes. I have said that the case is all about art 8; more precisely, it is all about art 8(2).

Before proceeding to the issues arising under art 8(2), I should make it clear that I entertain what is perhaps a deeper reason for my view that the case cannot be concluded by a judgment that there is no violation of art 8(1). It concerns the relationship between the two paragraphs of art 8. I have held that eviction of these appellants would constitute a *prima facie* violation of their right to respect for their homes. But this conclusion is not simply an instance of that everyday judicial process, the application of a statute's correct construction (here, art 8(1)) to a particular set of facts. Rather it has a purposive quality. The court has to arrive at a judicial choice between two possibilities, a choice which transcends the business of finding out what the legislation's words mean. The first choice (accepting Mr Underwood's submission) would entail a judgment that the Convention requirement was met at the art 8(1) stage: on balance, taking into account all the factors which I have listed in para 23, there was no want of respect for the appellants' homes. The second choice (accepting a *prima facie* violation of art 8(1)), which I prefer, entails a judgment that the more rigorous and specific standards set out in art 8(2) have to be met if the court is to hold that the evictions are compatible with the appellants' Convention rights. The Convention is, as it were, much more remotely engaged in the fabric of our domestic law if the first, rather than the second, choice is taken. Part of the court's task is to decide how close that engagement should be in the context in hand. Thus I do not eschew the first choice merely because I take the view that the second more naturally reflects the ordinary sense of the words used in art 8(1). I consider as a matter of substance that the vindication and fulfilment of the Convention rights, for which purpose HRA was enacted, require that the domestic law procedures involved in these appeals should be subjected to scrutiny for conformity with the art 8(2) standards. Such a process is demanded by the fullness of our municipal law of human rights.'

This reasoning, like that of Arden LJ in the present case, reflects the tenor of the Strasbourg jurisprudence and, in my opinion, gives effect to the purpose of the convention. I agree with it. In *South Bucks DC v Porter, Chichester DC v Searle, Wrexham County BC v Berry* [2003] UKHL 26 at [37], [2003] 3 All ER 1 at [37], [2003] 2 WLR 1547, I wished to leave open the question whether 'any action by a public authority seeking possession of residential property occupied by a defendant engages the operation of art 8'. Now that the question has been fully explored, I am satisfied that such actions will ordinarily do so if the residential property is occupied by the defendant as his home. But nothing I have said in this opinion should be understood as applying to any landlord or owner which is not a public authority.

[24] For these reasons and those given by Lord Steyn I would uphold the decision of the Court of Appeal and affirm its order that the issue of justification raised under art 8(2) be remitted to the county court.

[25] Mr Arden submitted that this outcome would impose a large burden of expense and delay on housing authorities. I do not accept this. The House has made it very plain, most recently in *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 WLR 388, particularly in paras [9] and [49], that the administration of public housing under various statutory schemes is entrusted to local housing authorities. It is not for the court to second-guess allocation decisions. The Strasbourg authorities have adopted a very pragmatic and realistic approach to the issue of justification. Counsel were agreed that even if the argument for Mr Qazi were accepted, the occasions on which a court would be justified in declining to make a possession order would be very highly exceptional. This is so. It would not be proper to comment on the present case, since I share the Court of Appeal's view that the issue of justification should be considered by the county court. If (contrary to the ruling of the majority of the House) effect were to be given to my opinion, I am confident that housing authorities acting in good faith in implementation of schemes prescribed by statute and administered by them need apprehend no significant increase in their litigious burden.

**LORD STEYN.**

[26] My Lords, given that I am in complete agreement with the opinion of my noble and learned friend Lord Bingham of Cornhill I can explain my view shortly.

[27] It would be surprising if the views of the majority on the interpretation and application of art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as incorporated into our legal system by the Human Rights Act 1998, withstood European scrutiny. It is contrary to a purposive interpretation of art 8 read against the structure of the convention. It is inconsistent with the general thrust of the decisions of the European Court of Human Rights, and of the Commission. It is contrary to the position adopted by the United Kingdom government on more than one occasion before the European Court of Human Rights. It does not accord to individuals 'the full measure of the [protection] referred to': *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 at 25, [1980] AC 319 at 328. On the contrary, it empties art 8(1) of any or virtually any meaningful content. The basic fallacy in the approach is that it allows domestic notions of title, legal and equitable rights, and interests, to colour the interpretation of art 8(1). The decision of today does not fit into the new landscape created by the 1998 Act.

[28] Lord Bingham has formulated the issues as follows: (a) whether (when proceedings were issued and possession was ordered) the house at 31 Hutton Lane was Mr Qazi's home within the meaning of that expression as used in art 8 of the convention; and, if so, (b) whether what the council or the court did or proposed to do infringed his right to respect for his home. Such differences of opinion as exist in this case do not extend to this formulation of the issues.

[29] The first question was the main focus of the debate below and in the House. All members of the Appellate Committee are now apparently agreed that this question can only be answered in the affirmative. Given this unanimity I have nothing to add to the reasons given by Lord Bingham, on the principal point in the case.

[30] On the second question the House is divided. While I accept that according to English conceptions of stare decisis there is in the European jurisprudence no decision directly in point, the thrust of the approach in *Larkos v Cyprus* (1999) 7 BHRC 244 and *Marzari v Italy* (1999) 28 EHRR CD 175 supports the view that when proceedings to recover possession of the defendant's home were issued and possession was ordered there was an interference with Mr Qazi's right to respect for his home. If it had been sufficient to say that when an applicant has no arguable legal right to remain in a property art 8(1) is not engaged, such an obvious ground would inevitably have formed part of European exposition and reasoning.

[31] Moreover, I found the trilogy of Court of Appeal decisions which Lord Bingham discussed in [21], [22] and [23], above instructive.

[32] In *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4, [2002] LGR 467, Laws LJ (speaking for a united Court of Appeal) analysed the position (at [26]–[27]) as follows:

> '... in these cases, the premises in Sheffield and Sunderland were without question the women's homes. Since the effect of the possession orders would be to throw them out, I think it inescapable that those orders amounted to an interference with the appellants' right of respect of their homes I have said that the case is all about article 8; more precisely, it is all about art 8(2).
>
> Before proceeding to the issues arising under art 8(2), I should make it clear that I entertain what is perhaps a deeper reason for my view that the case cannot be concluded by a judgment that there is no violation of art 8(1). It concerns the relationship between the two paragraphs of art 8. I have held that eviction of these appellants would constitute a *prima facie* violation of their right to respect for their homes. But this conclusion is not simply an instance of that everyday judicial process, the application of a statute's correct construction (here, art 8(1)) to a particular set of facts. Rather it has a purposive quality. The court has to arrive at a judicial choice between two possibilities, a choice which transcends the business of finding out what the legislation's words mean. The first choice ... would entail a judgment that the Convention requirement was met at the art 8(1) stage ... The second choice (accepting a *prima facie* violation of art 8(1)), which I prefer, entails a judgment that the more rigorous and specific standards set out in art 8(2) have to be met if the court is to hold that the evictions are compatible with the appellants' Convention rights. The Convention is, as it were, much more remotely engaged in the fabric of our domestic law if the first, rather than the second, choice is taken. Part of the court's task is to decide how close that engagement should be in the context in hand. Thus I do not eschew the first choice merely because I take the view that the second more naturally reflects the ordinary sense of the words used in art 8(1). I consider as a matter of substance that the vindication and fulfilment of the Convention rights, for which purpose HRA was enacted, require that the domestic law procedures involved in these appeals should be subjected to scrutiny for conformity with the art 8(2) standards. 'Such a process is demanded by the fullness of our municipal law of human rights.'

This statement admirably reflects the meaning of art 8 and the European approach to its application. It is in accord with the new landscape created by the 1998 Act.

**[33]** In agreement with the reasoning of Arden LJ in the Court of Appeal I would make the order proposed by Lord Bingham of Cornhill.

**LORD HOPE OF CRAIGHEAD.**

**[34]** My Lords, the issues which have been raised in this case relate to the impact of the Human Rights Act 1998 on the procedure by which a public authority landlord recovers possession of residential accommodation from a former tenant whose tenancy has come to an end by operation of law. Section 6(1) of the Act provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. It follows that any procedure by which a public authority recovers possession of the accommodation must be compatible with the former tenant's convention rights. That essential point is not in dispute. What is in dispute is whether the procedure by which the appellants, the local housing authority, seek to recover possession from the respondent, Mr Qazi, satisfies this requirement.

**[35]** The convention right which has been invoked in this case is set out in art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). It provides:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

**[36]** The question which lies at the heart of the case is whether, having regard to the provisions of art 8(1) of the convention, it is unlawful for a public authority to recover possession from a former tenant by a procedure which leads to possession being granted automatically, or whether the court must always be given an opportunity to consider whether the making of an order for possession would be proportionate. If the answer to that question is that the court must always be given that opportunity, it will be in the discretion of the court in all cases to decide whether or not an order for possession should be made. This will be so not only in those cases where there are statutory safeguards that must be satisfied. The court will have a discretion to exercise even in those cases where the tenancy has come to an end by the operation of law, there is an absolute right to possession and there are no statutory safeguards other than the basic rule that possession cannot be taken without an order from the court: see the Protection from Eviction Act 1977, s 3.

**[37]** It has not been easy to grasp the true significance of this issue from the way in which the argument has been developed in the Court of Appeal and in the appeal to your Lordships. But the background to it has been carefully and tactfully set out in the Law Commission's Consultation Paper *Renting Homes 1: Status and Security* (Consultation Paper No 162) Pt V, The Impact of Human Rights Law. As the author explains in para 5.1, none of the challenges to

substantive housing provisions that have been made since the coming into force of the 1998 Act have been successful in the sense that the provisions in question have been declared incompatible or have required the deployment of the special interpretative obligation under s 3(1) of the 1998 Act. But a series of cases have raised important issues about the procedures within which housing laws must operate. Among these are the issues raised by art 8 of the convention with which this case is concerned.

[38] As the author explains in para 5.76 of the consultation paper, the approach which has been taken up to the Court of Appeal is based on the conclusion that art 8(1) is always 'engaged' by an eviction. The implication of this conclusion in practice, he suggests, is that a procedure which enables the court to consider the issue of proportionality will become a necessity in respect of any use by a public authority landlord of a procedure under which, by the operation of law, it would previously have been entitled to recover possession automatically: see para 5.74. If so, this result will affect housing associations and other registered social landlords as well as local housing authorities. The point of automatic possession proceedings is generally to provide a quick and reliable way of evicting tenants whose leases have by the operation of law been terminated. A procedure which gives a discretion to the court by requiring it to consider whether having regard to art 8(2) the making of the order would be proportionate is inimical to that purpose, as para 5.74 of the consultation paper points out. Therein lies the importance in domestic law of the issues which your Lordships have been asked to consider in this appeal.

[39] These issues fall naturally into two parts. The first is whether residential accommodation occupied by a former tenant whose tenancy has come to an end by the operation of law is that person's 'home' within the meaning of art 8(1). The second is whether every claim by a public authority for possession of such residential accommodation 'engages' art 8, as it is put in para B3 of the statement of facts and issues. I shall have something to say later about the use of the word 'engage' in this context (see [47], below), and about the significance of its use in regard to art 8 when read as a whole.

THE FACTS

[40] The appellants seek possession in these proceedings of a two-bedroom dwelling house of which they are and have been at all material times the freehold owners. On 15 January 1992 the premises were let to the respondent and his then wife, Saman Qazi, as joint tenants with effect from 20 January 1992. By the operation of Pt IV of the Housing Act 1985 this was a joint secure tenancy: see ss 79 and 81. As it was a joint tenancy it was capable of being terminated by either one of the joint tenants by a notice to quit served on the landlord. It is to be noted that s 82 of the 1985 Act, which provides for security of tenure, only prevents termination of the tenancy by the landlord. A secure tenancy cannot be brought to an end by the landlord until a date when the tenant is ordered to give up possession by the court. But the tenant may terminate the tenancy in the usual way by serving a notice to quit or by surrender.

[41] The respondent and his wife lived in the house together with their daughter until 1998. In that year Saman Qazi moved out with their daughter and went to stay with her mother. The tenancy agreement provided that either tenant could terminate the tenancy by serving a written notice to quit on the appellants giving four weeks' notice and expiring on a Monday which was the

start of a new period of the tenancy. On 19 February 1999 Saman Qazi served on the appellants a valid written notice to quit which expired on 22 March 1999: see the Protection from Eviction Act 1977, s 5. This had the effect in law of bringing the tenancy to an end on that date.

[42] On 26 May 1999 a housing management officer of the appellants informed the respondent by letter that the tenancy had come to an end. She enclosed an application form for the respondent to complete if he wished to apply for a sole tenancy of the house. She told him that if he applied a decision would be taken as soon as possible, but she also told him that she could not guarantee that he would be granted a tenancy of it or of any other premises. The respondent completed and returned the application form. On 16 July 1999 he was informed by the housing management officer that his application had been refused because, as he was a single person, he was not entitled to family-sized accommodation.

[43] On 16 November 1999 the appellants' housing manager wrote to the respondent confirming that it had been decided that he should not be granted a tenancy of the house and that possession proceedings would be commenced against him. He also informed the respondent that he was entitled to apply for accommodation through the housing register. He asked him to vacate the premises immediately and return the keys to the housing department. The respondent did not do so. The appellants commenced these proceedings against him on 13 March 2000.

[44] Events did not then stand still. At a preliminary court hearing on 6 June 2000 the respondent told the appellants that he had remarried in October 1999 and that he was now living in the house with his new wife, Abida Qazi, and her five-year old child. In October 2000 he applied for accommodation through the housing register. He was told that no action would be taken on his application as the number of households on the register was already far in excess of the houses with two bedrooms which were available. On 17 November 2000 Mrs Abida Qazi, who was now expecting another child, applied for a new joint tenancy to be granted to herself and the respondent if his application was unsuccessful. No action was taken on her application either. On 23 December 2000 she gave birth to her child. The respondent, Mrs Abida Qazi and her two children were still living in the premises when the appellants' action for possession came to trial.

[45] On 8 June 2001, following a trial in Luton County Court, Mr Recorder Williamson held that a notice to quit by one tenant was sufficient in law to determine the joint tenancy and that since 22 March 1999 the respondent no longer had any legal or equitable right in the premises. He also held that the premises did not constitute the respondent's 'home' within the meaning of art 8(1) and that art 8 was not 'engaged'. He ordered the respondent to give up possession of the premises on 11 July 2001. On 3 December 2001 the respondent was given permission to appeal against this decision on the basis that the recorder had adopted too restrictive a definition of the word 'home'. There was and is no challenge to the recorder's decision that the respondent no longer had any legal or equitable right or interest in the premises. On 3 December 2001 the Court of Appeal (Peter Gibson, Mantell and Arden LJJ) allowed the appeal and remitted the case to the county court to determine whether interference with the respondent's 'right to a home', as Arden LJ put it ([2002] HLR 276 at [58]) was permitted by art 8(2) of the convention.

ARTICLE 8: WHAT IT PROTECTS

[46] In *Marckx v Belgium* (1979) 2 EHRR 330 the European Court of Human Rights took the opportunity, in a case where the complaint was about the effect on family life of certain aspects of the Belgian illegitimacy laws, to make some general observations about art 8 of the convention. The court said (at 342):

> 'By proclaiming in paragraph 1 the right to respect for family life, article 8 signifies first that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2. As the Court stated in the *Belgian Linguistic Case* [(1968) 1 EHRR 252 at 282 (para 7)], the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.
>
> This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child's integration in its family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of article 8 without there being any call to examine it under paragraph 2.'

[47] Sir Gerald Fitzmaurice, in a dissenting opinion, also made some helpful observations on the scope of art 8. Two passages in his opinion are worth mentioning in the present context. The first is his discussion of what he described as the issue of 'applicability' in general. As he put it in para 2 of his opinion (at 364), this issue relates to the applicability or relevance in any way at all to the particular complaints that the applicants have made. It has become the practice in our jurisdiction to use the verb 'engage' to describe this concept. This word does not form part of the vocabulary of the European Commission or of European Court, and as Laws LJ observed in *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4 at [22], [2002] LGR 467 at [22] its use is liable to be misleading and unhelpful. But I would not for my part regard its use as objectionable, so long as there is no doubt as to what it means in this context. In my opinion the issue to which it is directed is whether, in the words of Sir Gerald Fitzmaurice, the provision in question is 'applicable'. What he had to say about this appears in para 3 of his opinion ((1979) 2 EHRR 330 at 364):

> 'The question of the applicability of a legal provision—it should hardly be necessary to say so—is quite distinct juridically from that of whether there has been a breach of that provision in any particular instance. Issues of applicability or scope are therefore strictly preliminary ones. A provision (rule, section, clause, article, etc) is applicable in any given case, at least prima facie, if it relates to the class, category, order, type or kind of subject-matter to which the claim or complaint itself, as made in that case, relates, and/or is concerned with the facts, events or circumstances involved in such a case. If it does not—if it deals with something different or not so comprised—then

clearly it is irrelevant to the claim or complaint, and the question of a possible breach of the Convention does not arise.'

[48] The second passage in his opinion which is worth mentioning appears in para 7 of his opinion, where he said (at 366):

> 'It is abundantly clear (at least it is to me)—and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view—that the main, if not indeed the sole, object and intended sphere of application of article 8 was that of what I will call the "domiciliary protection" of the individual. He and his family were not longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delayings and confiscation of correspondence; to the planting of listening devices (bugging); to restrictions on the use of radio and television; to telephone-tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another—in short, the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently.'

[49] Most international human rights instruments recognise a right to privacy. That is the concept which underlies art 8 of the convention, as the language of art 8(1) shows. But, as Professor David Feldman *Civil Liberties and Human Rights in England and Wales* (2nd edn, 2002) p 524, has explained, art 8 is unique in the way in which the rights that are expressed in it are conceived in relation to private life. Instead of giving a right to be free of arbitrary or unlawful interference with privacy, it provides for a right to 'respect' for it. It has been suggested that the move from a right to freedom from interference with privacy to respect for it tends to weaken the right: JES Fawcett *The Application of the European Convention on Human Rights* (2nd edn, 1987) p 211. But I believe that Professor Feldman was right to point out, at pp 524–525, that this potential limitation on the negative aspects of the right to privacy should not blind us to the considerable extension of the right which the notion of respect may entail, bearing in mind the fact that a right to respect is capable of imposing positive duties on public authorities.

[50] It seems to me that the following conclusions can be drawn from the language of art 8(1) in the light of the observations in *Marckx v Belgium*. The right to respect referred to in this paragraph extends to the person's home. But the essence of this right lies in the concept of respect for the home as one among various things that affect a person's right to privacy. The context in which the reference to the person's 'home' must be understood is indicated by the references in the same paragraph to his private and family life and to his correspondence. The emphasis is on the person's home as a place where he is entitled to be free from arbitrary interference by the public authorities. Article 8(1) does not concern itself with the person's right to the peaceful enjoyment of his home as a possession or as a property right. Rights of that kind are protected by art 1 of the First Protocol.

[51] The article must be read as a whole, and the wording of art 8(2) helps to explain art 8(1). It refers to 'interference' by a public authority 'with the exercise

of the right described in art 8(1). The circumstances in which such interference is permissible indicate the limits within which the article as a whole was designed to operate. Any interference with the right to respect for the person's privacy has to be measured against what is in accordance with the law and, in certain strictly defined respects, is necessary in a democratic society. Here too the emphasis is on the balance between the right to privacy on the one hand and the wider interests of the community in a democratic society on the other, rather than with issues about a person's right to own or occupy his home as an item of property.

**[52]** The right described in art 8 is not isolated from the other rights guaranteed by the convention. As I have already mentioned, art 1 of the First Protocol guarantees a right to property. For example, in *Stretch v UK* [2003] All ER (D) 306 (Jun) the European Court held that there had been a violation of art 1 of the First Protocol where the applicant had been deprived of the benefit of a renewal of a lease granted to him by a local authority. The protection extends to rights of occupation as well as rights of ownership. Then there is art 6, which may be described as the key procedural provision of the convention: Law Commission Consultation Paper, para 5.17. Article 6(1) guarantees to everyone in the determination of his civil rights and obligations a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The protection extends to the procedure by which landlords can recover possession of residential property, as possession cannot be taken without an order from the court. But neither art 6 nor art 1 of the First Protocol are in issue in this case. We are concerned only with art 8.

**[53]** As the jurisprudence of the European Court of Human Rights and of the European Commission of Human Rights has developed, it has tended to reinforce the impression which is conveyed by *Marckx v Belgium* that the object of art 8 is to protect the individual against arbitrary interference by the public authorities with his right to privacy and that it is not concerned, as such, with the protection of his right to own or to occupy property.

**[54]** In *P v UK* App No 14751/89 (12 December 1990, unreported), the applicants' complaint that their eviction from a municipal caravan site which had been designed for the accommodation of gypsies was a breach of their rights under art 8 was held to be manifestly unfounded. The Commission considered whether the termination of their occupation of the site in accordance with the tenancy agreement which they had entered into with the local authority, which had been held to entitle the council to obtain an order for possession, could be considered as an interference with their rights under art 8(1). Its conclusion was that, 'even assuming that it could constitute an interference', it would be justified under art 8(2) of the convention (p 7). Among the reasons given was the following (p 8): 'The Commission considers that the applicants cannot derive from art 8 of the convention an unconditional right to remain on the Thistlebrook site.'

**[55]** In *O'Rourke v UK* App No 39022/97 (26 June 2001, unreported), the applicant complained that, among other things, his eviction from a hotel room where he had been given temporary accommodation by the local authority was an interference with his right to respect for his home under art 8 of the convention. In his case too the allegation was found by the court to be manifestly ill-founded. The court said that it had significant doubts over whether or not the applicant's links with the hotel room were sufficient and continuous enough to make it his 'home' at the time of his eviction but that, 'even if they were', the

eviction was in accordance with law and proportionate in pursuit of the legitimate aims of preventing disorder or crime at the hotel and protecting the rights and freedoms of the proprietors, their staff and other guests (p 6). The reasons for the decision include the following (p 5):

> 'The court recalls that art 8 does not in terms give a right to be provided with a home (see, for example, *Chapman v UK* (2001) 10 BHRC 48 at para 99). It considers therefore that the scope of any positive obligation to house the homeless must be limited.'

**[56]** In *Chapman v UK* (2001) 10 BHRC 48 the applicant was a gypsy who lived with her family in a caravan on her own land. She was refused the planning permission which she needed if she was to be allowed to live there. When enforcement measures were taken against her she complained that her rights under arts 6, 8 and 14 and art 1 of the First Protocol had been violated. The government accepted, adopting the language of art 8(2), that there had been 'an interference by a public authority' with her right to respect for her home which had been disclosed by the refusal of planning permission to allow her to live in her caravan on her own land and the pursuit of enforcement measures against her (at 67 (para 75)). The court too was satisfied on this point (at 68 (para 78)). It was not contested by the applicant that the measures to which she was subjected were in accordance with the law. In the course of its discussion of the question whether the interference pursued a legitimate aim and was necessary in a democratic society the court said (at 72 (para 99)):

> 'It is important to recall that art 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the contracting states many persons who have no home. Whether the state provides funds to enable everyone to have a home is a matter for political not judicial decision.'

**[57]** Further guidance as to how the court approaches this article is to be found in *Marzari v Italy* (1999) 28 EHRR CD 175. The applicant, who was suffering from metabolic myopathy and had been recognised as 100% disabled, was allocated an apartment which he considered to be inadequate to his needs. He ceased paying rent for it, demanding that certain works be carried out to make it suitable for him to live in. He was served with a notice to quit and proceedings were taken against him for his eviction. He complained that his rights under art 8 has been violated. The court found that his eviction from his apartment interfered with his rights under art 8(1). Its reasons for doing so were explained in this passage (at 179–180):

> 'The Court must first examine whether the applicant's rights under article 8 were violated on account of the decision of the authorities to evict him despite his medical condition. It further has to examine whether the applicant's rights were violated on account of the authorities' alleged failure to provide him with adequate accommodation. The Court considers that, although article 8 does not guarantee a right to have one's housing problems solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under article 8 of the Convention because of the

impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such interference; in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life.'

**[58]** In *Larkos v Cyprus* the applicant complained that as a government tenant he had been unlawfully discriminated against in the enjoyment of his home as, unlike a private tenant renting from a private landlord, he was not protected from eviction on the expiry of his lease. He relied on art 14 of the convention and art 1 of the First Protocol in conjunction with art 8 of the convention. The Commission held that there had been a violation of art 14 taken in conjunction with art 8. In the course of its opinion the Commission said:

'The Commission considers that, although art 8 of the Convention gives rise to positive obligations for states, it might not necessarily require states to take measures to protect tenants from expulsion after the termination of the contracts by virtue of which they occupied their "homes". However, Cyprus has taken such measures by enacting the Rent Control Law (Law 23/1983). Since this law regulates "the right to respect for one's home" under art 8 of the Convention, it must apply in a non-discriminatory manner in accordance with art 14 thereof.'

The court too held that there had been a violation of art 14 taken in conjunction with art 8. Of particular interest are the following observations ((1999) 7 BHRC 244 at 251 (para 28)):

'...the court notes that it has not been disputed that Mr Larkos can rely on the guarantee against unlawful discrimination contained in art 14 of the convention and it sees no reason to hold otherwise. It observes in this respect that the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affects the enjoyment of his right to respect for his home guaranteed under art 8 of the convention. Mr Larkos has not contended that there has been a breach of art 8 on account of the fact that, being a government tenant, he is faced with the threat of eviction from his home. However, it suffices for the purposes of the application of art 14 that the facts relied on in the instant case fall within the ambit of art 8 and the relevance of that article cannot be denied in view of the judgment of the District Court of Nicosia ordering Mr Larkos to leave his home ... Furthermore, even if the applicant has not yet been evicted from his home it is nevertheless the case that the 1983 Law has actually been applied to him to his detriment since he and his family have been living under the threat of eviction ever since the instigation of the eviction proceedings and that threat has become even more real following the judgment of the Supreme Court.'

**[59]** In the light of that background it is important to note what the respondent does and does not claim in this case. He does not base his claim that he is threatened with a violation of his convention rights on art 1 of the First Protocol or on art 14 of the convention read with art 8. Nor does he claim that his rights under art 6(1) have been violated. His claim is based on the proposition

that the appellants acted in breach of art 8 in seeking a possession order against him. He contends that the premises where he is living have not ceased to be his 'home' within the meaning of art 8(1) just because it has become unlawful for him to reside in it. He submits that art 8(1) is 'engaged', so the appellants must justify their claim for possession under art 8(2).

**[60]** It is to be noted that the respondent does not contend that there has been an interference with his right to respect for his private and family life or his correspondence. The argument is directed entirely to his right to respect for his home. So the first issue that has to be resolved is whether the house which he has been occupying continuously since 20 January 1992 is his home within the meaning of art 8(1), having regard to the fact that his tenancy of it has been terminated.

'HOME'

**[61]** The word 'home' in art 8(1) has an autonomous meaning in the law relating to convention rights. Its meaning cannot be defined by reference to domestic law. This is because it has to be determined in a way that will enable the expression to be applied uniformly irrespective of the contracting state from which the case comes. This is a concept which was already familiar in EC law, as words used in Community legislation must receive uniform application in all jurisdictions throughout the European Union. But it is a necessary part of the jurisprudence relating to the convention also. Although its provisions do not all have to be applied uniformly as a margin of appreciation is given to the contracting states in some contexts, the meaning which they take from the words used in each article of the convention has to be the same.

**[62]** The critical question is whether an individual has to have a lawful interest in the premises before they can be regarded as his home within the meaning of art 8(1). The jurisprudence of the European Court and the European Commission does not appear to have been entirely consistent on this issue. In *S v UK* (1986) 47 DR 274 at 278 (para 4) the Commission noted that the applicant was occupying the house, of which her partner had been the tenant, without any legal title whatsoever:

> 'Contractual relations were established between the local authority and the deceased partner and that contractual agreement may or may not have permitted long-term visitors. The fact remains, however, that on the death of the partner, under the ordinary law, the applicant was no longer entitled to remain in the house, and the local authority was entitled to possession so that the house could no longer be regarded as "home" for the applicant within the meaning of article 8.
>
> Further, even if the applicant's right to respect for her home, as guaranteed by article 8, could be regarded as having been interfered with by order of the county court for possession against her, the Commission considers that such interference was clearly in accordance with the law and was also necessary for the protection of the contractual rights of the landlord to have the property back at the end of the tenancy.'

**[63]** On the other hand in *Buckley v UK* (1996) 23 EHRR 101, where the applicant's occupation had never been lawful because she did not have permission to station her caravans on the land which she had purchased, the following views were expressed (at 115 (para 63)):

'The Commission considers ... that the concept of "home" within the meaning of article 8 is not limited to those which are lawfully occupied or which have been lawfully established. "Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a "home" which attracts the protection of article 8(1) will depend on the factual circumstances, namely the existence of sufficient and continuous links. The factor of "unlawfulness" is relevant rather to considerations under paragraph 2 of that provision of "in accordance with law" and to the balancing exercise undertaken between the interests of the community and those of the individual in assessing the necessity of any interference.'

The Commission found that the applicant's complaint that she was prevented from living with her family in her caravans on her land fell within the scope of art 8 as relating to her right to respect for her family life, private life and home (at 115 (para 65)).

**[64]** The factual test which the Commission identified in *Buckley v UK* had been adopted by the court in at least one previous case. In *Gillow v UK* (1986) 11 EHRR 335 at 348–349 (para 46) the court observed that, although the applicants had been absent from the house in Guernsey of which they had retained ownership for almost 19 years, they had not established any other home elsewhere in the United Kingdom. It held that they had in the circumstances retained sufficient continuing links with the house for it to be considered their home for the purposes of art 8. The links which they had retained were the ownership of the house, their intention always to return to it and the keeping of their furniture there. The test was essentially a factual one. Although the applicants had a legal title to the house, this factor was not identified as a necessary part of it.

**[65]** In *Khatun v UK* (1998) 26 EHRR CD 212 at 215 (para 1) the Commission noted that in the domestic proceedings (see *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, [1997] AC 655) a distinction had been made between those applicants with a proprietary interest in the land and those without such an interest. It added this comment:

'For the purposes of article 8 of the Convention, there is no such distinction. "Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a "home" which attracts the protection of article 8(1) of the Convention will depend on the factual circumstances, namely the existence of sufficient and continuous links (see *Gillow v UK* (1986) 11 EHRR 335). Even where occupation of the property is illegal, this will not necessarily prevent that occupation from being that person's "home" within the meaning of article 8 of the Convention (see *Buckley v UK* (1996) 23 EHRR 101). The Commission considers that article 8(1) applies to all the applicants in the present case whether they are the owners of the property or merely occupiers living on the property, for example the children of the owner of the property.'

**[66]** The observations by the Commission in *Khatun v UK* seem to me to be conclusive on this issue. The violation of the right to respect for their homes and family and private lives which was alleged by the applicants in that case was said to have arisen because of the pollution of the area by dust caused by building

works in the Docklands area. Their right to occupy the premises was not in issue, so the question whether the accommodation in which they were each living was their 'home' for the purposes of art 8(1) did not have to concern itself with the question of their legal title to the premises. The approach which the commission took is entirely consistent with the view that the object of art 8 is to protect the individual against arbitrary invasion by the public authorities of his privacy.

**[67]** Where an individual's right to respect for his private and family life is in issue, the application of a narrow or technical test as to what this part of his life comprises would plainly be inappropriate. The same is true of the word 'home' when it is used in the same context. It cannot be right that the word should take on a different meaning according to the nature of the interference which is alleged by the applicant. The fact that the European Commission had to alter its approach to this issue from that indicated by a literal reading of the first paragraph of the passage which I have quoted from *S v UK* underlines, if I may say so, the importance of keeping the purpose of art 8 firmly in mind when one is considering these concepts.

**[68]** In my opinion therefore the test which was identified in *Buckley v UK* and applied again in *Khatun v UK* is the test which should be applied in this case. I think that there is no doubt that the respondent's links with the premises are sufficient and continuous, so they must be regarded as his 'home' for the purposes of art 8(1). I would hold, in agreement with all your Lordships, that the fact that the respondent's tenancy has come to an end does not mean that the premises ceased to be his 'home' for these purposes.

**[69]** The more difficult question, to which I now turn, is where that conclusion leads to in the present case. The Court of Appeal held that art 8(1) is engaged by the making of an order for possession. So it remitted the case to the county court to determine whether 'interference with Mr Qazi's right to a home' is permitted by art 8(2) ([2002] HLR 276 at [58]). The description of the right in issue in this case as a 'right to a home' must, I think, be taken to have been a slip of the pen. Article 8(1), as the Strasbourg court has repeatedly said, does not guarantee a right *to a home*. What it guarantees to the individual is *respect for his home*, which is an entirely different concept. The question is whether the Court of Appeal was right to remit the case to the county court to determine whether the interference with the respondent's right to respect for his home which will result from the making of an order for possession is permitted by art 8(2).

IS ARTICLE 8(1) 'ENGAGED'?

**[70]** I mention this question merely to say that I consider that it can receive only one answer in the circumstances. The effect of an order for possession will be to require the respondent to leave the premises which are his 'home' for the purposes of art 8(1). Regarding the question of respect for his home as one which is directed in essence to his right to be respected by the public authorities in the enjoyment of his privacy, his removal from his home is bound to interfere with his enjoyment of that right at least to some extent. As Sedley LJ said in *Lambeth London BC v Howard* [2001] EWCA Civ 468 at [30], (2001) 33 HLR 636 at [30], any attempt to evict a person, whether directly or indirectly or by process of law, from his or her home is on the face of it a derogation from the respect to which the home is prima facie entitled. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 at [67], [2001] 4 All ER 604 at [67], [2002] QB 48 Lord Woolf CJ observed that to evict the defendant from her home

would impact on her family life. The same might be said of the impact on the respondent in this case, although I am conscious of the fact that this was not how Mr Luba QC for the respondent has presented his argument.

[71] It follows, to adopt the language of Sir Gerald Fitzmaurice in *Marckx v Belgium* (1979) 2 EHRR 330 at 364, that art 8 is 'applicable'. The issue which the respondent has raised is within the scope of that article. It is not irrelevant to his case. In that sense the article is 'engaged'. But in my opinion it does not follow that, on the facts of this case, there is an issue which must be decided within the domestic legal order by remitting the question whether any interference is permitted by art 8(2) for decision by the county court.

IS THE INTERFERENCE PERMITTED BY ARTICLE 8(2)?

[72] The issue to which I now turn, as the Law Commission Consultation Paper, para 5.1, points out, raises a question of procedure as well as one of substance. It is a domestic problem. It is not one which troubles the European Court, as it has full jurisdiction to decide all the issues which are remitted to it by art 41 of the convention. This, no doubt, is why the questions arising under art 8(1) and 8(2) are so often run together at the admissibility stage with the result that the Commission or the court, as the case may be, is content to address art 8(2) on the assumption that the right to respect for the home has been interfered with: see, eg, *S v UK* (1986) 47 DR 274 at 278 (para 4); *O'Rourke v UK* App No 39022/97 (26 June 2001, unreported) p 6. In the domestic legal order however the county court, which is the court in which actions for possession are brought, does not have unlimited jurisdiction. It does not have jurisdiction in judicial review. The question whether, and if so to what extent, it has a discretion to make or withhold an order for possession depends on the law which has to be applied to the tenancy.

[73] The legislation relating to housing which has been enacted by Parliament is complex and much of it is designed to give statutory protection to tenants. It is necessary only to mention, by way of illustration, the discretionary grounds on which possession may be given which are set out in Sch 2 to the Housing Act 1985 and the protection which is given to introductory tenancies in Pt V of the Housing Act 1996. Where provisions of that kind are in issue, their application to the case where an order for possession is sought must be determined by the county court. In these cases the reasonableness or proportionality of making the order will arise because a decision on this point is required by the statute.

[74] The present case, however, is not a case of that kind. The joint tenancy has been brought to an end by the service of a tenant's notice to quit. The position in domestic law is that in these circumstances, as a result of the joint tenant's action and in terms of the lease, the whole of the joint tenancy is terminated. So neither joint tenant has any longer any right to remain in the premises. The county court has no discretion as to whether or not it should grant an order for possession in these circumstances. In domestic law the making of an order for possession follows automatically. It has not been suggested that the fact that this is what the law provides is itself a violation of art 8. That proposition would not be sustainable in view of the fundamentally subsidiary role of the convention, which gives special weight to the role of the domestic policy maker: see *Hatton v UK* [2003] All ER (D) 122 (Jul) at para 97. The only question is whether it is a violation of the respondent's art 8 rights for the law to be applied as it stands to his case.

[75] Some guidance as to what the European Court would make of this issue is provided by *Ure v UK* App No 28027/95 (27 November 1996, unreported), as the facts in that case are very similar to the facts in this appeal. The applicant had become, with his wife, a joint secure tenant of a flat belonging to the housing authority. His wife then left the flat and, having been advised that she could terminate the tenancy by serving a notice to quit, did so. The housing authority then applied for a possession order on the ground that the notice had terminated the joint tenancy. An order for possession was granted by the county court and upheld on appeal. The applicant submitted that the legislation which provided for the termination of a joint tenancy by a unilateral notice by one of the joint tenants operated in a manner which was incompatible with the other tenant's convention rights. He invoked various articles including art 8 of the convention, as to which his complaint was that his right to respect for his home had been breached. The Commission's response to this argument was as follows (at p 4):

> 'In the present case the Commission notes that the applicant and his wife were joint tenants and that, therefore, the right to use the apartment was to be exercised by them jointly. The applicant apparently was not entitled, under the tenancy agreement, to use the flat as a sole tenant. It was therefore clear at the outset that in the case one of the joint tenants decided to leave, the other could not claim a right to become the sole tenant. This was the legal situation as regards joint tenancies on all types of property, and not only on residential property.
>
> Furthermore, it does not appear that the manner in which the authorities balanced the various interests involved, such as the interest of the leaving co-tenant, of those in need of accommodation and of the applicant, was arbitrary or unreasonable. Thus, the applicant's housing need apparently changed as he was not living with his wife and child any more. Moreover, replacement housing accommodation had been obtained for the applicant.'

[76] It is true, as Mr Luba pointed out, that the commission did not base its decision in that case on the simple answer that the flat was no longer the applicant's home once the lease had been terminated. But it is plain that the legal situation in domestic law was an important factor. The observations about balancing the various interests involved were directed to a passage in the judgment of the Court of Appeal setting out its reasons for dismissing the applicant's argument that the housing authority, having allegedly instigated and assisted the wife to serve a notice to quit, was not entitled to rely on its own wrongdoing in seeking possession of the flat. They were also directed to an observation by the county court judge that there was nothing in itself either improper, unlawful or unfair in a local authority assisting a tenant in terminating a tenancy so that a person who might be entitled to other accommodation is able to obtain it. That has not formed any part of the respondent's argument in this case. It has not been suggested that there has been any wrongdoing on the appellants' part. The respondent did not seek judicial review of the decision to refuse his application in October 2000 for accommodation through the housing register.

[77] In *Wood v UK* (1997) 24 EHRR CD 69 the applicant had obtained a loan on the security of her house. It was repossessed when she was unable to meet the repayments on the loan. She complained that her rights under art 8 and art 1 of

the First Protocol had been breached. The Commission's response to the complaint under art 8 is set out at 70–71:

> 'In so far as the repossession constituted an interference with the applicant's home, the Commission finds that this was in accordance with the terms of the loan and domestic law and was necessary for the protection of the rights and freedoms of others, namely the lender.'

In this case the point which was taken in the first paragraph which I have quoted from *Ure v UK* was decisive. Reading these two cases together with the second paragraph of the passage which I have quoted from the decision of the Commission in *S v UK*, I would expect the European Court to attach much importance to the fact that it was clear from the outset of the respondent's joint tenancy that it could be terminated by a notice to quit by one of the joint tenants, that the appellants' right to immediate possession is in these circumstances unqualified in domestic law and that the premises, once recovered, will be available for letting to others who are in need of housing in their area. The conclusion which I would draw is that on these facts the proposition that there was a violation of art 8 was unarguable.

**[78]** In *Lambeth London BC v Howard* [2001] EWCA Civ 468 at [32], (2001) 33 HLR 636 at [32] where possession was sought against a secure tenant on the grounds of nuisance under ground 2 of Pt I of Sch 2 to the Housing Act 1985, Sedley LJ said:

> 'A legal threat to a secure home will, in the ordinary way, engage article 8(1). In situations where the law affords an unqualified right to possession on proof of entitlement, it may be that article 8(2) is met, but that is not the present class of case and nothing in this judgment should be taken as impinging on it.'

As I have already indicated, I respectfully agree with the opinion which he has expressed in the first sentence of this quotation. But I think that the point which he makes at the outset of the second sentence can be expressed more strongly. My understanding of the European jurisprudence leads me to the conclusion that art 8(2) *is* met where the law affords an unqualified right to possession on proof that the tenancy has been terminated.

**[79]** In *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4, [2002] LGR 467 the defendant had been granted a non-secure tenancy of a residential property as a homeless person under s 193 of the Housing Act 1996. Complaints that she was causing a nuisance were received from neighbours, so the housing authority served her with a notice to quit. When it had taken effect the authority applied for a possession order. The Court of Appeal held that there was a prima facie violation of art 8(1) but, after examining of the scheme laid down by Parliament, that there had been no breach of the defendant's art 8(1) right in that case. It was also held, following *R (on the application of McLellan) v Bracknell Forest BC, Reigate and Banstead BC v Benfield* [2001] EWCA Civ 1510, [2002] 1 All ER 899, [2002] QB 1129 that a challenge to the decision to serve a notice to quit could be made in judicial review within the appropriate time limits, and that in the rare situation where something wholly exceptional happened after service of the notice to quit which fundamentally altered the rights and wrongs of the proposed eviction the judge in the county court who was hearing the claim for possession might be obliged to address it in

deciding whether the making of a possession order could be justified: see [2002] LGR 467 at [40] and [44]–[45] per Laws LJ. I wish to reserve my opinion as to whether it would be open to the tenant, in a wholly exceptional case, to raise these issues in the county court where proceedings for possession were being taken following the service of a notice to quit by the housing authority, bearing in mind as Lord Millett points out that its decision to serve the notice to quit would be judicially reviewable in the High Court so long as the application was made within the relevant time limit. The situation in the present case is different, as it was a notice to quit served by one of the joint tenants that terminated the tenancy.

**[80]** In *Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617 the tenant of a secure tenancy had died. An order for possession was sought against the defendant, who had been living with the deceased but was not a member of the deceased's family as defined by the statute. In this case too it was held that there was a prima facie violation of his rights under art 8(1) but, following a consideration of the statutory scheme, that there had been no violation. As Mance LJ explained, at [82], that case belongs to a different category of case from this one as it was a statutory scheme that terminated the tenancy. He observed that the question whether there might prove in the county court to be short answers to the question raised by art 8(2) was not before the Court of Appeal in this case. That is not the position now, as your Lordships gave permission for argument to be presented on the question whether every claim for possession of a home engages art 8. In the course of that argument submissions were made as to whether, in a case of this kind, the right to respect for a home had been violated.

CONCLUSION

**[81]** In the second paragraph of his speech, which I have had the opportunity of reading in draft, my noble and learned friend Lord Steyn says that the approach of the majority empties art 8(1) of any or virtually any meaningful content and that it allows domestic notions of title, legal and equitable rights to colour its interpretation.

**[82]** I hope that I have been able to show that this is not so. I believe that the key to a proper understanding of the issues in this case lies in an appreciation of the fact that art 8 regards a person's home as an aspect of his right to privacy. The interpretation which I would give to the concept of a person's home in this context is broad enough to give a full measure of protection in a wide range of circumstances that may be envisaged where a person's right to respect for his home is interfered with by the public authorities. The issue which arises in this case is, by way of contrast, a very narrow one which has much more to do with the law relating to property rights than respect for a person's privacy.

**[83]** I do not say that the right to respect for the home is irrelevant. But I consider that such interference with it as flows from the application of the law which enables the public authority landlord to exercise its unqualified right to recover possession, following service of a notice to quit which has terminated the tenancy, with a view to making the premises available for letting to others on its housing list does not violate the essence of the right to respect for the home under art 8(1). That is a conclusion which can be applied now to all cases of this type generally.

[84] I agree with my noble and learned friends Lord Millett and Lord Scott of Foscote that the Strasbourg jurisprudence has shown that contractual and proprietary rights to possession cannot be defeated by a defence based on art 8. It follows that the question whether any interference is permitted by art 8(2) does not require, in this case, to be considered by the county court. I would allow the appeal and restore the order of Mr Recorder Williamson.

**LORD MILLETT.**

[85] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Lord Scott of Foscote. They have subjected the case law of the Strasbourg Court to close analysis and there is no need for me to repeat the exercise. I can therefore be relatively brief in explaining the reasons why I agree with them that the appeal should be allowed. In doing so I wish to make it clear that the difference which divides the majority from the minority is a very narrow one. This should not, however, obscure the fact that it is nevertheless of great practical importance, since it goes to the question whether the county court has discretion to refuse an order for possession in a straightforward situation of daily occurrence.

[86] It used to be an Englishman's proud boast that 'an Englishman's home is his castle'. The idea was given expression in stirring language by William Pitt the Elder (Lord Chatham) as recorded in Brougham's *Statesmen in the Time of George III* (First Series) (1839) pp 41–42:

> 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it— the storm may enter—the rain may enter—but the King of England cannot enter! —all his force dares not cross the threshold of the ruined tenement!'

[87] Although not unrelated to his rights of property, the poor man's defiance of the King was not based on his title. The common law protects possession as well as title. A person who is in actual possession of land is entitled to remain in peaceful enjoyment of the property without disturbance by anyone except a person with a better right to possession. It does not matter that he has no title. A squatter can maintain a claim of trespass. His want of title does not justify the authorities in searching his premises without a search warrant. He cannot be evicted save at the suit of someone with a better right to possession, and even then that person must rely on the strength of his own title and not the weakness of the squatter's.

[88] The same idea is now enshrined, in suitably restrained and less colourful language, in art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998):

> *'Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,

a for the protection of health or morals, or the protection of the rights and freedoms of others.'

The reference in art 8(2) to 'interference with ... the exercise of this right' is somewhat clumsily expressed in relation to the right in question. It is to be interpreted as forbidding interference with the enjoyment of the right in b question.

[89] Rights of property are protected by the First Protocol to the convention, not by art 8. Although added by a later Protocol the heading to art 8 indicates its essential thrust. It is not directed to the individual's rights of property but to his right to be left alone to live a normal family life without arbitrary interference by the public authorities: see *Marckx v Belgium* (1979) 2 EHRR 330 at 342. In art 8 an c individual's 'home' is not defined by the particular building which he owns or occupies. The Strasbourg court has repeatedly stated that art 8 does not give anyone a right to a home or 'an unconditional right to remain' in any particular home: see *P v UK* App No 14751/89 (12 December 1990, unreported). A person's 'home' is rather the place where he and his family are entitled to be left in peace d free from interference by the state or agents of the state. It is an important aspect of his dignity as a human being, and it is protected as such and not as an item of property.

[90] The facts of the present case are in small compass. Mr and Mrs Qazi were council tenants. They had a joint tenancy of a two-bedroomed house and lived there with their daughter. The marriage broke up and Mrs Qazi and her e daughter went to live elsewhere, leaving her husband alone in the house. She divorced him and he has remarried. She gave the council written notice to determine the tenancy in accordance with the terms of the tenancy agreement. This brought the tenancy to an end and with it Mr Qazi's right to go on living in the house. He applied to the council for a new tenancy, but his application was f refused on the legitimate ground that he was now a single person and that acceding to his application would result in under-occupation of a house which should be made available to accommodate a family with greater priority need in an area of acute housing shortage.

[91] Mr Qazi did not vacate the house and the council brought possession proceedings against him in the county court. The council is a public authority, g and Mr Qazi could, if so minded, have challenged its decisions to refuse his application for a new tenancy and to bring proceedings to recover possession on the grounds that they were 'arbitrary', that is to say not objectively justifiable but unreasonable or disproportionate. Such proceedings would have to be brought in the High Court; but the county court could have been asked to stay the h possession proceedings in order to permit them to be brought, though he would have had to show that they would have at least some prospect of success.

[92] Mr Qazi did not take this course. Instead he resisted the possession proceedings on the ground that by bringing them the council was interfering with the enjoyment of his right to respect for his home contrary to art 8. Absent a j timely challenge to the lawfulness of the council's decisions to refuse a new tenancy and seek possession, Mr Qazi had no defence under domestic law. The question to be decided in this appeal is whether he had any arguable defence by reference to art 8.

[93] The recorder held that art 8 was not 'engaged', that is to say was not applicable, because the premises were not Mr Qazi's 'home' within the meaning

of art 8. It was not his 'home' because he had no legal or equitable right or interest in the premises. a

[94] It is not disputed that, once his tenancy was determined, Mr Qazi no longer had any legal or equitable proprietary right in the premises. But the recorder's conclusion that Mr Qazi had no sufficient interest in the premises to support his claim to be left to enjoy them in peace was untenable even as a matter of domestic law. He was in actual possession, and this was enough to enable him b to claim the protection of the law against anyone who did not have an immediate right to possession.

[95] The Court of Appeal allowed Mr Qazi's appeal, and after a review of the case law of the Strasbourg court held that the premises were Mr Qazi's 'home' for the purposes of art 8. I agree with all your Lordships that they were right to do c so. The word 'home' has an 'autonomous' meaning in the Strasbourg jurisprudence, that is to say one which is independent of any particular meaning which may be attributed to it in the law of an individual contracting state. It does not, however, bear a special legal meaning developed by the case law of the Strasbourg court, as does the expression 'civil rights' for example. It bears its natural and ordinary meaning as popularly understood throughout the d contracting states. Whether premises constitute a person's 'home' for the purposes of art 8 is therefore a question of fact, and the Strasbourg court will examine the facts for itself in order to determine whether they do so.

[96] Considered as a question of fact, the premises were Mr Qazi's home at all material times. They were his home when he lived there with his former wife, e and they continued to be his home after she left him. They did not cease to be his home when his tenancy came to an end. The most that can be said is that he no longer had a legal right to remain in occupation which he could maintain against the council, though he could maintain it against anyone else. He was liable to be evicted at the suit of the council; but while he lived there it was still his home. It was his home when the council brought proceedings against him, f and it was still his home when the recorder made a possession order against him. It would not have ceased to be his home until he left possession or was evicted by the bailiffs. This has not happened. He lives there to this day, now with his second wife and two children. It is still his home.

[97] This is the approach which has been adopted by the Strasbourg court. Its g case law has been consistent in treating the question as one of fact. It is neither necessary nor sufficient that the applicant should have a proprietary interest in the premises which are alleged to constitute his 'home'. A person may make his home where he has no right to be; and a person may choose not to make his home where he has a right to live. I agree with my noble and learned friend Lord h Scott that *S v UK* (1986) 47 DR 274 has been misinterpreted, and that properly understood it remains authority for what it decided. Although clumsily expressed, the Commission's decision was clearly based on the fact that the local authority was entitled to possession. This was the basis of the Commission's conclusion that the house could 'no longer be regarded as "home" for the applicant within the meaning of article 8'. The Commission cannot have meant j this literally, for it would emasculate art 8. Its protection would entirely fall away as soon as the applicant's tenancy came to an end. The police could search his house without a warrant; the applicant and his family would be liable to immediate and arbitrary eviction by anyone with or without a shadow of a legal right without the protection of the convention. Not only is this indefensible in

human rights terms, it does not follow (as the Commission thought the local authority's compliance with its obligations under art 8 did) as a logical consequence of the determination of the applicant's tenancy. I think that the Commission was saying that the house could no longer be regarded as attracting the protection of art 8 so as to afford a defence to the local authority's claim to possession. So understood the decision is both internally logical and consistent with the later jurisprudence of the Strasbourg court.

**[98]** The only other case to which I would refer at this stage is *Gillow v UK* (1986) 11 EHRR 335. This was a decision of the Strasbourg court and was concerned with the converse case where the applicant owns the premises but does not live there. The court held that, although the applicants had not lived in the premises for 19 years, they had not established any other home elsewhere in the United Kingdom and had 'retained sufficient continuing links' with the subject premises for them to be considered their 'home' for the purposes of art 8. I do not think that this undermined the decision in *S v UK* in any way. It did not substitute a new test of 'sufficient and continuous links' for a former test of legal or equitable title, for this test, if it be one at all, was satisfied. It merely showed that, whether or not title was necessary to bring premises within the protection of art 8, it might not be sufficient.

**[99]** Accordingly I am satisfied that, when the local authority's claim for possession came before the recorder, and contrary to his decision, the premises did constitute Mr Qazi's 'home' for the purposes of art 8.

**[100]** It necessarily follows that art 8 was applicable. But it does not follow that it was even arguably infringed. In my opinion art 8 is not ordinarily infringed by enforcing the terms on which the applicant occupies premises as his home. Article 8(1) does not give a right to a home, but only to 'respect' for the home. This meaning of 'respect' for the home cannot be understood in isolation; it can be understood only if art 8(1) is read together with art 8(2). This forbids interference with the right conferred by art 8(1) except in the circumstances specified. By explaining the circumstances in which there may be lawful interference with the right to 'respect', art 8(2) gives meaning to that concept and limits the scope of the article.

**[101]** Article 8(2) stipulates that interference with the right must not be arbitrary; it must be in accordance with law. This requirement is satisfied in the present case, and it need not be examined further. But this is not sufficient. The interference must also be justified. In most cases art 8(2) calls for a balance to be struck between the applicant's right to 'respect' for his home and some competing public interest, such as national security, public safety, the prevention of disorder or crime, the protection of health or morals, and so on. But art 8(2) also permits interference with the right where it is necessary 'for the protection of the rights and freedoms of others'. Those others include but are not limited to private citizens. They include landowners whether they are private citizens or public authorities.

**[102]** Consideration of the question whether interference with the right is 'necessary for the protection of the rights and freedoms of others' may also call for a balance to be struck, but it need not do so. A person's right to respect for his home includes his right to listen to music, but not to music so loud that it disturbs his neighbour's sleep at 3 am. Our ordinary law of nuisance requires the court to conduct a balancing exercise between the competing rights of neighbours to enjoy their respective properties. By carrying out that exercise the court will

inevitably be concluding, whether consciously or not, whether its interference with one party's right to respect for his home is necessary to protect his neighbour's rights and freedoms. Provided that it carries out the exercise properly and in accordance with the ordinary law, there is no need to give separate consideration to art 8.

**[103]** But no such balancing exercise need be conducted where its outcome is a foregone conclusion. In the present case, as in *S v UK*, the local authority had an immediate right to possession. The premises were Mr Qazi's home, and evicting him would obviously amount to an interference with his enjoyment of the premises as his home. But his right to occupy them as such was circumscribed by the terms of his tenancy and had come to an end. Eviction was plainly necessary to protect the rights of the local authority as landowner. Its obligation to 'respect' Mr Qazi's home was not infringed by its requirement that he vacate the premises at the expiry of the period during which it had agreed that he might occupy them. There was simply no balance to be struck.

**[104]** This conclusion too is in accordance with Strasbourg jurisprudence. I have already referred to *S v UK*, where in very similar circumstances the Commission declared the complaint to be manifestly ill-founded. Another such case is *Wood v UK* (1997) 24 EHRR CD 69 where the Commission rejected a complaint by a mortgagor who was in default that her art 8 rights had been infringed by the making of a possession order at the suit of the mortgagee. The Commission held that even if the repossession constituted an interference with the applicant's home, it was in accordance with the terms of the loan and domestic law and was necessary for the protection of the rights and freedoms of others, namely the mortgagee. There was thus no infringement of the art 8 right. There is no relevant distinction between that case and the present. It is true that the mortgagee in *Wood v UK* was not a public authority whereas the council in the present case is; but the council's conduct as a public authority was not challenged, as it could have been by proceedings for judicial review in the High Court, and in bringing its claim for possession it relied on its ordinary rights, shared by everyone, as the owner of the premises and not on its rights as a public authority. Its status as a public authority was simply irrelevant to its claim.

**[105]** An instructive case which demonstrates the limits of the protection afforded by art 8 is *Larkos v Cyprus* (1999) 7 BHRC 244. As in the present case, the applicant was a tenant whose tenancy had come to an end and whose landlord sought possession. The applicant was a tenant of government-owned premises, and as such was not entitled to the security of tenure which he would have enjoyed if he had held his tenancy from a private landlord. He did not complain of an infringement of art 8 alone, and it is clear that neither the Commission nor the court would have found one. They found a breach of art 14 taken in conjunction with art 8. Article 14 secures the enjoyment of convention rights without discrimination. The convention right in question was the right to respect for the applicant's home. That had been secured to tenants, but on a discriminatory basis which infringed art 14.

**[106]** The Commission expressly acknowledged that art 8 does not require states to take measures to protect tenants from eviction after the termination of the contracts under which they occupy their homes. But the state concerned had done so. Since the law by which it had done so 'regulates the right to respect for one's home' it must apply in a non-discriminatory manner in accordance with art 14. The importance of *Larkos v Cyprus* for present purposes lies in the fact that,

if national law had not discriminated against government tenants by withholding the security of tenure which it granted to tenants of private landlords, the eviction would not have amounted to a breach of the applicant's art 8 rights.

**[107]** It follows that I do not accept without qualification the suggestion of Laws LJ in *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4, [2002] LGR 467 that, once it is established that the premises in question are the applicant's home, an order for possession amounts to an interference with (and prima facie an infringement of) his art 8 right of respect for his home. The qualification, which is built into the provisions of art 8 itself, is that save in wholly exceptional circumstances (which it has not been suggested exist in the present case and with which I shall deal below) there is no lack of respect, and no infringement of art 8, where the order is made in favour of the person entitled to possession by national law.

**[108]** I would also wish to dissociate myself from the dictum of Waller LJ in *R (on the application of McLellan) v Bracknell Forest BC, Reigate and Banstead BC v Benfield* [2001] EWCA Civ 1510, [2002] 1 All ER 899, [2002] QB 1129 that, even in a case where a private landlord is seeking possession, the court, as a public authority, must consider whether the order is justified under art 8(2) before making an order. The fact that a person cannot be evicted without a court order does not mean that the court, as a public authority, is bound in each case to consider whether an order for possession would be disproportionate and infringe art 8 rights. The court is merely the forum for the determination of the civil right in dispute between the parties: see *Di Palma v UK* (1988) 10 EHRR 149. Its task is to resolve the dispute according to law. In doing so it would, of course, have to consider whether the landlord was entitled to possession as a matter of our ordinary domestic law (ie apart from the Human Rights Act 1998), taking into account the various statutory provisions which operate in this field. But once it concludes that the landlord is entitled to an order for possession, there is nothing further to investigate. The order is necessary to protect the rights of the landlord; and making or enforcing it does not show a want of appropriate respect for the applicant's home.

**[109]** I would accordingly endorse the observations of Moses J in *R (on the application of Gangera) v Hounslow London BC* [2003] EWHC 794 (Admin), [2003] All ER (D) 200 (Apr) that in proceedings between private parties the court does not act incompatibly with art 8 by making or enforcing a possession order without considering questions of proportionality. I also agree with him that it makes no difference that the landlord is a public authority. In most cases the statutory scheme established by Parliament will provide the objective justification for the council's decision to seek possession, which need not be demonstrated on a case-by-case basis: see *Wandsworth London BC v Michalak* [2002] EWCA Civ 271 at [46], [2002] 4 All ER 1136 at [46], [2003] 1 WLR 617. In the exceptional case where the applicant believes that the local authority is acting unfairly or from improper or ulterior motives, he can apply to the High Court for judicial review. The availability of this remedy, coupled with the fact that an occupier cannot be evicted without a court order, so that the court can consider whether the claimant is entitled as of right to possession, is sufficient to supply the necessary and appropriate degree of respect for the applicant's home.

**[110]** In my opinion the Court of Appeal were right to determine that the premises constituted Mr Qazi's home at the material time, but wrong to remit the case to the county court for further consideration. In my opinion there was

nothing further for the county court to consider. There was no arguable breach of art 8, and the Court of Appeal ought to have dismissed Mr Qazi's appeal, albeit on grounds which differ from those of the recorder.

**LORD SCOTT OF FOSCOTE.**

INTRODUCTION

**[111]** My Lords, the issue before your Lordships turns on the view to be taken of the effect of art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) on a case where the owner of property is seeking to recover possession from the occupier whose home it has become but who has no right, as against the owner, to remain there. The facts of the case have been fully set out in the opinions given by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead, as well as in the courts below, and I can deal with them briefly.

**[112]** The property is a two-bedroom house at 31 Hutton Lane, Harrow. The owner is the appellant, the London Borough of Harrow (the council). The house forms part of the council's housing stock. The respondent, Mr Qazi and his then wife, Mrs Saman Qazi, became joint tenants of the house under a secure tenancy granted by the council in 1992. They lived there with their daughter. It was their home. In 1998 their relationship broke up. Mrs Qazi left the home with their daughter to live elsewhere and served notice to quit on the council. It may safely be assumed that the service of the notice to quit was contrary to Mr Qazi's wishes. He wanted to continue to occupy the house as his home.

**[113]** It is accepted, however, that the effect in law of the service of a notice to quit by one joint tenant who jointly with another holds a tenancy of property terminates the tenancy. The effect, therefore, of the service by Mrs Qazi of the notice to quit terminated the secure tenancy under which Mr Qazi was occupying the house. He had, thereafter, no property right that entitled him, as against the council, to remain in occupation.

**[114]** Mr Qazi applied to the council for a new tenancy. His application was refused in July 1999. The council took the view that, as a single occupant, the accommodation was more than he needed. They wanted to allocate the house to one of the families on their lengthy housing list. In November 1999, in response to a repeated request from Mr Qazi, the council repeated their refusal to grant him a new tenancy. They asked him to vacate the house. Mr Qazi refused to vacate the house and, in March 2000, the council commenced possession proceedings in the county court. It is those proceedings that, via the Court of Appeal, have led to this appeal to your Lordships' House.

**[115]** Mr Qazi could have tried to challenge, by judicial review, the council's decision to refuse to grant him a new tenancy of the house. But he did not do so. It may be he took the view that, in the circumstances pertaining in July and November 1999, the challenge would have been a hopeless one.

**[116]** In 2000, however, a change in circumstances had occurred. Mr Qazi formed a relationship with a lady whom he married in October 1999 in an Islamic ceremony. She had a five-year-old son. Their marriage was later solemnised in a civil ceremony. By July 2000 they were all living together as a family in the house. The family was increased when Mr Qazi's new wife, Mrs Abida Qazi, gave birth to their child in December 2000. She applied to the council for the

grant of a tenancy of the house to herself and Mr Qazi. The council's previous objection to Mr Qazi's application, namely, that the accommodation was more than a single occupant required, no longer applied. But the council refused her application. They placed her and Mr Qazi on their housing list but pointed out that there were many families above them on the list. They were not willing to accord Mr and Mrs Qazi priority over those other families. This decision, too, was not challenged in any judicial review application.

**[117]** Meanwhile the possession proceedings brought by the council were continuing. Mr Qazi's defence has been throughout, and remains, that the council's claim for possession, and any possession order made by the court acceding to that claim, would be in breach of his rights under art 8 of the convention. On 8 June 2001 Mr Recorder Williamson, sitting in the Watford County Court, rejected this defence and made an order for possession in favour of the council. He did so because, in his view, property in which a claimant had no legal or equitable right or interest could not constitute the claimant's 'home' for art 8 purposes. On appeal, the Court of Appeal disagreed with this view. They held that the factual links between the claimant and the property sufficient or necessary for it to constitute his 'home' for art 8 purposes did not include a legal or equitable right or interest in the property. They held that the possession proceedings constituted an interference with Mr Qazi's 'home' so that art 8, contrary to Mr Recorder Williamson's view, was applicable. They therefore allowed Mr Qazi's appeal and remitted the case to the county court in order for the county court to decide whether the interference could be justified under art 8(2).

**[118]** There appear, therefore, to be two issues for your Lordships. The first is whether the house, 31 Hutton Lane, Harrow, constituted Mr Qazi's 'home' for art 8 purposes notwithstanding that he had no legal or equitable right or interest in the property. The second issue is whether, if the house did constitute Mr Qazi's 'home', Mr Qazi can raise an art 8 defence to the council's claim for possession notwithstanding that, as against the council, he has no right under the ordinary law to remain in possession. In other words, can art 8 ever constitute a defence to a claim by an owner of property to recover the property where, art 8 apart, the defendant has no right to remain there?

ARTICLE 8

**[119]** Article 8 says:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

**[120]** The structure of art 8 is, in my opinion, very important. Paragraph 1 expresses a general principle, rather than a precise legal right: the words 'the right to respect' are indicative of this. The object of the 'right to respect' is home life in all its aspects: privacy, family, home, correspondence. Paragraph 2, on the other hand, expresses, with precision, the gateways through which a public

authority that interferes, or proposes to interfere, with the para 1 'right to respect' for home life must pass if the interference is to be permissible. The interference must always be in accordance with the law. But it must also be necessary in a democratic society for one or other of the specified reasons. The obviously pertinent reason for the purposes of the present case is 'for the protection of the rights and freedoms of others'. But, of course, one never gets to a consideration of the gateways unless the interference complained of is capable of constituting interference with the 'right to respect' for home life.

**[121]** Before turning to the Strasbourg and domestic case law relevant to the issues before the House, it is helpful to reflect on the intended purpose of the convention. It was the progeny in a European context of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226) proclaimed by the General Assembly of the United Nations. It (the convention) recited that '[the Universal] Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared' and that the signatory governments (to the convention) were resolved 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'. I have referred to these recitals as a preliminary to making the point that not one of the rights declared in the Universal Declaration and not one of the rights and freedoms enshrined in the convention involves, in express terms at least, any diminution of (or encroachment on) the property rights of others. The reverse is the case. Article 17(2) of the Universal Declaration says that 'No one shall be arbitrarily deprived of his property'. This is reflected in art 1 of the First Protocol to the convention which secures the right of every 'natural or legal person' to the peaceful enjoyment of his possessions. Any interference with this right must be 'in the public interest and subject to the conditions provided for by law'.

**[122]** As to the right to respect for home life provided by art 8 of the convention, its progenitor is art 12 of the Universal Declaration which says that 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence'. Neither this language, nor the language of art 8 can, in my opinion, be read as authorising any deprivation of the property rights of others.

**[123]** The Universal Declaration and the convention were the product of the horrors of fascism which led to World War II and the Holocaust. One of the recitals to the former records that 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'. The intention of these instruments was to enshrine fundamental rights and freedoms. It was not the intention to engage in social engineering in the housing field. It was, in 1948 and 1950, when these instruments came into being, and it still remains, the province of individual signatory states to decide for themselves what social housing legislation to introduce. Thus, if a signatory state chose not to provide any security of tenure to residential tenants, so that on the expiry of every tenancy the landlord would become entitled to recover possession, this state of affairs would offend neither art 12 of the Universal Declaration nor art 8 of the convention. The recovery by the landlord of possession of his property, the ex-tenant having no right to remain there, would not be 'arbitrary' (see art 12) nor would it be indicative of any lack of respect for the tenant's home life. It would simply be the recovery by the landlord of his property. The tenant's home life at the property would throughout have been subject to the possibility of

having to move out on the expiry of the tenancy. Article 8 would not alter the position.

[124] Nor would recovery by a property owner of his property from a squatter/occupier who had made it his home be in any different state. If the occupier had been in adverse possession for 12 years, he would have acquired a title by adverse possession and be entitled to remain. Article 8 would not be relevant. The disentitled owner might make a complaint under art 1 of the First Protocol but would fail. The divesting operation of the Statutes of Limitation would be justifiable as being in the public interest etc (see *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2002] 3 All ER 865, [2003] 1 AC 419 and, in the Court of Appeal [2001] EWCA Civ 117, [2001] Ch 804). But if the home occupier had been in possession for less than 12 years he would have no right as against the owner to remain. The recovery by the owner of his property would not be arbitrary nor would it evidence any lack of respect for the occupier's home life. His home life at the property would have always been subject to the possibility of eviction by the owner.

[125] It is, of course, the case that the United Kingdom, in common, I expect, with all other signatories to the convention has enacted elaborate social housing legislation. The degree of security of tenure provided to tenants of residential property on the expiry of their tenancies is highly complex. There are assured shorthold tenancies, secure tenancies, non-secure tenancies, introductory tenancies, service tenancies, furnished tenancies and, no doubt, others. The manner in which these tenancies can be brought to an end varies and depends on the contents of the relevant legislation. The respective rights of landlord and tenant, after termination of the tenancy, similarly depend on the content of the legislation. If, under the relevant provisions of the relevant legislation, the tenant has no right to remain in possession, the case is no different from that in which there is no relevant legislation at all. If, pursuant to the provisions of the relevant legislation, the tenant is entitled to remain in possession after the termination of his tenancy, there will have been a corresponding diminution of the landlord's property rights. This diminution will put art 1 of the First Protocol into play. But social housing legislation of this character is well justifiable on the public interest grounds provided for by the article (c/f *James v UK* (1986) 8 EHRR 123). If, on the other hand, the tenant has no right to remain in possession as against the landlord he cannot claim such right under art 8. To hold otherwise, to hold that art 8 can vest property rights in the tenant and diminish the landlord's contractual and property rights, would be to attribute to art 8 an effect that it was never intended to have. Article 8 was intended to deal with the arbitrary intrusion by state or public authorities into a citizen's home life. It was not intended to operate as an amendment or improvement of whatever social housing legislation the signatory state had chosen to enact. There is nothing in Strasbourg case law to suggest the contrary.

STRASBOURG CASE LAW

[126] I start with *S v UK* (1986) 47 DR 274. The case concerned a homosexual couple living together in a house of which one of them was the tenant under a secure tenancy. The tenant died. The local authority landlord sought to recover possession from the survivor. The survivor's defence in the domestic courts was that she was entitled under s 30 of the Housing Act 1980 to succeed to her deceased partner's secure tenancy. Section 30 gives a right of succession to a

surviving occupier where the survivor is a spouse or member of the family of the deceased tenant. But the contention that a homosexual partner could be a spouse or a member of the family of the deceased tenant for s 30 purposes was not accepted, a possession order was made and she was evicted. She then applied to Strasbourg on the ground of a breach of her convention rights. She claimed first, that 'respect for her private and family life has been denied' and that her 'eviction was not necessary on any ground enumerated within article 8(2)' (at 277). She claimed also under art 14, that she had been discriminated against in relation to her rights under art 8. The Commission said (at 278) that 'any interference which there may have been with the applicant's private life falls to be considered in the context of her home' and then said:

> 'The Commission notes that the applicant was occupying the house, of which her partner had been the tenant, without any legal title whatsoever. Contractual relations were established between the local authority and the deceased partner and that contractual agreement may or may not have permitted long-term visitors. The fact remains, however, that on the death of the partner, under the ordinary law, the applicant was no longer entitled to remain in the house, and the local authority was entitled to possession so that the house could no longer be regarded as 'home' for the applicant within the meaning of article 8.'

[127] The cited passage has been much criticised, but I think it has been misunderstood. The Commission were not, in my view, seeking to prescribe the features of occupation of premises that would enable the premises to constitute an individual's 'home' for art 8 purposes. S had been lawfully occupying the house as her 'home' by permission of and with her deceased partner. But after the death of the partner the local authority owner wanted to recover possession and S could not as against the owner, invoke art 8 rights. This, I think, is what the Commission meant in saying 'the local authority was entitled to possession so that the house could no longer be regarded as 'home' for the applicant within the meaning of article 8'. The Commission cannot be taken to have meant that the applicant could not, after the death of her partner, have asserted art 8 rights against any bugging of her telephone, any intrusion on her privacy by long range photography or any like invasions of her home life by third parties or, indeed, by the local authority itself. The Commission was commenting on a recovery of possession by an owner entitled to possession. Unless it could have been said that art 8 conferred some countervailing property rights on S and correspondingly diminished the local authority's property rights, thereby amending in favour of S the relevant housing legislation, art 8 was simply irrelevant to the local authority's right to recover possession. No such argument was addressed to the Commission. If it had been it should, in my opinion, have failed for the reasons I have already given.

[128] The correctness of the Commission's approach to S's art 8 objection to the local authority's right to recover possession can be tested by considering the position if the deceased tenant in her lifetime had asked S to leave. Assume that S had no contractual or equitable rights under the ordinary law. Could she have contended that her partner's request that she leave offended her 'right to respect' for her home? In my opinion, plainly not, unless it were to be said that art 8 had given S some interest in the house and correspondingly diminished the partner-tenant's proprietary interest. If art 8 can be raised against the landlord by

an occupier with no proprietary or contractual right as against the landlord, it must equally be capable of being raised against the tenant by an occupier with no proprietary or contractual right against the tenant.

**[129]** Immediately after the passage I have cited, the Commission went on (at 278):

> 'Further, even if the applicant's right to respect for her home, as guaranteed by article 8, could be regarded as having been interfered with by order of the county court for possession against her, the Commission considers that such interference was clearly in accordance with the law and was also necessary for the protection of the contractual rights of the landlord to have the property back at the end of the tenancy.'

Just so, but what the Commission was saying, in effect, was that the landlord's legal right to recover possession of its property at the end of the tenancy prevented art 8 from providing any assistance to S. A possession order was necessary in order to give effect to, 'for the protection of', that right to possession. How else could it have been protected?

**[130]** *Di Palma v UK* (1988) 10 EHRR 149 was a case in which the landlord (a private landlord, not a local authority) had forfeited the tenant's lease on account of her failure to pay a service charge. The landlord then brought possession proceedings in the county court. Subject to the question of relief from forfeiture the tenant had no defence to the action. The issue was whether either the county court or the High Court had jurisdiction to grant that relief. If there had been jurisdiction to grant relief, relief would, on the facts, have been granted. But the county court's jurisdiction to grant relief from forfeiture was statutory and was very limited. On the facts of the case it was not exercisable. The High Court's jurisdiction to grant relief had been removed by the statute which had conferred the limited jurisdiction on the county court (see s 191, County Courts Act 1959). So the tenant fell in a black hole, was unable to obtain relief from forfeiture and lost her flat, notwithstanding that the forfeiture was a disproportionate penalty for her failure to pay the service charge: (see *Di Palma v Victoria Square Property Co Ltd* [1984] 2 All ER 92 at 100, 104–105, [1984] Ch 346 at 362, 368–369). The tenant applied to Strasbourg complaining, inter alia, that the possession order was in breach of her art 8 rights. She said that 'her eviction from her home constitutes an unjustified interference with the right to respect for her home protected by article 8' ((1988) 10 EHRR 149 at 155). But the Commission held (at 155–156) that—

> 'any interference with the applicant's right to respect for her home which the forfeiture of her lease engendered was in conformity with article 8(2) as a measure which was in accordance with the law and necessary in a democratic society for the protection of the rights of others.'

They held her art 8 complaint to be manifestly ill-founded. It is important to notice that this was not a conclusion to which the Commission came on grounds of proportionality. Otherwise they must have found in favour of the applicant. They held in effect, as they had done in *S v UK*, that art 8 rights could not suffice against an owner of property with an otherwise unimpeachable right to possession.

**[131]** It is said that the approach of the Strasbourg tribunals in cases such as *Gillow v UK* (1986) 11 EHRR 335, *Buckley v UK* (1996) 23 EHRR 101, *Mabey v UK*

(1996) 22 EHRR CD 123 and *Chapman v UK* (2001) 10 BHRC 48 is inconsistent with that of the Commission in *S v UK* and *Di Palma v UK*. My Lords, I think not. None of these cases involved a claim by the owner of the premises in question against an occupier who, vis-à-vis the owner, had no right to remain. *Gillow v UK* was a case in which the premises were in Guernsey and the owner, Mr Gillow, needed a licence in order to be allowed to reside there. He applied for the necessary licence but was refused. The refusal, he contended, interfered with his art 8 right to respect for his home. One of the issues was whether the premises did constitute his home. He had lived there at one time but for a long period had lived abroad. The court held that he had 'retained sufficient continuing links' with the premises for it still to constitute his home for art 8 purposes (see para 46). The court found (para 58) that the interference that the refusal of the licence and the consequent prosecution of Mr Gillow for unlawful occupation constituted was disproportionate to the legitimate aim pursued and consequently was not justifiable under art 8(2). This conclusion was reached after a careful consideration of the purposes of the Guernsey legislation requiring certain people to obtain residence licences and of the various factors taken into account by the Guernsey authorities in deciding whether or not to grant Mr Gillow a licence. There is a very striking contrast between this balancing process that the court undertook and the absence of any such balancing process in *S v UK* or in *Di Palma v UK*. The contrast does not indicate that the commission's approach was wrong. It indicates that the art 8(2) balancing process is inappropriate where possession is being claimed by the owner of the property against whom the occupier has no right to remain.

**[132]** *Buckley v UK*, *Mabey v UK* and *Chapman v UK* were cases where gipsies had acquired land on which to stand the caravans in which they lived. They began using the land, their own land, for that purpose, but the standing of caravans on the land was unlawful under the planning laws. The planning authorities brought proceedings to prevent these breaches of the planning laws. The land/caravan owners contended that to bring these proceedings was an interference with their art 8 rights to respect for their homes. It was contended, in answer, that because the establishing of their homes was in breach of the planning law and therefore unlawful art 8 could not apply. This contention was rejected. In *Buckley v UK* (1996) 23 EHRR 101 the European Court quoted the Commission which said (at 115 (para 63)):

> '... the concept of "home" within the meaning of article 8 is not limited to those which are lawfully occupied or which have been lawfully established. "Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a "home" which attracts the protection of article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links.'

**[133]** It has been suggested that this test of what constitutes a 'home' for art 8 purposes invalidates what the Commission had said in *S v UK*. My Lords, I do not think so. In *S v UK* the Commission was concentrating on the question whether the recovery by a landlord of possession of premises after the expiry or determination of the tenancy under which the premises had been occupied as a home constituted an interference with the right to respect for the occupier's home guaranteed by art 8. The Commission held it did not and, in explaining

why not, said ((1986) 47 DR 274 at 278 (para 4)) that 'the local authority was entitled to possession *so that* the house could *no longer* be regarded as a home' (my emphasis). In *Buckley v UK*, by way of contrast, as in the other gypsy cases, the issue was whether the unlawfulness under the planning laws of the applicant-owner's occupation of the property in question disqualified the occupation from being occupation of a 'home' for art 8 purposes. The Commission formulated the test in the way it did in order to eliminate the unlawfulness of the occupation as a relevant factor, let alone a determinative factor, in deciding whether the occupation was of a 'home'. There was no suggestion, however, by the European Court in *Buckley v UK* that the Commission's approach in *S v UK* needed to be re-considered or was wrong. *Buckley v UK* does not constitute any authority at all for the proposition that a home-occupier can resist a possession action by the owner of the property on art 8 grounds.

**[134]** For my part I think that the first passage I cited from the Commission's judgment in *S v UK* should, in the light of *Buckley v UK*, be re-worded. I think the Commission should have said, simply, that the claim by the local authority landlord to recover possession of the house after the death of the tenant did not constitute an interference with S's right to respect for her home since she no longer had, vis-à-vis the landlord, any right to remain there. This, I think, is what the Commission meant.

**[135]** In *Wood v UK* (1997) 24 EHRR CD 69 the Commission adopted an approach to art 8 consistent with their approach in *S v UK*. The case was one in which the applicant was a mortgagor who had fallen into arrears with her mortgage payments. The mortgagee, exercising its powers under the mortgage, had taken possession of the house, the mortgaged property. The applicant complained that the repossession constituted a breach of her art 8 right to respect for her home. The Commission rejected her claim. It said (at 70–71) that the re-possession 'was in accordance with the terms of the loan and the domestic law and was necessary for the protection of the rights and freedoms of others, namely the lender'. There is no suggestion that this decision was reached by weighing up the applicant's interest in retaining her home against the mortgagee's interest in enforcing its security. The Commission's conclusion makes it clear, in my opinion, that a mortgagor cannot invoke art 8 in order to diminish the contractual and proprietary rights of the mortgagee under the mortgage. Article 8 is simply not applicable.

**[136]** Similarly art 8 could never be successfully prayed in aid by a vendor to prevent a contractual purchaser from obtaining specific performance of a contract for the purchase of the house which was the vendor's home. This must be so unless it be said that art 8 diminishes the contractual and proprietary rights of the mortgagee in the case of a mortgage of residential property or of a purchaser in the case of a contract to purchase residential property.

**[137]** *Marzari v Italy* (1999) 28 EHRR CD 175 was, like *Wood v UK* and *Di Palma v UK*, a case where no attempt was made to strike a balance between the interests of the applicant and those of the person responsible for the eviction of the applicant from his home. The applicant, a council tenant was evicted following service of a notice to quit for non-payment of rent. The Strasbourg court found the undoubted interference with the applicant's home that the eviction constituted to be justified under art 8(2) but without any attempt to address the proportionality of the eviction. As in *Wood v UK* and *Di Palma v UK* the failure of the art 8 complaint was inevitable in

view of the absence of any answer under the ordinary law to the landlord's, or mortgagee's, contractual and proprietary right to possession. It could be said that in these cases art 8 is simply not applicable. Or it could be said, applying art 8(2), that the recovery of possession by the person entitled to possession is in accordance with the law and is necessary to protect that right to possession. It comes to the same thing. Article 8 does not attack the owner's legal right to possession.

**[138]** *Larkos v Cyprus* (1999) 7 BHRC 244 was a decision of the Strasbourg court. The applicant was tenant of a house. It was his home. His landlord was the government. The tenancy was terminated by the government and an eviction order was made against the tenant by the domestic court. Under the local law, the tenant would have had security of tenure if his landlord had been a private landlord; but as his landlord was the government he had had no security of tenure. His complaint to the Strasbourg court was not that his art 8 right of respect for his home had been infringed. It was that he had suffered discrimination in that as a government tenant he had had no security of tenure. His complaint was of a breach of art 14. The eviction order, sought by the government and made by the domestic court, had certainly interfered with his home. He had been evicted. The absence in such a case of any claim by the tenant that his art 8 rights had been infringed or of any suggestion by the Strasbourg court that he might have so claimed seems to me highly significant. The reason, surely, is that the recovery of possession by a landlord entitled to possession could not have sustained such a claim. The discriminatory element, enabling a claim under art 14 to be made, was essential.

**[139]** I have referred to these Strasbourg decisions in order to try and demonstrate the consistency with which the principle which, to my mind, underlies art 8 has been applied. In no case has art 8 been applied so as to diminish or detract from the contractual and proprietary rights of the person entitled to possession.

DOMESTIC CASE LAW

**[140]** Your Lordships have been referred to three Court of Appeal cases in which art 8 was in issue in proceedings for possession brought by a landlord against a tenant whose tenancy had expired. In none did the landlord fail to recover possession. In each the case was decided on the ground that the interference was justified under art 8(2). In my respectful opinion, however, the approach by the court in each of these cases is open to criticism.

**[141]** The first of these cases was *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48. The landlord sought a possession order against an assured shorthold tenant. The relevant legislation bars recovery of possession by the landlord otherwise than under an order of the court but requires the court to make the order if the requisite statutory conditions are met. In this case they had been met. But art 8 was relied on by the tenant. It was accepted, of course, that an order for possession would constitute an interference with the tenant's home. Whether it would have constituted an interference with the tenant's 'right to respect' for the home was not considered. Argument centred on whether justification for the interference under art 8(2) could be shown. The Court of Appeal attributed weight to the impact that eviction would have on the tenant's family life but held, on balance, that the interference was justified. It is implicit in this approach that, if the facts had been different, the balance might have come down the other way,

in favour of the tenant. This would, in effect, have amended in favour of the tenant the relevant housing legislation. It would have given the tenant possessory rights in respect of the house and correspondingly diminished the landlord's proprietary rights. It would, in my opinion, have given art 8 an effect it was never intended to have and ought not to have. It would have denied the landlord the necessary protection for its contractual and proprietary right to possession. In my respectful opinion the court, having noted that the eviction would have constituted an interference with the tenant's home, should have held that in view of the landlord's right to possession art 8 was not applicable. The case was, in my view, correctly decided but for the wrong reason.

**[142]** *R (on the application of McLellan) v Bracknell Forest BC, Reigate and Banstead BC v Benfield* [2001] EWCA Civ 1510, [2002] 1 All ER 899, [2002] QB 1129 concerned an introductory tenancy. The tenancy had been duly terminated by the local authority landlord in accordance with the procedures prescribed by the relevant legislation. The tenant had no contractual or proprietary right, as against the landlord, to remain in possession. Counsel for the landlord submitted that 'the rights of the tenant to occupy the premises were simply in accordance with [the introductory tenancy] scheme' (at [37]) and that art 8 had no application. But the Court of Appeal disagreed and held that 'the question to be considered is whether an eviction was in accordance with the law, and whether it was necessary for the protection of the rights and freedoms of others' (at [42] per Waller LJ). Waller LJ went on to say that even in a case where the landlord was a private landlord, in which case art 8(2) would appear to have no application, the court, as a 'public authority', would have to consider, before making a possession order, whether an art 8(2) justification was established.

**[143]** My Lords, the remarks of Waller LJ to which I have just referred, which follow with inescapable logic from the proposition that in all cases where possession is sought of property which constitutes the defendant's home an art 8(2) justification must be shown, demonstrate, in my respectful submission, why the proposition cannot be right. Waller LJ's remarks have the effect that the words in art 8(2) 'by a public authority' are deleted from the article for the purpose of its application in domestic law. A court, being a public authority, cannot, it is said, give a private owner of residential property the possession order to which under the ordinary law he would be entitled against a person occupying the property as his home but who has no contractual or proprietary right to remain there, unless the making of the order can be justified under art 8(2). If this is right, it would give art 8 a significantly broader scope in its application than its language justifies. The words 'by a public authority' become otiose.

**[144]** The error is not in Waller LJ's logic, but in the proposition itself. If art 8 does not vest in the home-occupier any contractual or proprietary right that he would not otherwise have, and does not diminish or detract from the contractual or proprietary rights of the owner who is seeking possession, the problem identified by Waller LJ does not arise. The fate of every possession application will be determined by the respective contractual and proprietary rights of the parties. Article 8 can never constitute an answer. In my opinion *McLellan's* case, like *Donoghue's* case, was correctly decided but for the wrong reason.

**[145]** The third of these cases is *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4, [2002] LGR 467. This case concerned non-secure tenancies. The tenancies had been duly determined by the local

authority landlords. Possession was sought. Laws LJ, with whose judgment the other two members of the Court of Appeal agreed, said (at [26]):

> 'the premises ... were without question the women's homes. Since the effect of the possession orders would be to throw them out, I think it inescapable that those orders amounted to an interference with the appellants' right of respect of their homes ...'

and (at [27]) that 'eviction of these appellants would constitute a *prima facie* violation of their right to respect for their homes'. I respectfully disagree. Each home had been established on the basis of a proprietary interest in the premises obtained under the contractual tenancy granted by the landlord. How could the termination of that tenancy in a manner consistent with its contractual and proprietary incidents be held to constitute a lack of respect for the home that had been thus established? The home was always subject to those contractual and proprietary incidents. The contrary view seems to me to treat a 'home' as something ethereal, floating in the air, unconnected to bricks and mortar and land.

**[146]** I need not set out the whole of Laws LJ's reasoning. It has already been extensively set out in the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. Lord Bingham comments that the reasoning, like that of Arden LJ in the present case, reflected the tenor of the Strasbourg jurisprudence. But nowhere in the Strasbourg case law is there to be found any case in which a landlord's claim to possession has failed on art 8(2) grounds. In each case, of course, the landlord has had to show that his claim is 'in accordance with the [ordinary] law'. So what is left? If the landlord is entitled to possession under the ordinary law, how can it be otherwise than 'necessary in a democratic society' to make a possession order 'for the protection of' and to give effect to his right to possession? It is true that in a number of cases the Strasbourg tribunal (whether court or Commission) has held art 8 to be prima facie applicable but has held the 'interference' constituted by the claim or the order for possession to be justified under art 8(2). But there is no case in which this conclusion has been reached by considering the degree of impact on the tenant's home life of the eviction. There is no case in which a balance has been struck between the tenant's interests and the landlord's rights. In every case the landlord's success has been automatic. And so it must be unless art 8 is to be allowed to diminish or detract from the landlord's contractual and proprietary rights. In my opinion, the Strasbourg jurisprudence has shown, in effect, that art 8 has no relevance to these landlord/tenant possession cases.

THIS CASE

**[147]** As I have said, in the present case Mr Qazi failed at trial because the judge held that in order to have an art 8 home the occupier must have a legal or equitable interest in the premises. I agree with Arden LJ in the Court of Appeal and with your Lordships that that bald proposition cannot be supported. If the judge had held that an occupier with no legal or equitable interest enabling him to resist the landlord's possession claim could not resist the claim by relying on art 8 rights to respect for his 'home', I would have agreed with him.

**[148]** In the Court of Appeal, Arden LJ held, following the test prescribed in *Buckley v UK*, that Mr Qazi did, for art 8 purposes, have a 'home' at 31 Hutton Lane. I agree with that conclusion. But she then went on to propose that the case

be remitted to the county court 'to determine whether interference with Mr Qazi's right to a home is permitted by art 8(2), and the Court of Appeal made that order.

**[149]** In my opinion, the Court of Appeal, having correctly held that Mr Qazi had an art 8 'home', should have held that his rights under art 8 could not prevail against the council's admitted and undoubted right to possession under the ordinary housing law. I would, for my part, have said that art 8 was not, in these circumstances, applicable. But it could also be said that a possession order was 'in accordance with the law' and was necessary in order to protect and give effect to the council's right to possession. To express the point in that way would be to follow the Strasbourg tribunals in *S v UK*, in *Di Palma v UK* and in *Wood v UK*. But it comes to the same thing. Article 8 cannot be raised to defeat contractual and proprietary rights to possession.

**[150]** In arguing the case for Mr Qazi, Mr Luba QC seemed to me to be in an impossible quandary. He conceded that art 8 did not vest in the home-occupier any contractual or proprietary rights in the property. He accepted that the expectation in every case would be that the owner entitled under the ordinary law to possession would succeed in establishing an art 8(2) justification for the possession claim. But he insisted that art 8 did allow for the special case where the possession claim could be resisted or the possession order denounced on the ground that the recovery of possession by the owner otherwise entitled thereto constituted an unlawful interference with the home-occupier's right to respect for his home. The circumstances, he accepted, would have to be exceptional but the possibility had to be kept open. Naturally he said that, in due course, on the remission to the county court, he would contend that the circumstances of Mr Qazi brought the case within that exceptional category so as to prevent the council from justifying under art 8(2) their recovery of possession.

**[151]** In my opinion, your Lordships should reject these arguments. They seem to me inconsistent. If Mr Qazi has no contractual or proprietary right under the ordinary law to resist the council's claim for possession, and it is accepted he has not, the acceptance by the court of a defence based on art 8 would give him a possessory right over 31 Hutton Lane that he would not otherwise have. It would deprive the council of its right under the ordinary law to immediate possession. It would constitute an amendment of the domestic social housing legislation. It would give art 8 an effect it was never intended to have and which it has never been given by the Strasbourg tribunals responsible for implementing the convention.

**[152]** If the reality of the matter is, as I believe it is, that an art 8 defence can never prevail against an owner entitled under the ordinary law to possession, your Lordships should, in my opinion, say so. Remission of the case to the county court for the county court to say so would be pointless. I would, therefore, allow the appeal. The reasons I have given for allowing the appeal are, I believe, essentially the same as those given by my noble and learned friends Lord Hope of Craighead and Lord Millett, whose opinions I have had the opportunity of reading in advance and with which I agree.

*Appeal allowed.*

Kate O'Hanlon Barrister.

# Re Claims Direct Test Cases

[2003] EWCA Civ 136

COURT OF APPEAL, CIVIL DIVISION

BROOKE, LAWS LJJ AND SIR ANTHONY EVANS

18, 19 DECEMBER 2002, 12 FEBRUARY 2003

*Costs – Order for costs – Jurisdiction – After-the-event (ATE) insurance premium – Claims handling service – Claimants paying claims handling service ATE premium in respect risk of incurring liability in proceedings – Successful claimants seeking to recover amount of ATE premium in costs – Whether claimants entitled to recover whole amount – Access to Justice Act 1999, s 29.*

Claims Direct provided a claims handling service to claimants with personal injury claims. The service included finance arrangements for claimants to take out a loan to pay a premium for an 'after-the-event' insurance policy providing cover, in the event that legal proceedings were unsuccessful or discontinued, for both costs and the amount of the premium. The premium was identified as such in the arrangement (the authority) between the underwriters of the scheme and an insurance intermediary which authorised the intermediary to issue insurance certificates to Claims Direct's customers and process claims on their behalf. Section 29[a] of the Access to Justice Act 1999 provided that where in any proceedings a costs order was made in favour of any party who had taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him included costs in respect of the premium of the policy. Various claimants who had been successful in litigation sought to recover as costs the amount of the 'premium' paid and a number of liability insurers challenged these attempts. Test cases were selected for the trial of preliminary issues, including the question of whether the sum paid by a claimant was properly to be regarded as a premium within the meaning of s 29 of the 1999 Act. The judge found that part of what was provided by Claims Direct was claims handling and part was insurance services, the premium for which was recoverable under s 29, in so far as it was reasonable. He analysed the way the total had been made up and specified the amounts he considered were properly to be regarded as premium, which he defined as the true consideration for which the insurer was undertaking his obligation under the contract of insurance. The claimants appealed, contending, inter alia, that the judge had been wrong in not accepting that the amount identified as 'premium' in the authority must be automatically equated with the 'premium' referred to in s 29 and that allowing the deconstruction of a premium liability would raise endless difficulties in the assessment of costs.

**Held** – In considering whether the 'premium' payable by a claimant was properly to be regarded as a premium within the meaning of s 29 of the 1999 Act the judge had been entitled to adopt the approach of lifting the veil and considering what was actually being provided for the payment in order to identify what should truly be treated as the premium. It had not been the intention of Parliament

a Section 29 is set out at [22], below

when it enacted s 29 of the 1999 Act to overload the recoverable premium by adding to the costs customarily embraced by such a premium, the costs, which a company providing personal injury claims handling services (including a costs indemnity in the event that a claimant's compensation claim was dismissed or discontinued), had to incur if insurers were to accept the risk at all. Accordingly, the judge had been entitled to come to the conclusion that he had and the appeal would therefore be dismissed (see [86]–[88], [90], [102], [103], below).

**Notes**

For after the event insurance, see 25 *Halsbury's Laws* (4th edn) (2003 reissue) para 807.

For the Access to Justice Act 1999, s 29, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1514.

**Cases referred to in judgments**

*Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142; *affd* sub nom *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

*Callery v Gray, Russell v Pal Pak Corrugated Ltd* [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112; *affd* sub nom *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

*Dimond v Lovell* [2000] 2 All ER 897, [2002] 1 AC 384, [2000] 2 WLR 1121, HL; *affg* [1999] 3 All ER 1, [2000] QB 216, [1999] 3 WLR 561, CA.

*Halloran v Delaney* [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28.

*Hunt v RM Douglas (Roofing) Ltd* (1987) Times, 23 November, CA.

*Hunt v RM Douglas (Roofing) Ltd* [1988] 3 All ER 823, [1990] 1 AC 398, [1988] 3 WLR 975, HL.

*Lewis Ltd v Norwich Union Fire Ins Co Ltd* [1916] SALR App D 509.

*Lownds v Home Office* [2002] EWCA Civ 365, [2002] 4 All ER 775, [2002] 1 WLR 2450.

*Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125.

*Snook v London & West Riding Investments Ltd* [1967] 1 All ER 518, [1967] 2 QB 786, [1967] 2 WLR 1020, CA.

*Street v Mountford* [1985] 2 All ER 289, [1985] AC 809, [1985] 2 WLR 877, HL.

**Appeal**

Sixteen claimants in test cases in costs-only proceedings between the claimants and three insurers (the first, second and third defendants) appealed from an order of Senior Costs Judge Hurst on 19 July 2002 ([2003] Lloyd's Rep IR 69) determining preliminary issues, set out at [20], below. The facts are set out in the judgment of Brooke LJ.

*Timothy Charlton QC* and *Nicholas Bacon* (instructed by *Colman Coyle*) for the claimants.

*Anna Guggenheim QC* and *Alexander Hutton* (instructed by *Vizards Wyeth, Lamport Bassitt,* Southampton and *Carters,* Peterborough) for the first and third defendants.

*Alan Newman QC* and *Andrew Neish* (instructed by *Beachcroft Wansbroughs*) for the second defendants.

*Cur adv vult*

12 February 2003. The following judgments were delivered.

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**BROOKE LJ.**

(1) INTRODUCTORY

[1] This is an appeal by 16 claimants in test cases concerned with what became known as the Claims Direct Protect Scheme against an order made by Master Hurst, the senior costs judge, whereby he directed judgment to be entered in costs-only proceedings for each claimant in respect of recoverable premium in the sum of £621·13 inclusive of insurance premium tax (IPT) ([2003] Lloyd's Rep IR 69). The test cases which have been taken to appeal are those numbered 1–3, 6–12, 14, 16, and 18–21 in the schedule to the master's judgment. I will describe the nature of the claimants' challenge to the master's order in [20] and [21], below. Master O'Hare sat with us as an assessor on this appeal, and we have benefited from his advice.

[2] The issue Master Hurst had to decide in these test cases was whether the money a claimant paid for the right to be included within the scheme (which was started by Claims Incorporated plc (Claims Direct) in August 1999) was a premium within the meaning of s 29 of the Access to Justice Act 1999, and to the extent that it was such a premium, whether or not it was reasonable in amount.

(2) THE FACTS

[3] It is possible to summarise the facts more briefly than was necessary for the purposes of the master's judgment. In 1990 Mr Tony Sullman launched a claims management company which specialised in pursuing uninsured loss claims on behalf of taxi drivers. The company's business involved the use of franchised claims managers working alongside panels of solicitors, doctors and accountants.

In 1995 the use of conditional fee agreements was permitted for the first time. Mr Sullman then joined forces with Mr Colin Poole, who is a practising solicitor, and the two men started running Claims Direct. The following year they caused a company called Medical Legal Support Services Ltd (MLSS) to be incorporated as a wholly-owned subsidiary of Claims Direct.

[4] Between 1996 and 1999 these two companies, acting in association, provided claims handling services to claimants with personal injury claims through a network of franchise claims managers along the lines previously established by Mr Sullman. The arrangements they made were known as the Portfolio Scheme. The companies' operations were based in Telford, where Mr Poole conducted his solicitor's practice. They attracted clients through national advertising. Claims managers visited likely clients in their homes in order to obtain instructions and to complete the contract with Claims Direct. The services embraced by the scheme included helping claimants to have access to members of the panels of solicitors, and medical experts; obtaining advice from counsel (in a single set of chambers) who provided opinions on liability and quantum for a standard fee; taking witness statements; and generally guiding them through to the conclusion of their claims. This package of services did not include any insurance element. If a claim was successful, Claims Direct would receive 30% of the damages recovered, together with VAT. If the claim failed, Claims Direct would discharge the defendants' costs themselves. The scheme appears to have been a great success.

[5] It was an important feature of the scheme that the claims managers undertook a lot of the work that would customarily be undertaken by a firm of solicitors. Mr Doona, who was the finance director of the Claims Direct group between December 1999 and September 2001, told the master that a claims manager originally paid £1,000–£2,000 for a franchise, but the price then went up to about £5,000–£6,000, and possibly as high as £20,000. In return, once a case was accepted by MLSS a claims manager would be paid a minimum fee, whatever the value of the claim (the minimum fee was £425 during the period with which this appeal was concerned). This fee would be liable to increase in proportion to the amount of work required of him in a particular case.

[6] MLSS therefore had to put in place an administrative structure capable of handling the recruitment and training of claims managers, and of acting in a liaison role between them and the others whose services were essential for the smooth running of the scheme. Mr Doona said that in his time 12 members of MLSS's staff performed these functions, although this number was liable to increase. MLSS also had a legal section comprised of about 30 members of staff who dealt with the claims handling process. Their role was to ensure that the panel solicitors complied with the requirements of the operations manual. We have been shown a copy of the operations manual which was current in the days of the Portfolio Scheme. We have also been shown a copy of the manual which was issued after the Protect Scheme came into force. The differences in the text of these two documents are insignificant. This is hardly surprising, since the basic structure of the scheme remained the same.

[7] By March 1999 Mr Sullman and Mr Poole wished to float their company on the Stock Exchange, and for this purpose they wished to abandon the 30% contingency scheme and move to an insurance-backed model. Their original reasons for wanting to make this change were not connected with the new opportunity afforded by the 1999 Act for recovering an 'after-the-event' (ATE) insurance premium from the other side as part of a successful claimant's costs. They had been advised that the success of a flotation would be prejudiced by the

existence of the contingent liability of an uncertain size. This liability arose out of the costs indemnity provided under the Portfolio Scheme.

[8] Mr Sullman therefore approached an insurance intermediary called Litigation Protection Ltd (LPL) to discuss the possibility of using an insurance-backed model, and during the spring and summer of 1999 representatives of LPL held bilateral meetings with Lloyd's underwriters on the one hand and Claims Direct on the other. The way in which the negotiations developed is apparent from an early memorandum. This memorandum, dated 22 March 1999, was prepared for underwriters by Mr Raincock, who handled this matter on behalf of LPL and who was subsequently to give evidence to the master. It includes this passage:

> 'Claims Direct has also considered the concept advanced by LPL ... that the indemnity in losing cases should include £1,000 in respect of the Claims Managers services and that in readiness for the Access to Justice Act when the premium will be recoverable, we should increase the notional premium to £1,190 plus IPT. Please note that the premium payable to Underwriters will remain based upon £190.'

[9] Although the expression 'notional premium' was to disappear, the idea that a claimant would pay a large 'premium' for an insurance policy, very little of which would be payable to underwriters as a premium for the risk they were undertaking to cover, remained an essential element of the arrangements that were to evolve. It was clear from the evidence that underwriters attached particular importance to the effectiveness of the group's control over the claims handling procedures. Mr Primer, whose underwriting agency was involved in the original discussions with Mr Raincock, told the master that the risk was presented to underwriters on the basis that more than 97% of the claims would be successful, and that they would only have to pay out (both defendants' costs and claimants' costs, including the full cost of the premium) in less than 3% of the cases. They carried out their premium calculations, however, on the basis of a 4–6% overall failure rate, and they reserved the right to demand a different premium once they had some experience of how the policy operated in practice.

[10] On 5 May 1999 Mr Raincock sent a memorandum to underwriters in which he explained the current state of Claims Direct's proposal. He recommended that underwriters should proceed on the basis set out in his paper. Under the heading 'New Information' he referred underwriters to 'the comprehensive and protective Operations Manual issued to all Panel Solicitors'. The memorandum was returned to him with the following manuscript endorsement initialled by an underwriter: 'Warranted: Claims Direct/Poole & Co maintain existing underwriting guidelines (all amendments to be agreed) and rejection rates consistent with their historical numbers.'

[11] On 12 May, following further discussions, Mr Raincock sent Mr Poole a cover note which contained this warranty in the following slightly altered terms:

> 'Warranted: That the Assured will maintain the existing procedures contained in the Poole and Co Underwriters Manual dated February 1999 and that Underwriters will be informed of all proposed changes prior to their inclusion in the Manual.'

The text of the cover note showed that the policy wording was at that time still to be agreed. It was envisaged that cover under the Claims Direct Protect Scheme would come into force on 1 June 1999, and that underwriters would receive a premium on each case declared to them. The figure quoted was £90 (plus IPT).

[12] The negotiations continued, and eventually a scheme emerged whereby underwriters agreed with LPL (acting on behalf of Claims Direct) an ATE premium of £140 for each case. LPL's 32·5% brokerage commission was charged on this £140, and underwriters received their premium net of this commission. In addition, Claims Direct, with advice from LPL, fixed a 'premium' which represented the total price which a claimant joining the scheme would theoretically be liable to pay. This sum was arrived at on the basis of Claims Direct's broad-brush assessment of what they believed the market would bear, reinforced by their concern to ensure that their income stream should remain the same as it had been under the Portfolio Scheme. This thinking was explained in a memorandum sent by their board of directors to all their claims managers on 5 July 1999, shortly before a couple of two-day seminars were to be held in order to explain the ramifications of the new arrangements. They were justified to the claims managers on the basis that the changes had been forced on Claims Direct by the government.

[13] The new 'Claims Direct Protect' business model (which in many respects resembled the old model) operated along the following lines. (1) Television and other advertising was used extensively to encourage potential claimants to ring the Claims Direct number. Claims were handled at a call centre in Telford. Initial details were taken and, if certain criteria were satisfied, the call was returned by arranging for a claims manager to visit the claimant at home. (2) On the claims manager's visit the claimant was provided with a leaflet called 'Your Worry Free Guide to Claims Direct'. The claims manager helped the claimant to complete a questionnaire and obtained his/her signature to a fair trading statement (FTS). This set out an offer made by the claimant for Claims Direct to take on the claim in return for the payment of a 'premium' of £1,312·50 (£1,250 plus £62·50 IPT) for a Claims Direct Litigation Protection Insurance Policy. The claimant also signed a consumer credit agreement with a bank under which he/she borrowed the 'premium' of £1,312·50 and a medical release form. Repayment of the loan was deferred until the end of the case. It would be repaid by insurers if the claimant lost. (3) The case was then sent to Mr Poole's firm at Telford for 'vetting' (to decide whether the prospects of success were better than 50%). A fee of £72·50 plus VAT was later payable by a panel solicitor for this service if he took the case on. (4) If the case survived the vetting procedure, it was sent to a panel solicitor with an acceptance form. There were over 80 solicitors on the panel in November 1999. If the panel solicitor agreed to take on the claim he had to pay the vetting fee to Mr Poole's firm and a fee of at least £395 plus VAT to MLSS in respect of the claims manager's services. (5) When the solicitor accepted the case, Claims Direct sent a letter of acceptance to the claimant together with 'Evidence of Insurance' signed by Mr Raincock of LPL on behalf of the insurers. At about the same time the bank, acting on behalf of the claimant, paid £1,312·50 to LPL as an agent for the insurers. The way this money was distributed is described in [16] and [17], below. (6) The functions of the panel solicitor and the claims manager were set out in the Claims Direct documentation. It was the solicitor's duty to send the claimant a client care letter in a recommended form, to write a letter before action, to seek advice from medical experts and counsel as required, and to negotiate a satisfactory settlement of the claim, if possible. On the other hand his freedom of action was quite significantly curtailed by the scheme. (7) The solicitor had to rely on the claims manager to draw up any witness statements that were needed—including the claimant's own statement—and to procure plans and photographs and any other evidence he

required. If medical advice was needed, he had to seek it from a member of a panel composed by Mobile Doctors Ltd (who paid MLSS £40 per case) and if advice from counsel was needed he had to seek it from counsel in a particular set of chambers in London (who paid MLSS £15 per case). The claims manager would undertake the task of arranging any necessary appointments and ensuring the claimant attended them. (8) In the event that the claim was settled the solicitor would claim from the defendants' insurer, in addition to his own profit costs, the £395 paid to MLSS, any disbursements on the fees of medical experts and counsel, and the vetting fee. The defendants maintain that the only actual change in the scheme after August 1999 was the replacement by an ATE insurance policy of Claims Direct's earlier liability to discharge a defendant's costs when a claim failed.

**[14]** From Claims Direct's viewpoint, the new scheme achieved the purpose of replacing one source of cash (the 30% share of any damages recovered by a claimant) with another (the £1,312·50 'premium'), with the added benefit that this cash flow was now achieved at the outset of each claim, rather than at its end. There is an explanation of all this in the company's annual report and accounts for the year 2000.

**[15]** Once the details of the scheme had been finalised, underwriters granted a binding authority to LPL (which was eventually extended to 15 August 2001), whereby they appointed that company as their coverholder to bind insurance and issue certificates to Claims Direct's customers, and thereafter to process claims on their behalf. The mechanics of the arrangements ran along the following lines.

**[16]** The customer's loan of £1,312·50 would be sent direct to LPL. They placed it on trust in a Lloyd's insurance broking account. They would then issue evidence of insurance to the customer, together with a receipt, as agent for underwriters. This document summarised the terms of a master policy which were incorporated in the customer's contract with underwriters. It provided for cover, up to a limit of £50,000, in the event that the claim or legal proceedings were unsuccessful or discontinued, for both sides' costs and the amount of the insurance premium, plus interest. The policy contained a term that in conducting the proceedings, compliance by the panel solicitor with the terms of the operating manual would be a condition precedent to any liability of the underwriters to make payment under the policy.

**[17]** LPL then accounted to underwriters, via Lloyd's brokers, for £140, plus the IPT of £62·50, less LPL's 32·5% brokerage on £140. Lloyd's brokers retained £7 brokerage for themselves before accounting to underwriters for the balance. Of the total premium of £1,312·50, £202·50 was paid out in this way. The premium was characterised in the binding authority as '£1,250 each case less £1,110 including underwriters' contribution to costs'. The remaining £1,110 was split up three ways. £110 was paid as brokerage or commission to Claims Direct. £775 was paid by LPL directly to MLSS for 'insurance services' (for which see [18], below). The remaining £225 was paid by LPL into an MLSS retention fund. This was a trust account created at underwriters' request. The money was to remain there until the end of each case, when it could be released to MLSS. The reason for this arrangement was that underwriters wished to know that there was a reservoir of money available to them in the event that anything untoward happened to Claims Direct or MLSS and they were left with the run-off responsibility.

**[18]** On 26 August 1999, at the same time as the binding authority was issued, Claims Direct made an agreement with LPL and MLSS whereby MLSS agreed to provide to LPL (on behalf of underwriters) what were described as initial

insurance services and continuing insurance services for a reward of £1,000 per case. Relevant features of this agreement are set out in [52]–[54], below. A significant part of the master's judgment was taken up with an analysis of what was being provided to the customer under the description of insurance services.

**[19]** This, then, is the scheme which Claims Direct introduced in August 1999. After it came into effect, a number of challenges were made by liability insurers in cases where successful claimants sought to recover as the premium for ATE insurance the whole of the 'premium' for their Litigation Protection Insurance Policy. Test cases were then selected, and in November 2001 Master Hurst directed the trial of ten preliminary issues (divided into two tranches). Twenty-three test cases were selected for the trial of the first tranche of cases. Two of them fell away prior to the trial, and another was withdrawn by consent at the hearing. Of the claimants whose test cases featured in the trial, 16 are now parties to this appeal. The defendants were grouped according to the liability insurers who stood behind them. Of the cases taken to appeal, the defendants represented by one insurer were involved in five of them, and those represented by another in a sixth. Those represented by a third insurer were involved in all the rest. For convenience these three groups of defendants have been referred to as the first defendants, the third defendants, and the second defendants, in that order.

(3) THE ISSUES

**[20]** The first trial, with which we are concerned on this appeal, dealt with the issues in the first tranche. In the event these issues were reduced to four in number, and there is no appeal against the way that Master Hurst dealt with two of them. The two remaining issues were stated in these terms, so far as material to this appeal. Issue 2: is the sum payable by a claimant properly to be regarded as a premium within the meaning of s 29 of the Access to Justice Act 1999? Issue 4: (i) are any of the benefits purchased by insurance forming part of the Claims Direct scheme collateral or extraneous to such insurance; and (ii) to what extent should the costs of collateral benefits be recoverable?

**[21]** At the trial there was no real issue about the legitimacy of the premium of £140, the commission of £110 to Claims Direct, or the principle that IPT on an appropriate amount was allowable. For reasons I will explain, the master went on to hold that the claimants were entitled to recover an extra £311·50 as premium, £30 as the premium for other insurance services, and £29·58 as IPT on the sums he identified as reasonable premium. The defendants do not seek to reduce any of these sums. The claimants, on the other hand, assert that they should have been allowed the whole of the premium of £1,250 plus IPT, and they bring this appeal on this basis. They also say that this premium was reasonable and proportionate in amount.

(4) THE APPLICABLE LAW

**[22]** I gratefully adopt Master Hurst's statement of the applicable law. Section 29 of the 1999 Act provides:

> 'Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in these proceedings, the costs payable to him may, subject in the case of court proceedings to Rules of Court, include costs in respect of the premium of the policy.'

[23] The Court of Appeal in *Callery v Gray (No 2)* [2001] EWCA Civ 1246 at [59] and [60], [2001] 4 All ER 1 at [59] and [60], [2001] 1 WLR 2142 decided that s 29 should be interpreted so as to treat the words 'insurance against the risk of incurring a costs liability' as meaning 'insurance against the risk of incurring a costs liability that cannot be passed on to the opposing party'. The statutory framework is discussed in *Callery v Gray (No 2)* (at [6]–[10]), and important issues relating to the reasonableness of a premium (at [11]–[13], [21]–[26], [29], [32]–[33] and [37]–[47]).

[24] CPR 43.2(1)(a) defines 'costs' as including 'any additional liability incurred under a funding arrangement'. Rule 43.2(1)(k) explains that 'funding arrangement' means an arrangement where a person has taken out an insurance policy to which s 29 of the 1999 Act applies. Rule 43.2(1)(m) states:

> '"Insurance premium" means a sum of money paid or payable for insurance against the risk of incurring a costs liability in the proceedings, taken out after the event that is the subject matter of the claim.'

[25] *MacGillivray on Insurance Law* (9th edn, 1997) para 72 defines the word 'premium' in these terms:

> 'The premium is the consideration required of the assured in return for which the insurer undertakes his obligation under the contract of insurance (*Lewis Ltd v Norwich Union Fire Insurance Co* ([1916] SALR App D 509 at 519)).'

Rule 43.2(1)(a) includes 'the insurance premium' in a definition of the words 'additional liability'.

[26] Although s 29 of the 1999 Act is specifically made subject to Rules of Court in the case of court proceedings, many of the test cases settled without legal proceedings ever having been commenced. Those cases came before the master under the provisions of r 44.12A (costs-only proceedings).

[27] Rule 44.4 deals with the basis on which costs are to be assessed. The relevant part of this rule is in these terms:

> '(1) Where the court is to assess the amounts of costs (whether by summary or detailed assessment) it will assess those costs—(a) on the standard basis; or (b) on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will—(a) only allow costs which are proportionate to the matters in issue; and (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.'

[28] Rule 44.5(1) requires the court to have regard to all the circumstances in deciding whether costs, assessed on the standard basis, were proportionately and reasonably incurred, or were proportionate and reasonable in amount.

[29] Section 11 of the Costs Practice Direction (CPD) gives further guidance about the factors to be taken into account in deciding the amount of costs which are set out in Rule 44.5. The CPD states:

> '11.1 In applying the test of proportionality the court will have regard to rule 1.1(2)(c) ...

a 11.5 In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs ...

11.7 Subject to paragraph 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the b solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement ...

11.10 In deciding whether the costs of insurance cover is reasonable relevant factors to be taken into account include—(1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case c with a conditional fee agreement with a success fee and supporting insurance cover; (2) the level and extent of the cover provided; (3) the availability of any pre-existing insurance cover; (4) whether any part of the premium would be rebated in the event of early settlement; (5) the amount of commission payable to the receiving party or his legal representatives or d other agents.'

**[30]** In costs-only proceedings under r 44.12A the CPD states:

'17.8(2) In cases in which an additional liability is claimed, the costs judge or district judge should have regard to the time when and the extent to which the claim has been settled and to the fact that the claim has been settled e without the need to commence proceedings.'

**[31]** In *Callery v Gray (No 2)* this court gave guidance in relation to ATE insurance, and its approach was left undisturbed by the House of Lords ([2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000). In addition to the passages already cited, particular attention should be paid in this context to *Callery v Gray,* f *Russell v Pal Pak Corrugated Ltd* [2001] EWCA Civ 1117 at [65], [91], [94], [95], [99(v)] and [100], [2001] 3 All ER 833 at [65], [91], [94], [95], [99(v)] and [100], [2001] 1 WLR 2112; and *Callery v Gray (No 2)* [2001] 4 All ER 1 at [57], [63] and [68]–[70].

**[32]** In a judgment arising out of an appeal against the master's case g management decision in these proceedings Arden LJ said ([2002] EWCA Civ 428 at [44], [2002] PIQR Q11 at [44]):

'The expression "premium" is not defined in the Access to Justice Act 1999. The court has been referred to the Civil Procedure Rules and various authorities. It is not appropriate for this court to determine the meaning of h "premium" on this appeal, which is concerned with case management issues and orders as to costs. However, in case the matters determined by the Senior Costs Judge should themselves be appealed, the Senior Costs Judge will no doubt wish to make clear findings on all amounts which could properly be regarded as a premium if there is any doubt as to whether any j single amount constitutes a premium. I would observe that, for the purposes of section 29, it is the premium as between the claimant and the provider of the policy which is in issue. In my judgment, the premium is not necessarily limited to payments paid on inception of cover, but could include any further amounts paid by, or on behalf of the insured, pursuant to terms agreed with the insurer. The premium could also include sums paid to the benefit of the insurer. We are told that the insurer has, in effect, outsourced claims

administration. The cost of this is borne by Claims Direct on behalf of underwriters. Any part of the sum paid by the insured which is devoted to this purpose may be capable of forming part of the premium.' a

[33] She went on to refer to the decision of this court in *Callery v Gray (No 2)* in these terms:

'[46] ... The court specifically added "Satellite litigation involving such an exercise [ie examining evidence of insurance cover] is, however, unsatisfactory. The judge can only be expected to give broad consideration to such evidence. It is not part of a function of a judge assessing costs to carry out an audit of the insurer's business" ... The court may wish to check the overall result which it reaches by reference to the alternative methods of obtaining access to justice. This might involve looking at alternative rates of cover, or the costs which would be involved if litigation were to be funded in some other way. This has been called the "top down" approach. Nonetheless, in making that comparison, it may be necessary to bear in mind that like may not be being compared with like ... Nevertheless, in my judgment, the comparison between the cover provided by these appellants and other means of financing litigation, including other insurance cover, is a relevant consideration which the appellants could properly bring to the attention of the Senior Costs Judge. I say this, bearing in mind the general purposes of the new methods of funding litigation introduced by the 1999 Act and by the fact that it is obviously highly desirable in the interests of justice that these methods should be competitive. A premium may not be reasonable if there are alternative ways of providing the same funding at significantly less expense.' b c d e

[34] This court has now given guidance as to the correct approach to be taken to proportionality in the context of costs assessments in *Lownds v Home Office* [2002] EWCA Civ 365, [2002] 4 All ER 775, [2002] 1 WLR 2450. f

(5) ISSUE 2: THE MASTER'S JUDGMENT

[35] The master first addressed issue 2: 'Is the sum payable by a claimant properly to be regarded as a premium within the meaning of s 29 of the 1999 Act?' He said ([2003] Lloyd's Rep IR 69 at 99) that it had long been held that the cost of funding litigation was not a recoverable cost as between the parties: g

'[B]y established practice and custom funding costs have never been included in the category of expenses, costs or disbursements envisaged by the statute or RSC Order 62. To include them would constitute an extension of the existing category of "legal costs" which is not under the prevailing circumstances warranted.' (See *Hunt v RM Douglas (Roofing) Ltd* (1987) Times, 23 November per Purchas LJ.) h

This point was not considered in the subsequent House of Lords appeal (see *Hunt v RM Douglas (Roofing) Ltd* [1988] 3 All ER 823, [1990] 1 AC 398). j

[36] He said that it followed that the only costs of funding litigation which were recoverable were those permitted by statute, in this case s 29 of the 1999 Act. Section 29 was specific and had been interpreted by this court in *Callery v Gray*. Anything falling outside the scope of that section was not recoverable.

[37] He found that when a claimant entered into a contract with Claims Direct he was not exclusively a 'party who has taken out an insurance policy'. He was

certainly given evidence of insurance, but this was only part of the package he purchased. In the master's view a claimant was entitled to recover the actual reasonable cost of the insurance element. He went on to accept the claimants' submissions that he should not further analyse the amount which he found to be properly the insurance premium.

**[38]** He said that the nub of these test cases was whether the sum paid by an individual claimant (£1,250 plus IPT) was a premium within s 29 of the 1999 Act, and if so whether it was reasonable. There was no dispute between the parties that the sum of £140 paid to LPL on behalf of the brokers and underwriters was indeed premium, and therefore recoverable. At the trial there was some argument, now no longer pursued, over the status of the £110 commission paid to Claims Direct. The main argument, however, centred on the £1,000 paid to MLSS in accordance with the agreement of 26 August 1999 (see [18], above). Although Claims Direct was a party to that agreement, the agreement imposed no duties on that company. The master considered (at 99) that the recital to the agreement explained the true position:

> 'LPL has agreed with Claims Direct to introduce an insurance scheme ... and ... has made arrangements for the issue of an insurance policy underwritten by certain Underwriters at Lloyd's ... in respect of which LPL has been appointed Underwriters representatives, which will provide an indemnity for clients of Claims Direct ... in relation to legal proceedings whether formally issued or not ...'

The next paragraph of the recital stated:

> 'LPL has agreed to engage MLSS to undertake certain services ... which will enable LPL as Underwriters representatives both to introduce and to manage the necessary insurance arrangements ...'

**[39]** The recital went on to set out the requirement for MLSS to undertake the initial and continuing insurance services. The agreement provided that in consideration of the premium allocation (£1,000 for each and every claim) MLSS would provide LPL the initial and continuing insurance services described in the agreement. Claims Direct was given no role to play under this agreement except, by implication, the introduction of prospective claimants.

**[40]** Mr Charlton QC, for the claimants, had argued, as he has before us, that since the contract between the individual claimants and Claims Direct was not a sham, the court could not go behind that contract to carry out an audit of the insurer's business. Similarly he argued that everything which a claimant received was sufficiently closely connected with the subject matter of the insurance (ie the risk that the insured might at the end of his case have a liability for both the costs of his own representatives and of the defendants' representatives) for the whole of the 'premium' to be recoverable, and that no part of these services should be regarded as collateral benefits of one kind or another.

**[41]** The master considered that the flaw in this argument was that Claims Direct was not the insurer, nor even the agent of the insurer. Claims Direct offered to members of the public a package which included an insurance element. He accepted that most of the claimants who purchased the Claims Direct product were not sophisticated, and that they would have taken at face value what they saw in the advertisements and what they were told by Claims Direct's claims managers. They could not be expected to analyse how the money they paid was to be utilised, and therefore what proportion of it was potentially recoverable

from a defendant. None the less, he said, this situation could not of itself render the whole of the money paid to Claims Direct a recoverable insurance premium if it was not. a

[42] He said that the true position was that this insurance was provided by the underwriters through their brokers and coverholder LPL to the claimant via Claims Direct. The claimant would, if asked, almost certainly think that he/she was making an agreement with Claims Direct, and not LPL or the underwriters. b

[43] Under the 26 August agreement MLSS had to carry out what were described as the initial and continuing insurance services, and the master accepted that some of these might indeed be insurance services, and therefore covered by the premium. Other activities, although nominally undertaken for the benefit of underwriters, formed no part of the actual insurance since they were part of a normal claims handling service. If these services had not been carried out by claims managers, they would have been carried out by solicitors in the normal way. To the extent that this work was reasonable and proportionate it might instead be recoverable as costs on behalf of a successful claimant. c

[44] He said that the agreement between the claimant and Claims Direct was not an agreement with an insurer, and that the money paid under it was not all premium. Part of what was provided by Claims Direct under its Claims Protect Scheme was, however, an insurance policy, the premium for which was recoverable, in so far as it was reasonable. He therefore had to identify the amount attributable to the insurance. d

[45] He added that if this was wrong, and if the claimants' argument that the whole of the Claims Direct premium was a recoverable insurance premium was soundly based, he would then have to decide whether £1,250 plus IPT was reasonable. He addressed this topic later in his judgment (see [89]–[90], below). e

[46] He said that in deciding what constituted 'premium' he would adopt the definition from *MacGillivray on Insurance Law* (see [25], above). He therefore had to decide what part of the money paid by the claimant was the true consideration for which the insurer was undertaking his obligation under the contract of insurance. In considering the sums which properly went to make up the recoverable premium he said that the starting point was the £140, being the figure originally allocated to underwriters, a sum which included brokerage and commission. It had soon become apparent to the underwriters, however, that this allocation was badly wrong, and they exercised their contractual right to a review. It is unnecessary for the purposes of this appeal to refer in any detail to the master's reasons for concluding that a further £311·55 per cover became recoverable as ATE premium in each case, because the defendants do not now challenge his conclusions. It is sufficient to say that after the review payments totalling £16·6m were made to underwriters. These payments were made in respect of all covers bound in 1999 and 2000, a total of 53,282 covers in all. It was by this route that the master accepted that underwriters received an extra £311·55 per cover. f g h

(6) THE MASTER'S JUDGMENT: CLAIMS DIRECT'S COMMISSION j

[47] The master then referred to the commission of £110 received by Claims Direct for every insurance which was accepted. The evidence showed that they used this money for advertising purposes. He said that there was in principle no difficulty over the inclusion of a referral commission in the overall cost of an insurance premium. Although the commission was high it did not appear to him

to be unreasonable, particularly in the light of the fact that this was a new product which necessarily had to be advertised heavily in order to generate the business.

**[48]** As I have said, the master's findings in [46] and [47], above are not challenged by the defendants on this appeal.

(7) THE MASTER'S JUDGMENT: THE PAYMENT TO MLSS

**[49]** The master then went on to consider the breakdown of the sum of £1,000 which was paid to MLSS. Originally this fee to MLSS was described as 'Claims Managers' Profit Commission'. The amount payable to MLSS was later reduced, following the reallocation of premium. The master said that the question he had to decide was the extent to which the Initial and Continuing Insurance Services were part of the insurance being provided by underwriters and, in so far as they did form part of the insurance, the value which should be put on them.

**[50]** He began his analysis by following the guidance given by Arden LJ (see [32] and [33], above). In so far as underwriters had outsourced the 'insurance claim handling' services to a third party, this did not make any difference when answering the question whether such a cost was recoverable in principle, if otherwise it would have been reasonable to expect underwriters to do these specific tasks themselves in order to provide the insurance product in question. The claimants had argued that once it was accepted that the services were of benefit or value to the underwriter they did not need to show any more. The master did not accept this argument. He said that he had to examine each of the services provided by MLSS and to decide to what extent, if at all, they accorded with the guidelines suggested by Arden LJ.

**[51]** In relation to the work undertaken by claims managers the master bore in mind remarks written by Mr Raincock (of LPL) in a memorandum for underwriters dated 5 May 1999:

> 'Underwriters have expressed their reservations to [claim managers' profit commission] in principle because they were led to believe ... that claims managers had some "judgment" over claims pursued. This is not so; they are solely expected to provide a completed report form and are then effectively an "outdoor clerk" who is the "gofor" for the appointed representative ...'

(8) THE MASTER'S JUDGMENT: INITIAL INSURANCE SERVICES

**[52]** The defendants had conceded that item 1 (arranging for the completion of the Claims Direct application form) and item 2 (arranging for the client to complete a credit agreement application form) were legitimately related to insurance. The master agreed, and he added that he regarded item 3 (forwarding the application form) as a necessary and integral part of the first two items. Item 4 (obtaining further information), on the other hand, was clearly part of the claims handling process. It referred to obtaining such further information as might be requested by the panel solicitor prior to his agreement to commence the legal proceedings.

(9) THE MASTER'S JUDGMENT: CONTINUING INSURANCE SERVICES

**[53]** The master then turned to the items described as 'Continuing Insurance Services'. He said that item 1 (obtaining witness statements from clients, witnesses and experts) self-evidently related to claims handling. It did not constitute insurance services. Item 2 (monitoring the conduct of the panel solicitor during the course of the legal proceedings and reporting to LPL), on the other hand, seemed to him to be properly part of the insurance services.

[54] Item 3 (arranging for the Claims Direct client to attend appropriate medical examination) and item 4 (review by a costs draftsman) could not, in his view, form part of the insurance services, although he accepted that it was in the overall interest of underwriters that the claims were efficiently handled. Item 5 (maintaining relevant financial information as may be required for LPL), on the other hand, seemed to him without doubt part of the insurance services.

[55] He rejected a submission by the defendants to the effect that because these services, or most of them, were also being provided by MLSS in the days before the Claims Direct arrangements included an insurance product, this prevented them being part of the insurance under the Claims Direct Protect Scheme. He said that the items he identified as being genuinely part of the insurance services represented legitimate outsourcing by the underwriters.

[56] He then considered an argument by the claimants to the effect that because underwriters had an interest in the Initial and Continuing Insurance Services being carried out, and may indeed have insisted on them, and because the agreement with MLSS was not a sham, it was not possible to go behind it, nor to apportion the money paid to MLSS, unless it could be shown that the services were for the benefit only of the individual's underlying damages claim and that they were not required to be performed for the benefit of insurers.

[57] The master said that this approach was too narrow. He did not regard the whole of the money paid by a claimant to constitute premium. In order to assess what was truly premium it was necessary to consider the various elements which went to make up the total figure. In broad terms the Initial Insurance Services were to his mind properly part of the insurance services, particularly if item 4 of the Initial Services was exchanged with item 2 of the Continuing Services. This would mean that the whole of the Continuing Services (apart from item 5) were claims handling, and not recoverable as part of the insurance premium. Item 5 (the maintaining of relevant financial information) was, it seemed to him, something which would be undertaken in any event as part of the monitoring of the conduct of the panel solicitor and reporting to LPL. He did not think there would be any significant increase in the amount required properly to remunerate this insurance service.

[58] The master then referred to figures in Claims Direct's prospectus. He said that it appeared that about £400 per case was being spent on advertising, £75 on irrecoverable VAT, and £425 on services provided by franchisees. It seemed clear from the evidence that the amount actually paid for 'insurance services' was £425. Of this £395 was said to be financed by money from the solicitors and the other £30 from Claims Direct's funds. The defendants had conceded that £30 should be allowed in respect of the insurance services, on the basis that their liability insurers were also being asked to pay £395 to the solicitors as a disbursement. The premium element paid towards the insurance services could not, in the master's view, exceed the £30 to the franchisees paid from Claims Direct's funds. Money paid by the solicitors was not premium. He was satisfied that £30 was not an unreasonable amount to pay for the insurance services which he had described.

[59] Adding together the sums he had held properly to be regarded as premium, £451·55 plus £110 (see [45]–[47], above) and £30 (see [58], above) brought the total recoverable and allowable premium to £591·55 plus £29·58 IPT (as to which, see [21], above), being sums totalling £621·13. As we have said, the defendants do not appeal against this award.

(10) THE MASTER'S JUDGMENT: ISSUE 4

**[60]** Master Hurst then went on to consider issue 4. This issue, so far as it is still live on this appeal, was in these terms: (i) are any of the benefits purchased by insurance forming part of the Claims Direct scheme collateral or extraneous to such insurance; and (ii) to what extent should the costs of collateral benefits be recoverable? He said that in his view the word 'premium', properly understood, excluded the value of these items, so that this issue was relevant only if his decision on issue 2 was wrong.

**[61]** The claimants invited him to approach this issue from the point of view of a claimant. It was the claimant who was intended to be helped by s 29 of the 1999 Act. What mattered, therefore, was what was known, or ought reasonably to have been known, by individual claimants when taking out their Claims Direct policies. The claimants asserted that no benefits were provided by the Claims Direct policy that fell outside the insurance allowed by s 29. They said that everything that they received was sufficiently closely connected with the subject matter of the insurance to permit its recovery.

**[62]** They suggested that it would be anti-competitive and contrary to the notion of easy access to justice if collateral benefits were disallowed from a competitively priced policy. Individual claimants would have no knowledge of the detailed operations of Claims Direct, MLSS and their appointed solicitors. It was argued that claimants have to choose an ATE policy by reference to the overall costs to them, and by reference to the attractiveness of the services offered. The test of reasonableness should therefore be perceived through the eyes of the ATE cover buyer only. Accordingly any finding that a collateral benefit was not recoverable should be prospective only, because it would be only from the date of that finding that it could be said that a claimant was acting unreasonably in purchasing such cover.

**[63]** Mr Newman QC, who appeared for the second defendants, had argued that there was a distinction between insurance services on the one hand and claims handling services on the other hand. Claims Direct provided claims handling services to its clients, and these were collateral benefits in respect of which nothing was recoverable. He relied on the finding of Master O'Hare in his report annexed to the judgment in *Callery v Gray (No 2)* [2001] 4 All ER 1 at 30, [2001] 1 WLR 2142 at 2170 (para 51). Having described work done by claims managers (not necessarily in Claims Direct cases) Master O'Hare said: 'In my view these benefits are extraneous to legal expenses insurance and a substantial discount on the recoverable premium should be made in respect of them.' Lord Phillips of Worth Matravers MR in his judgment in *Callery v Gray (No 2)* referred to that paragraph of Master O'Hare's report and said ([2001] 4 All ER 1 at [33]):

> 'If a payment described as a "premium" entitles the insured to benefits such as these it is ... at least arguable that, to that extent, the "premium" does not fall within the ambit of s 29.'

**[64]** Lord Phillips MR (at [12]) gave guidance on the test of what is reasonable:

> 'It is important in this context to draw a distinction between two separate matters. The first is the nature of the benefits to which the litigant is contractually entitled in exchange for the payment of the premium. This falls to be determined from the terms of the contract under which the premium is paid. Section 29 of the 1999 Act permits the recovery of a premium where this is payment for insurance against the risk of liability for

costs. If payment of a so-called premium buys a contractual entitlement to other benefits it is, to say the least, arguable that the premium cannot, to that extent, be recovered under s 29. Thus the court has to consider the terms of the contract under which the premium is paid to see whether it is simply a contract of insurance against liability for costs or whether it is something other than, or additional to, that.'

**[65]** Mr Hutton, who appeared for the first and third defendants, had argued that any benefits over and above those covered by the £140 paid to underwriters were collateral or extraneous and should not be recoverable. He referred in this context to the speeches of the House of Lords in *Dimond v Lovell* [2000] 2 All ER 897, [2002] 1 AC 384, suggesting that they should be applied by analogy. The House of Lords found that the claimant could not recover the full amount charged under his agreement with a specialist vehicle hire company for a replacement car when his own car was damaged in an accident. Although it was reasonable for the claimant to use the services of such a hire company, he obtained more from the agreement than the cost of a replacement car, and the additional benefits were not recoverable against the defendant. The House found that the recoverable loss, after allowance had been made for the additional benefits, would normally be the market rate for hiring from an ordinary car hire company. (See [2000] 2 All ER 897 at 910–911, 915, [2002] 1 AC 384 at 401–403, 407 per Lord Hoffmann and Lord Hobhouse of Woodborough respectively.)

**[66]** Reliance was also placed by the defendants on the points already made in relation to the content of the initial and continuing insurance services. It was said that the claims manager in effect held the client's hand throughout the entire legal process. His services went far beyond true insurance services and should not be paid for as part of the insurance premium.

**[67]** Master Hurst concluded on this issue that the starting point should be that any benefits over and above those covered by the payment of £451·55 to underwriters (which included an element of own costs cover) should be regarded as collateral or extraneous and should not be recoverable. If his decision on issue 2 was wrong, he would hold that the premium of £1,250 included payment for the extraneous benefits, namely the claims handling services, which he had already identified, and that the costs of those services were not recoverable as premium. On the other hand the actual amount paid by Claims Direct for insurance services was £30, and that element was recoverable.

(11) ISSUE 2: CONCLUSION

**[68]** The main issue we have to determine on this appeal is whether the master was correct in refusing to accept that the 'premium' of £1,250 identified in the binding authority must be automatically equated with the premium referred to in s 29 of the 1999 Act. We were told that if we were to allow the 'deconstruction' of a premium liability in the manner advocated by the defendants, insurers would raise endless arguments on the appropriateness of different elements of a premium, and that this would make the assessment of this type of 'additional liability' a nightmare for those concerned with the assessment of costs. All that was needed, Mr Charlton said, was a proportionality check of the type already required by CPD para 11.10 (see [29], above).

**[69]** I certainly agree that the court should apply a proportionality check whenever costs are assessed on the standard basis (see [34], above for the leading case on this topic). The courts will not sanction a situation in which the recoverable

costs are altogether too high in relation to the value of a claim (but see CPD para 11.5—set out in [29], above—for the treatment of 'additional liabilities' in this context). But this consideration in itself throws no light on the distinct issue we have to decide, namely what constitutes the 'premium' on the facts of these cases for the purposes of s 29 of the 1999 Act. There is a particular feature here which is bound to excite attention. The services provided for the claimants were in most respects identical under the Portfolio Scheme and the Claims Direct Protect Scheme. How then can it be said that all the claims handling services (previously remunerated out of Claims Direct's 30% share of the award in successful cases) suddenly became insurance services when an ATE insurance element was added to the package? This consideration alone is sufficient to put a costs judge on inquiry.

**[70]** The insurance agreement was not a sham in the sense that it was intended to give the appearance of creating legal rights and obligations different from the actual legal rights and obligations which the parties intended to create (see *Snook v London & West Riding Investments Ltd* [1967] 1 All ER 518 at 528, [1967] 2 QB 786 at 802). But before a court could be satisfied that when the parties to these unusual negotiations adopted the word 'premium' in their arrangements in the sense of a premium paid for the purpose identified in s 29 of the 1999 Act it is necessary for it to conduct an exercise of the type undertaken by Master Hurst. In *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809, for instance, the parties gave the word 'licence' to the agreement they had made as to the terms on which residential premises might be occupied. The House of Lords held, however, that the legal effect of their agreement could not be conclusively determined by the label they gave to it. Lord Templeman said ([1985] 2 All ER 289 at 294, [1985] AC 809 at 819):

> '[T]he consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence.'

**[71]** In order to analyse the true nature of the arrangements more deeply, I must go to the evidence of the claimants' three witnesses which the master summarised in his judgment. He was clearly impressed by the experience and professionalism of each of them, and he accepted the evidence they gave.

**[72]** The master had taken as his starting point what Claims Direct told the public about its business at the time of its flotation. The relevant part of its prospectus reads:

> 'In total, the Group receives about £1,560 of gross revenue per claim, but incurs direct costs of approximately £425 and indirect costs of approximately £475. The Group makes a gross profit per claim of approximately £660.'

**[73]** Although Mr Doona (for whom see [5], above) had not been with the company at the time the original figure for the premium was calculated, he said that underwriters had arrived at it by looking at their costs and the profit ratio they wished to make and settling the figure accordingly.

**[74]** After describing the structure of MLSS's business (for which see [6], above) Mr Doona told the master that the direct costs of £425 related entirely to the payments made to the claims managers. In addition to the £395 they were paid by the panel solicitor, a further £30 came from other income of the group. He thought that the suggestion in the reply that this £30 came from the premium was not strictly accurate. It would have been better to have said that the £30 simply came

from Claims Direct's general income, although of course the amount the company received from LPL was the largest single component of this income. a

[75] As to the indirect costs of £475, he said that £75 represented irrecoverable VAT, and £350–£400 was his best estimate of the total cost of annual advertising. He said that there were also the indirect expenses of performing the claims handling services on behalf of underwriters, as required under the agreement. He found it very difficult to calculate a precise cost per policy for these services, because the b work was not costed that way. He said that they had never tried to apportion the expenses of claims handling by isolating the expenses attributable solely to the services provided to underwriters from any other expenses, and then seeking to apportion this total cost to each policy. He agreed that a profit of £660 per claim, as shown in the prospectus, was an extraordinary one.

[76] In his evidence Mr Doona was trying to identify the cost to MLSS of c carrying out the work which underwriters required them to undertake under the 26 August agreement. The origin of these obligations was made clear in the evidence given by Mr Raincock (see [10]–[12], above for the history). He said that underwriters were not willing to accept the risk offered to them unless the proponents of the risk were willing to undertake that they would continue to run d an efficient business.

[77] He explained that he was in the habit of carrying out random audits on individual files. If he was dissatisfied with what he saw, he would then report his dissatisfaction to MLSS, and they would then inspect the file to ensure that the panel solicitor was performing his duties in the manner required of him by the e operating manual. He told how the number of panel solicitors increased from 175 to almost 400 in order to cope with the volume of business. Solicitors were required to attend a seven-day training course run by MLSS. An accreditation system was also set up.

[78] Mr Raincock expressed the view that all these services were intrinsic to the insurance cover because without them the insurance policy could not have been f managed. He accepted that the monitoring service, designed to improve performance, was not only provided for the benefit of underwriters. It benefited the claimants as well. He conceded that there might be an element of damages claim handling in the work undertaken by Claims Direct and MLSS.

[79] Mr Primer gave evidence from the perspective of the underwriters. He said that underwriters had always approached this risk on the basis that virtually all the g work involved in promoting the project and in the work of vetting cases and claims handling and administration would be sub-contracted. Underwriters were concerned to ensure that these functions were properly carried out, particularly the vetting.

[80] Since most of these functions were being sub-contracted, underwriters took h the view that they should calculate the 'burning cost' per policy (with a margin for error, given their lack of experience with this type of policy) and then apply an appropriate margin for overheads and profit. (The phrase 'burning cost' means the frequency of loss (ie the percentage of policies in which a claim is made) multiplied by the average cost of each claim.) Underwriters' figures were originally calculated j on the assumption of a failure fate of 4–6%. In March 2002 the failure rate was about 25%.

[81] He said that underwriters would not have been prepared to underwrite the business without proper arrangements being in place for promotion, vetting, claims handling and so on, and that they were not in a position to undertake this work themselves. There was a relatively small allocation of premium to pure

underwriting risk. Underwriters expected LPL to maintain a rigorous supervisory regime over the activities of Claims Direct and MLSS, including the vetting procedures, in return for the 32·5% commission they were to receive. The initial £91 net premium turned out to be a 'poor call' due to the excessive failure rate experienced in practice.

**[82]** So far as Lloyd's internal arrangements are concerned, underwriters are bound by an agreement with Lloyd's (which permits them to carry on business at Lloyd's) whereby a limit is placed on the total gross premium which a syndicate is permitted to underwrite. It is noteworthy that the figure which appeared in the syndicates' books as premium income was the net amount (originally £91), and not the £1,250, although that sum was described as 'premium' in the binding authority. Section 21 of that authority provided, in its final form, that—

> 'Unless otherwise agreed by the Underwriter in writing and endorsed hereon the total gross premium income attaching hereunder shall not exceed 21 million *after the deduction of the Premium Allocation payable to MLSS.*' (My emphasis.)

**[83]** In his witness statement Mr Primer said, like the other witnesses, that no specific costings were provided for individual components of MLSS's work. He would readily accept, however, from his experience in the industry and his knowledge of the work MLSS did, that the cost per claim would be likely to be several hundred pounds. In his oral evidence he put this figure at between £300 and £900. He said that he knew what it cost to bring third party administrators in, what coverholders had to pay their auditors, and what brokers charged for their services.

**[84]** In the course of his submissions on the appeal Mr Charlton relied on what his clients called a 'deconstruction schedule' which was based on this evidence. Their case was founded firmly on the contention that the only contract which the individual claimants had made was a contract with the underwriters, who undertook to provide them with protection against their own costs and the other side's costs in the event that their claims failed, and all this for a premium of £1,250 (plus IPT). Viewed in this light, the cost of 'risk control/claims handling/vetting' which underwriters required MLSS to perform for them could be put between £225 (the original amount paid into the retention fund) and £689 (the whole of the £1,000 paid to MLSS, less the £311 clawed back once premium was reallocated). Similarly, the sum of £475 mentioned in the Claims Direct prospectus as part of the indirect costs attributed to each claim could be properly treated as advertising and promotion costs required by underwriters.

**[85]** The master considered that there were two relevant contracts with which each claimant was concerned, and not merely one. Once Claims Direct accepted the proposal the claimant made in the fair trading statement (see [13](2), above) it expressly undertook to assist him with his claim. Consideration was given for this undertaking because Claims Direct expected to profit as a result of the obligations the claimant agreed to undertake. The task the master had to perform in these circumstances was to identify how much of the premium allocation to MLSS in truth represented the cost of the obligations Claims Direct undertook (to all its customers) to procure, even though in a quite different agreement, to which the claimants were not parties, many of these services were labelled 'insurance services'.

**[86]** In my judgment it is clear that the master attached too much weight to the figures quoted in the prospectus, about which Mr Doona was quite rigorously cross-examined. The difference between the minimum fee of £395 which a panel

solicitor had to pay a claims manager and the sum of £425 quoted in the prospectus as a direct cost suggests a net outlay of £30 by MLSS on each claim, but I do not consider that this figure casts any particularly useful light on anything the master had to decide. It is clear that MLSS incurred significant expense in performing the 'insurance services' required of them under the 26 August agreement. The central issue under question 2 is whether the master was entitled to lift the veil and to be influenced by what was actually being provided in return for the premium allocation paid to MLSS (see [18] and [39], above).

**[87]** In my judgment, in this quite exceptional case, it was inevitable that the master should adopt this approach in order to identify what should truly be treated as the premium. As this court explained in *Callery v Gray (No 2)* [2001] 4 All ER 1:

> '[11] It was common ground, and rightly so, that the court, when considering whether to award an insurance premium by way of costs, has to consider whether the premium is reasonable. It was also common ground that, in so far as the court finds that the premium is not reasonable, it can and should reduce it. There was debate as to the appropriate approach to the application of the test of what is reasonable.
>
> [12] It is important in this context to draw a distinction between two separate matters. The first is the nature of the benefits to which the litigant is contractually entitled in exchange for the payment of the premium. This falls to be determined from the terms of the contract under which the premium is paid. Section 29 of the 1999 Act permits the recovery of a premium where this is payment for insurance against the risk of liability for costs. If payment of a so-called premium buys a contractual entitlement to other benefits it is, to say the least, arguable that the premium cannot, to that extent, be recovered under s 29. Thus the court has to consider the terms of the contract under which the premium is paid to see whether it is simply a contract of insurance against liability for costs or whether it is something other than, or additional to, that.'

**[88]** It was not, in my judgment, the intention of Parliament when it enacted s 29 of the 1999 Act to overload the recoverable premium by adding to the costs customarily embraced by such a premium the costs which a company like MLSS had to incur if insurers were to accept the risk at all. I would look equally askance at the recoverability, in similar circumstances, of a premium for a fire policy which included the cost the insured had to incur in installing and maintaining a sprinkler system as a condition for his insurance cover, or a premium for a household insurance policy which included the cost of installing and maintaining a burglar alarm.

**[89]** The obligation which the insurer undertook under his contract of insurance with the claimant was to provide an indemnity in the event that the claimant's compensation claim was dismissed or was discontinued. It was not an obligation to provide the 'Continuing Insurance Services' described in the 26 August agreement. The claimant would be provided with these services in any event, whether or not the claim was unsuccessful. If and in so far as the work done by a claims manager represented an appropriate disbursement for work a solicitor would otherwise have to perform himself, then the cost of that work would be properly recoverable as part of the solicitor's bill.

**[90]** For these reasons I am satisfied that the master's conclusion was correct, although I have reached the same conclusion by a somewhat different route. I would probably not have been as generous as he was in attributing expenses to the

insurance element of the arrangements, but since the defendants have not cross-appealed, there is no need to go into this aspect of the case.

(12) ISSUE 4 AND THE REASONABLENESS OF THE PREMIUM

**[91]** In these circumstances it is unnecessary to deal separately with issue 4.

**[92]** Since the defendants do not challenge the reasonableness of the sum awarded by the master it is also not necessary to say very much about the final element in the appeal. In para 234 of his judgment Master Hurst explained why he considered a premium of £621·13 to be reasonable and proportionate. He was not given any evidence of comparable or alternative products. Nor was he told the then current premium rates for ATE insurance policies. He was therefore constrained to take as a starting point the award in *Callery v Gray* of an ATE insurance premium of £350 plus IPT (£367·50) plus a success fee.

**[93]** In 11 of the cases he was able to identify the actual base costs claimed, and these averaged £2,097 per case. A 20% success fee (as in *Callery v Gray*) would yield a figure of £419, while a 5% success fee (as suggested by this court in *Callery v Gray* as a preferred alternative) would yield a figure of £105. The master then added £367·50 to each figure, and considered the resultant range of figures between £472·50 and £786·50. He concluded that since his award of £621·13 fell within the middle of the range, it should be regarded as reasonable and proportionate, and the higher figure of £1,250 plus IPT would not.

**[94]** Mr Charlton submitted that the success fees adopted by the master in his calculations were far too low, and that if more realistic success fees were adopted the premium sought by his clients could not fairly be castigated as unreasonable and disproportionate, particularly as 'both sides' cover' was available under the Claims Direct policy.

**[95]** Our assessor has advised us that he considers that some of Mr Charlton's criticisms have some force. It appears that Master Hurst assumed that all the cases he examined were cases as simple as *Callery v Gray*, and that they all settled pre-issue. In fact, some of them were not particularly simple, and two of them did not settle pre-issue. On the other hand our assessor considered that most of the success fees suggested by Mr Charlton were too high. He said—and I would accept his advice—that a success fee of 40% would be reasonable in case 12, a success fee of 20% in cases 6, 10, 18 and 20, and a success fee of 30% in the remainder. Whereas Mr Charlton's comparison figures ranged between £801 and £2,982, our assessor's comparison figures ranged between £656 and £1,412.

**[96]** Provided that the sample is large enough, the 'one allowance suits all' approach adopted by Master Hurst is obviously the appropriate method of assessing the reasonableness of a premium in a situation of this kind. Our assessor adopted an average success fee of 28% for the cases he examined, (which had an average base cost of £2,130) and this provided a comparison figure of £979, in contrast to the figure of £1,518 suggested by Mr Charlton. These calculations are, however, based largely on the figures for costs claimed as opposed to costs agreed or allowed. It is also likely that a larger sample would produce a smaller comparison figure.

**[97]** It follows that the sum awarded by Master Hurst is both reasonable and proportionate. The sum claimed by the claimants (£1,250 plus IPT) would not have been.

**[98]** I would also accept our assessor's advice that the claimants' reliance on CPD para 11.10(1) as the sole determinant of the reasonableness of 'both sides cover' premium is likely to produce more uncertainty for a claimant than the

possibility of deconstruction or further premium reallocation in an exceptional case would produce. This uncertainty would also be far greater if two-step success fees became the norm for most cases.

**[99]** Before leaving this case, there is one other matter I need to mention. There seems to be widespread misunderstanding about the role which this court can perform on particular appeals. There may be important occasions, of which *Callery v Gray* was undoubtedly one, and *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125, was another, when the court may seek the assistance of other parties in the relevant field in addition to the parties to the immediate litigation. On such an occasion the court will also do its best to derive benefit from whatever research evidence is available before giving guidance of general applicability in a variety of cases.

**[100]** *Halloran v Delaney* [2002] EWCA Civ 1258, [2003] 1 All ER 775, [2003] 1 WLR 28 was not such an occasion. It was concerned with an extremely simple road traffic accident claim which was swiftly settled for £1,500 with a minimum of fuss and bother. In my judgment I referred (at [32]) to the court's description of *Callery v Gray* as a 'modest and straightforward claim for compensation for personal injuries resulting from a traffic accident ... where there was no special feature that raised apprehension that the claim might not prove to be sound'. I suggested (at [34]–[36]) the approach that judges should adopt in future when appraising the appropriateness of a success fee 'in claims as simple as this'.

**[101]** Subsequent events have shown that I should have expressed myself with greater clarity. The type of case to which I was referring was a case similar to *Callery v Gray* and *Halloran v Delaney* in which, to adopt the 'ready reckoner' in *Cook on Costs* (2003) p 545, the prospects of success are virtually 100%. The two-step fee advocated by the court in *Callery v Gray, Russell v Pal Pak Corrugated Ltd* [2001] 3 All ER 833, [2001] 1 WLR 2112 is apt to allow a solicitor in such a case to cater for the wholly unexpected risk lurking below the limpid waters of the simplest of claims. It did not require any research evidence or submissions from other parties in the industry to persuade the court that in this type of extremely simple claim a success fee of over 5% was no longer tenable in all the circumstances. The guidance given in that judgment was not intended to have any wider application.

**LAWS LJ.**

**[102]** I agree.

**SIR ANTHONY EVANS.**

**[103]** I also agree.

*Appeal dismissed.*

Melanie Martyn Barrister.

# Wermuth v Wermuth

[2002] EWCA Civ 50

COURT OF APPEAL, CIVIL DIVISION
THORPE, LATHAM LJJ AND LAWRENCE COLLINS J
17 DECEMBER 2002, 4 FEBRUARY 2003

*Divorce – Financial provision – Jurisdiction – Husband bringing divorce proceedings in Germany – Wife subsequently bringing divorce proceedings in England – Judge granting wife's application for maintenance pending suit – Whether maintenance order 'provisional measure' – Council Regulation (EC) 1347/2000, art 12.*

A husband and wife with German citizenship had homes in England and Germany. They separated at the end of March 2002. In May 2002 the husband filed for divorce in Germany and shortly after the wife filed for divorce in England. Council Regulation (EC) 1347/2000 (the Brussels II regulation) applied to the jurisdiction and the recognition and enforcement in matrimonial matters in both the United Kingdom and Germany and art 11[a] provided that where proceedings involving the same cause of action and between the same parties were brought before courts of different member states, the court second seised was to stay proceedings until such time as the jurisdiction of the court first seised was established. The husband applied to the German court for an order that it was first seised within the terms of the Brussels II regulation and a hearing date was fixed. He also applied to strike out the wife's English petition on the ground that the primary jurisdiction lay with the German court. The district judge adjourned his application to strike-out, ordering that no steps should be taken in the English divorce proceedings save under art 12[b] of the Brussels II regulation which provided that in 'urgent cases' the provisions of the regulation were not to prevent courts of a member state from taking 'such provisional, including protective measures' in respect of persons or assets in that state as might be available under the law of that state even if, under the regulation, another court had jurisdiction as to the substance of the matter. In September 2002, in reliance on art 12, the wife applied for and was granted maintenance pending suit of £12,500 per month, two thirds of which was intended to provide funds to enable her to litigate. The husband appealed contending, inter alia, that a measure did not come within the scope of art 12 if its provisional character were not guaranteed; that a court order requiring an unconditional interim payment could not be a provisional measure unless, if the payee were unsuccessful, the payer could obtain repayment; and that there was no evidence of urgency. The wife conceded that the order could not be classified as a protective measure.

**Held** – An application for maintenance pending suit could not be categorised as a protective measure. It could not even be categorised as a provisional measure since over-payments or payments obtained by material non-disclosure were at best given some indirect reflection in a later quantification of substantive orders. Furthermore if the duty to quantify the substantive order was to be discharged in

a Article 11, so far as material, is set out at [13], below
b Article 12, so far as material, is set out at [14], below

the court of another member state, the payee might well escape even that reflection. In the instant case, if viewed as a provisional measure, the judge's order had a substance and an undefined duration that were an unwarranted invasion of the proper function of the German judge as the judge of the court first seised. It had been conceded that it could not be classified as a protective measure. Nor could it be brought within a definition of 'urgent cases'. Accordingly, the appeal would be allowed (see [31]–[33], [36], [37], [43], below); *de Cavel v de Cavel* Case 143/78 [1979] ECR 1055, *Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line* C-391/95 [1999] All ER (EC) 258 and *Reichert v Dresdner Bank AG (No 2)* Case C-261/90 [1992] ECR I-2149 applied.

**Notes**

For the stay of proceedings in matrimonial causes where proceedings are brought before the courts of different member states of the European Union, see 29(3) *Halsbury's Laws* (4th edn reissue) para 659.

**Cases referred to in judgments**

*de Cavel v de Cavel* Case 143/78 [1979] ECR 1055, ECJ.

*Ghoth v Ghoth* [1992] 2 All ER 920, [1993] 1 FCR 177, CA.

*Mietz v Intership Yachting Sneek BV* Case C-99/96 [1999] ECR I-2299, ECJ.

*Reichert v Dresdner Bank AG (No 2)* Case C-261/90 [1992] ECR I-2149, ECJ.

*Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line* C-391/95 [1999] All ER (EC) 258, [1999] QB 1225, [1999] 2 WLR 1181, [1998] ECR I-7091, ECJ.

**Cases also cited or referred to in skeleton arguments**

*A v A (maintenance pending suit: provision for legal costs)* [2001] 1 FCR 226, [2001] 1 WLR 605.

*F v F (ancillary relief: substantial assests)* [1996] 2 FCR 397.

*G v G (maintenance pending suit: legal costs)* [2002] EWHC 306 (Fam) [2002] 3 FCR 339.

**Appeal**

Jochen Ralph Wermuth, who had commenced divorce proceedings in the Mainz Amtsgericht, Germany, against his wife, Tatiana Yurievna Wermuth, appealed from the decision of Johnson J on 22 October 2002 in English divorce proceedings subsequently brought against him by his wife, ordering him to pay maintenance pending suit to his wife at the rate of £12,500 per calendar month. The facts are set out in the judgment of Thorpe LJ.

*Nicholas Mostyn QC* and *Richard Todd* (instructed by *Mishcon De Reya*) for the husband.

*Lewis Marks QC* and *Tim Amos* (instructed by *International Family Law Chambers*) for the wife.

**THORPE LJ.**

[1] The issue in this appeal is the proper construction of art 12 of the Council Regulation generally known as Brussels II. Its official designation is Council Regulation (EC) 1347/2000 (the Brussels II Regulation). It came into force on 1

March 2001. The primary purpose of the regulation was to avoid jurisdictional conflicts between the states of the European Community in cases for divorce, judicial separation and nullity (to use our terminology). Thus the regulation is entitled 'On the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses'.

[2] In the event Denmark elected not to be a party to the convention negotiations that culminated in the regulation with the consequence that it binds only the 14 other member states. During the negotiating process the United Kingdom held profound reservations at the prospect of resolving jurisdictional conflicts in this field by the rule of lis alibi pendens rather than by the doctrine of forum conveniens, which had statutory expression in para 9 of Sch 1 to the Domicile and Matrimonial Proceedings Act 1973. That provision, of course, continues to regulate conflicts between this jurisdiction and jurisdictions other than the 14 member states of the European Union.

[3] The objection to the proposed convention was encapsulated in two arguments: first that an arbitrary rule of lis alibi pendens was a poor substitute for a balanced discretionary appraisal of fairness and convenience that the doctrine of forum conveniens permits. The second argument was that the introduction of a rule giving priority to the court of first issue would inevitably encourage a rush to be first, eliminating or minimising attempts at reconciliation or conciliation. However the experience of 18 months of operation has been reassuring. Research carried out by specialist practitioners in London and Edinburgh in preparation for the Fourth Anglo-German Family Law Judicial Conference in September 2002 did not suggest that the regulation had resulted in any significant shift in accepted standards of professional good practice at the stage when divorce proceedings are in contemplation. Furthermore, in relation to the first argument, the loss of an ability to conduct a balanced judgment of the more appropriate jurisdiction is compensated by the elimination of the need for expensive litigation (generally conducted concurrently in both jurisdictions) as each party manoeuvres to establish the jurisdiction of his or her preference as the more convenient jurisdiction.

[4] With that introduction to the regulation I turn to the facts in the present appeal. The parties are in their mid-30s, the husband being basically German and the wife Russian. They married on 20 September 1997 in Russia. Since 1999 they have had homes in England and Germany. On 28 April 2000 they entered into a marriage contract in Germany. On 13 February 2002 the wife became a naturalised German citizen. In the same month they seemingly decided to make London their main base but separated at the end of March 2002. On 12 April 2002 the lease on the wife's London flat terminated and thereafter the husband did not know her address. Accordingly on 8 May 2002 the husband swore an affidavit seeking an order for substituted service of the German petition that he was preparing to issue. The petition was filed in the Mainz Amtsgericht on 14 May. On the previous day the husband sent the wife an e-mail letter:

> 'Dear Yana, I have filed for divorce. For you to receive the papers, could you please let me have your address such that the documents could be delivered to you personally? Thanks. Jochen.'

[5] The wife responded at length on the following day but ignored the request. The request was repeated in an e-mail on 16 May. The wife's e-mail response of the following day stated that the papers could be served at Atelier 214, 176 Finchley

Road, which was a post office box set up by the wife on that very day for the receipt of mail. a

[6] Accordingly on 20 May the husband applied for an order for substituted service. The order was made on 24 May and, under its terms, service was deemed to have been effected on 12 June.

[7] The wife's competing divorce proceedings in this jurisdiction were filed on 24 May and were deemed served by an order for substituted service made on 11 June. On 26 June the husband applied to strike out the wife's English petition on the obvious ground that primary jurisdiction lay with the Amtsgericht in Mainz. That application came before Deputy District Judge Solomons on 13 August 2002. Both parties appeared by counsel. There are two recitals to the order as follows: b c

> '(a) Both parties have agreed that it is their intention that the hearing in the German divorce proceedings fixed for 27 August 2002 should proceed;
>
> (b) no steps should be taken in the English divorce proceedings, including ancillary relief, save under Article 12 of the Brussels II [Regulation] pending the hearing in England referred to at paragraph 1 below.'

d

Paragraph 1 of the order provided that the husband's strike-out application be heard by a judge of the Division on the first open date after 15 November. The other provisions of the order regulated the filing of evidence in preparation for that hearing.

[8] The hearing in Germany referred to in the first recital was to have been the hearing of the husband's application for an order that the Mainz Amtsgericht was first seised within the terms of the Brussels II Regulation and that the husband had established the jurisdictional grounds for divorce. We were told that the hearing had to be adjourned since an interpreter had not been arranged for the wife. e

[9] On 24 September in reliance on the second recital to the order of 13 August the wife issued an application for maintenance pending suit. We were told that District Judge Million on about 15 October referred it to be heard by a judge of the Division and that hearing took place on 22 October before Johnson J. How the wife obtained a full hearing before a judge of the Division only seven days after the district judge's direction I do not know. f

[10] Before Johnson J counsel for the husband submitted that the wife's application for maintenance pending suit did not fall within the exceptions provided by art 12 of the regulation. Johnson J rejected that submission and ordered the husband to pay maintenance pending suit at the rate of £150,000 a year, two thirds of which was intended to provide funds with which to enable the wife to litigate. The order was backdated to 11 June 2002, the date of service of the wife's petition. The payment in respect of the period 11 June to 10 November (£62,500) was ordered to be paid on or before 2 December and future payments due on 11 November and subsequently were ordered to be paid monthly in advance by standing order. The judge refused an application for permission to appeal and for a stay. Those applications were subsequently granted by me on paper on 7 November. However permission was granted only to argue the Brussels Regulations points. By a further ground the husband sought to challenge the practice (approved in two recent first instance authorities) of including within a maintenance pending suit order a provision for litigation costs. I refused permission to advance that ground only in the circumstances of this case and this judgment is not to be read as an implicit approval of the practice. g h j

[11] The hearing in Mainz, adjourned from 27 August, duly took place on 10 October. Judgment was delivered on 14 November. The essential conclusions of that judgment are as follows. (i) The court had jurisdiction under art 2 of the regulation, both parties being German nationals. (ii) The German court was first seised under the provisions of art 11.4(a). (iii) The husband's application for substituted service was well founded since at the material time he did not know where the wife was living. The wife's contention that the husband had been devious in seeking substituted service of his petition was rejected. Furthermore the court made the contrary finding that the wife had been endeavouring to avoid service of the husband's petition.

[12] The husband's application to strike out the wife's petition, fixed by para 1 of the order of 13 August, was heard by Bracewell J on 9 December. There was no dispute that the court had jurisdiction founded on the wife's habitual residence throughout the 12 months immediately preceding the presentation of the petition. However Bracewell J, like the judge in Mainz, concluded that primary jurisdiction rested with the Mainz court as the court first seised. However, given that Mr Amos relied on the wife's intention to appeal the Mainz judgment of 14 November, counsel for the husband accepted that the appropriate consequential order was for a stay of the English petition rather than a strike-out.

[13] I turn now to the regulations and rules directly relevant to this appeal. Article 2 of the Brussels II Regulation sets out the basis upon which states acquire jurisdiction. Since it is common ground that both Germany and the United Kingdom have jurisdiction it is unnecessary to enter that area of the text. The relevant provisions of art 11 are as follows:

> '1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established ...
>
> 3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.
>
> In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.
>
> 4. For the purposes of this Article, a court shall be deemed to be seised:
>
> (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent ...'

[14] Article 12, the article that governs the outcome of this appeal, provides:

> 'In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that state as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.'

[15] Finally I refer to amendments to the Family Proceedings Rules 1991, SI 1991/1247 which came into effect in September 2001 as a belated response to the precipitate arrival of the Council Regulation. The rule most relevant to this appeal is r 2.27A(2) which is in these terms:

> 'Where at any time after the presentation of a petition, it appears to the court that, under Articles 9, 10 or 11 of the Council Regulation, the court does not have jurisdiction to hear the petition and is required or may be required to stay the proceedings, the court shall stay the proceedings and fix a date for a hearing to determine the questions of jurisdiction and whether there should be a stay or other order and shall serve notice of the hearing on the parties to the proceedings ...'

Given the clear terms of the rule Mr Mostyn QC rightly observes that what appears as the second recital to the order of 13 August should have constituted the first paragraph of the order.

**[16]** Before expressing my own conclusions I record the reasoning of Johnson J. It must be remembered that this was a brief hearing and I doubt whether the judge received much if any forewarning of the difficult and novel point upon which the husband's counsel relied. Accordingly Johnson J's reasoning is understandably and commendably brief. He said only this:

> 'The meaning of the term "provisional, including protective, measures" has been the subject of some discussion. I was referred to an explanatory report prepared by Dr Alegria Borras explaining the consequences of this European legislation. It would be surprising, give rise to the possibility of tactical abuse and be impractical if a right to support were to be suspended without remedy.
>
> In my judgment, the term "provisional, including protective, measures" does cover an application such as this, and I hold that I have jurisdiction to make the orders sought.'

**[17]** Mr Mostyn informs us that the third sentence in the above passage represents the judge's second thoughts. His instructing solicitor's shorthand note of the judgment has this for that sentence:

> 'It was common for English Courts to be asked to make financial provision for a wife in circumstances similar to this which were known as protective measures.'

Johnson J no doubt had in mind cases in which maintenance pending suit had been ordered during the currency of a jurisdictional challenge to an asserted domicile or habitual residence. The case of *Ghoth v Ghoth* [1992] 2 All ER 920, [1993] 1 FCR 177, is an instance.

**[18]** Of course the correction of a transcript of an oral judgment provides the judge with the opportunity to express himself differently and I only record both his first and second thoughts because each are independently legitimate and require separate consideration if this judgment is to cover comprehensively this fresh field of law.

**[19]** In relation to the judge's first thought I do not consider that prior practice cases involving a challenge to jurisdiction can have any application to cases that are directly governed by the regulation. We must find our answer in the words of art 12 and such guidance as there is as to its construction. Nor do I think that the judge's second thought provides a secure foundation for his conclusion. The right to support would not be suspended without remedy by a stricter construction of art 12. The right would be exercisable in the jurisdiction first seised and only suspended in the jurisdiction second seised.

**[20]** I doubt whether the judge's task was much clarified by the reference to the explanatory report prepared by Dr Borras. Article 12 is considered in paras 58 and

59 of her report but the text is dense and by no means easy to understand even after repeated readings.

**[21]** So what then is the extent and the effect of art 12?

**[22]** I come now to the rival submissions. Mr Mostyn took us through the terms of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (as set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982) (Brussels I) (both in its old form as adopted by the then six member states in 1968 and in its modern replacement, namely Council Regulation (EC) 44/2001) and particularly arts 21 and 24 of the convention and arts 27 and 31 of the regulation which are the provisions matching arts 11 and 12 of the Brussels II Regulation. The relevance of the mirror provisions in Brussels I is twofold: first Brussels I and not the Brussels II Regulation is concerned with jurisdiction and enforcement in relation to maintenance. Second the report of Dr Borras confirms that art 12 was modelled on art 24 of Brussels I and accordingly decisions on the construction of art 24 are directly in point. He prefaced his review of decided cases by reference to a published work of Lawrence Collins J *The Civil Jurisdiction and Judgments Act 1982* (1983) where, at p 99, critical comment is directed to excessive claims to jurisdiction founded on the provisional measures exception. He also derives support from *Jaffey on the Conflict of Laws* (2nd edn, 2002) at p 139 where the authors state that art 31 of Brussels I—

> 'applies to measures which are intended to preserve a factual or legal situation in one member state so as to safeguard rights which are the subject matter of litigation in the court of another member state which has jurisdiction as to the substance of the matter.'

**[23]** On the same page the authors write:

> 'A measure does not come within the scope of Article 31 if its provisional character is not guaranteed; a court order requiring the defendant to make an unconditional interim payment cannot be a provisional measure for the purposes of Article 31 unless, if the claimant is unsuccessful, the defendant can obtain repayment.'

**[24]** The authorities for these propositions are first *Reichert v Dresdner Bank AG (No 2)* Case C-261/90 [1992] ECR I-2149. In that authority Mr Mostyn relies upon paras 32 and 34 of the judgment to this effect:

> '32. The court has already declared in the judgment in Case 143/78 *De Cavel v De Cavel* ([1979] ECR 1055 at para 8) that as provisional or protective measures may serve to safeguard a variety of rights, their inclusion in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect. It added, in paragraph 9 of that judgment, that the provisions of Article 24 of the Convention cannot be relied upon to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded therefrom.
>
> 34. The expression "provisional, including protective, measures" within the meaning of Article 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.'

[25] The authority for the second proposition is *Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line* C-391/95 [1999] All ER (EC) 258, [1999] QB 1225. From this authority it is sufficient to cite only paras 46 and 47:

> '46. However, an order for interim payment of a sum of money is, by its very nature, such that it may pre-empt the decision on the substance of the case. If, moreover, the plaintiff were entitled to secure interim payment of a contractual consideration before the courts of the place where he is himself domiciled, where those courts have no jurisdiction over the substance of the case under arts 2 to 18 of the convention, and thereafter to have the order in question recognised and enforced in the defendant's state, the rules of jurisdiction laid down by the convention could be circumvented..
>
> 47. Consequently, interim payment of a contractual consideration does not constitute a provisional measure within the meaning of art 24 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.' (See [1999] All ER (EC) 258 at 287, [1999] QB 1225 at 1257–1258.)

[26] Mr Mostyn also referred us to the earlier case of *de Cavel* principally since it was authority in relation to matrimonial property. His reliance is on para 8 containing the following short citation:

> 'As provisional protective measures relating to property—such as the affixing of seals or the freezing of assets—can serve to safeguard a variety of rights, their inclusion in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect.'

[27] On those authorities Mr Mostyn observes that had the wife applied under art 31 of Brussels I (the regulation concerned with maintenance matters) these authorities would have been fatal to her claim. How then can she fare better by relying on art 12 of the Brussels II Regulation?

[28] In summary Mr Mostyn submits—(i) An application for maintenance pending suit clearly cannot be categorised as a protective measure. (ii) Nor can it be categorised as a provisional measure: the wife is penniless and would be quite unable to repay even the first instalment which would have fallen due on 2 December but for this court's stay. (iii) Article 12 is restricted to 'urgent cases'. There was no evidence of urgency in this case and the wife had failed to advance any reason why she had not moved the German court for interim maintenance when present and represented at the hearing on 10 October. The only inference is that her application to the English court had nothing to do with urgency but was founded on a perception that she would be awarded more in London than she would be in Mainz.

[29] Mr Lewis Marks QC in his response concedes that he cannot support the judge's order on the grounds that it constitutes a protective measure. He submits that the order constitutes a provisional measure and relies the *Van Uden Maritime BV* case as an illustration of the fact that the payment of money can be classified as a provisional order. He says that whilst a guarantee of repayment in civil cases may be a strict requirement there should be no such in family proceedings where the

court has a wider interest in justice and the protection of the vulnerable. In the alternative he claims that his client is in a position to guarantee repayment since she is the owner of two flats in the Moscow area. His claim that they had a value of several hundred thousand dollars was modified on instructions to £60,000. Finally Mr Marks submitted that the requirement of urgency was met in the present case since by 23 September the wife's reserves had reduced to £14,000.

[30] In his reply Mr Mostyn was swift to contrast Mr Marks' presentation of the wife's financial circumstances with para 24 of her affidavit of means of 23 September in which the wife had asserted that she owned only one flat, that it was unsaleable and that the transfer of funds from Russia was difficult if not impossible.

[31] I accept the general thrust of Mr Mostyn's submissions. On the facts of this case I am quite clear that the order made by Johnson J on 22 October cannot be classified as a provisional measure. The order to pay at the rate of £150,000 per annum for an indefinite period has a substance and an undefined duration that I would classify as an unwarranted invasion of the proper function of the German judge as the judge of the court first seised. On the facts of this case there are simply no realistic prospects of repayment were the substantive judgment on the merits so to require. Plainly the order cannot be classified as a protective measure, as Mr Marks has sensibly conceded. Finally the order could not possibly be brought within a definition of 'urgent cases'. As Mr Mostyn has pointed out the wife could have had an earlier hearing in Mainz.

[32] However it is necessary to look beyond the facts of the present case to consider more generally the application of arts 11 and 12 to financial claims ancillary to the proceedings for divorce, judicial separation or nullity. Plainly the Brussels II Regulation has no direct application to such claims. In modern times the real issues litigated as a consequence of the breakdown of relationships are usually money and children. In modern times the utility of the power to order maintenance pending suit has much diminished and the right to apply for it is much less often exercised. For those with little means there is the safety net of benefit entitlement. The affluent generally have capital reserves or the ability to borrow. The procedures for the preparation of the substantive financial claims have been streamlined, partly in an attempt to avoid the unnecessary expense of a contested hearing to determine the level of temporary provision only to be followed by a contested hearing to settle the long-term future. In these cases with an international dimension the temptation on the parties first to manoeuvre and then to fight to establish the jurisdiction which one believes will be more generous and the other believes will be less generous need to be firmly kerbed. It does not require great insight to see that a judgment on pending suit provision is likely to impact upon the outcome of the substantive application, even if it does not pre-empt the operation of the alternative jurisdiction. It is manifest, in my judgment, that an application for maintenance pending suit cannot be categorised as a protective measure. The *de Cavel* and *Reichert* cases make that plain and the principles there stated should equally be applied to art 12 of the Brussels II Regulation.

[33] I am also myself of the opinion that an application for maintenance pending suit cannot even be categorised as a provisional measure. Over-payments or payments obtained by material non-disclosure are at best given some indirect reflection in a later quantification of substantive orders. Furthermore if the duty to quantify the substantive order is to be discharged in the court of another member state the payee may well escape even that reflection.

[34] If this last point be finely balanced then the balance should in my judgment be settled by a strict construction of art 12 for policy reasons. First we must espouse the regulation and apply it wholeheartedly. We must not take or be seen to take opportunities for usurping the function of the judge in the other member state. Once another jurisdiction is demonstrated to be apparently first seised, this jurisdiction must defer, by holding itself in waiting in case that apparent priority should be disproved or declined. Second one of the primary objectives of the convention is to simplify jurisdictional rules and to eliminate expensive and superfluous litigation. A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed. In reality it is a curse restricted to the rich. Only they can afford such folly. This case is a paradigm example. Let me assume that the husband is a man of means. The wife is said to be destitute. Yet she has incurred costs here of £153,000, of which only £16,000 has been paid on account. Her solicitors have no security for the payment of the balance of £137,000, billed but unpaid. In that sense they have funded this litigation. The husband's costs are put at £108,000 in this jurisdiction. By contrast the costs in Germany are said to be £11,000 for the wife and £2,600 for the husband. The inevitable comparison should give the specialist practitioners in London pause for thought. All this might perhaps be prevented for the future were this appeal to contribute to the adoption of a narrow construction of art 12 here and in other member states pending a possible future ruling of the Court of Justice of the European Communities.

[35] There is one additional point that arose during the course of debate which I have yet to record. At the date of the hearing before Johnson J the identity of the jurisdiction first seised was disputed both in Germany and in London and determined in neither place. In such circumstances Mr Marks submitted that art 12 would operate as a denial of remedy in both. Of course we are now at the stage where there is a judgment in both jurisdictions establishing Germany as the jurisdiction first seised. But the German judgment is said by Mr Marks to be under appeal and with excellent prospects of success since the wife has Professor Schlosser on her side and he will outweigh the contrary opinion of Professor Danneman. (In this as in other family appeals expert witnesses on issues of law seem still to be available to deliver partisan opinions.) So it is said that until the exhaustion of the appellate process the identity of the court first seised remains undetermined and art 12 available as a defence in both. I would unhesitatingly reject that submission not only on the basis of the judgments recently delivered in Mainz and London but also as things stood at the date of the hearing before Johnson J. There must be a strong presumption that, absent a clear case of irregularity, the court of first issue is the court first seised.

[36] For all those reasons I would allow this appeal and discharge the order for maintenance pending suit. The husband is accordingly relieved from the obligation to make any further payment and is entitled to repayment of or credit for the single payment made prior to the grant of the stay.

**LATHAM LJ.**

[37] I agree.

**LAWRENCE COLLINS J.**

[38] I also agree that this appeal should be allowed, and I add these observations because we are differing from a judge with very considerable expertise not only in

matrimonial proceedings, but also in cases with an international element. Provisional measures vary from one context to another, and from one country to another, but what they have in common is that their object is to ensure that the rights of parties and the ultimate effectiveness of a judgment are not frustrated by the actions of one party pending resolution of their respective rights. In the international context it is vitally important to ensure that provisional measures are not used to frustrate internationally-agreed principles of jurisdiction.

**[39]** The important features of this case are that prima facie the German court was seised by the husband on 14 May 2002, a day after he told the wife that he was filing for divorce, and ten days before she filed for divorce in England; that (subject to appeal) the Mainz court has now decided that it was first seised; and that on 13 August 2002 the deputy district judge ordered (in a form embodied in a recital) that pending the husband's application to strike out the English divorce proceedings no steps should be taken in them 'including ancillary relief, save under Article 12 of the Brussels II [Regulation]'.

**[40]** Article 12 (and the corresponding provisions in art 24 of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (as set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982) (Brussels I) and of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (as set out in Sch 3C to the Civil Jurisdiction and Judgments Act 1982), and art 31 of Council Regulation (EC) 44/2001) do not, of course, require provisional measures to be taken. They give a power to a court which has no jurisdiction over the substance of the matter if: (a) the measures are provisional measures within the meaning of art 12 and the corresponding provisions; (b) the court has power to grant the measures under national law; (c) the court considers that in the circumstances of the case it is appropriate to grant them; and (d) the case is urgent (which is explicit in art 12, but must be implicit in the corresponding provisions).

**[41]** Article 12 of the Brussels II Regulation pre-supposes that the court which takes provisional measures is not the court with jurisdiction over the substance of the case. The court which takes the provisional measures is therefore acting in support of the main litigation. So in *Reichert v Dresdner Bank AG (No 2)* Case C-261/90 [1992] ECR I-2149 the Court of Justice of the European Communities held that art 24 referred to measures which were intended to preserve a factual or legal situation so as to safeguard rights the recognition of which was being sought elsewhere from the court having jurisdiction over the substance of the matter (para 34).

**[42]** Ever since Brussels I came into force in 1973 there has been controversy over whether orders for provisional payments (especially of damages) are within the scope of art 24. The principal objections to them were: (a) that they involved a preliminary determination of the merits of the case by the court purporting to exercise jurisdiction under art 24, when ex hypothesi the jurisdiction to determine the merits was vested in the court with jurisdiction over the substance; and (b) that in substance such orders granted the party some or all of the relief which he was only entitled to seek in the country with jurisdiction over the substance. The second objection, but not the first, has been met (at least in cases relating to contractual claims) by the ruling in *Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line Case* C-391/95 [1999] All ER (EC) 258 at 287, [1999] QB 1225 at 1257–1258 (para 47) (confirmed in *Mietz v Intership Yachting Sneek BV* Case C-99/96 [1999] ECR I-2299) that the court taking provisional

measures must therefore impose conditions or stipulations so as to guarantee their provisional or protective character, ie it must ensure that repayment to the defendant is assured if the plaintiff is ultimately unsuccessful in the main proceedings abroad, and so not pre-empt the effect of the ultimate decision of the court with jurisdiction over the substance. a

**[43]** I agree with Thorpe LJ, that in the light of the order which was made on 13 August 2002, there are no grounds for a successful argument that the order in this case (especially when two-thirds of it was to provide funds for litigation at the rate of £8,000 per month) could legitimately have been made under art 12. b

*Appeal allowed.*

James Brooks Barrister.

# Anton Durbeck GmbH v Den Norske Bank ASA

[2003] EWCA Civ 147

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, BROOKE AND LAWS LJJ

3 FEBRUARY 2003

*Conflict of laws – Jurisdiction – Civil jurisdiction – Special jurisdiction as regards dispute arising out of the operations of a branch, agency or other establishment – Civil Jurisdiction and Judgments Act 1982, Sch 3C, art 5(5).*

The defendant, a Norwegian bank with a branch in London, agreed to provide a loan to three borrowing companies for the purchase or refinancing of three vessels. The security for the loan included mortgages on each vessel. The loan was entered into and administered by the London branch of the defendant and the loan agreement was governed by English law. A cargo of bananas was loaded on board one of the vessels for delivery to the claimant, a German company, in Europe. Shortly thereafter the vessel was arrested in Panama in an action in rem against the vessel commenced by the defendant on the instructions of its London branch. The London branch had given power of attorney to Panamanian lawyers to enable them make the arrest. The defendant claimed that part of the loan was outstanding. The claimant considered that the cargo was a constructive total loss and it was discharged overboard at sea. The vessel was sold by order of the Panamanian court and the claimant commenced proceedings in rem in Panama against the proceeds of sale, claiming damages for breach of the contract of carriage. The defendant applied in Panama to commence an action for a declaration that it was not liable to the claimant. The claimant thereupon brought proceedings against the defendant in England. The Panamanian court subsequently gave permission to the defendant to bring its claim for a declaration of non-liability and the defendant applied for an order setting aside the claim form in the instant action on the ground that the English court did not have jurisdiction to hear and determine the claim, alternatively for an order that the proceedings be stayed in favour of Panama on the ground of forum non conveniens. The judge held that the court had no jurisdiction to hear the claim, but indicated that if he had held that the court did have jurisdiction, he would have granted a stay. The claimant appealed, arguing that the provisions of art 5(5)[a] of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as set out in Sch 3C to the Civil Jurisdiction and Judgments Act 1982) (which provided that a person domiciled in a contracting state might, in another contracting state, be sued as regarded a 'dispute arising out of the operations of a branch' in the courts for the place in which the branch was situated) conferred jurisdiction on the English courts in the instant case. The claimant would also have wished to challenge the jurisdiction to stay the proceedings if they were properly founded under the convention, but accepted that binding authority precluded it from doing so.

a Article 5(5) is set out at [11], below

**Held** – (1) For jurisdiction to be conferred by art 5(5) of the convention, there had to be such nexus between the operations of the branch and the dispute as to render it natural to describe the dispute as one that had arisen out of the operations of the branch. Where the claim was in contract, that nexus could be derived from the negotiations between the claimant and the branch that gave rise to the contractual obligation the alleged breach of which was the subject of the dispute. Where the claim was in tort or delict, however, there would be no such nexus. The events that gave rise to liability in tort could vary very widely and it was not, therefore, desirable to formulate any specific test for determining whether a dispute had arisen out of the activities of a branch, since that would depend on the particular facts of each case. In the instant case, the activities which had given rise to the dispute had arisen out of London banking business conducted by the defendant's London branch. The loan in respect of which the security over the vessel had been taken had been negotiated in London; the decision to enforce the security had been taken in London; and the London branch had given instructions to enforce the security and the power of attorney to enable it to be done. Giving the words of art 5(5) their natural meaning, the dispute in the instant case had arisen out of the activities of the London branch and the English courts therefore had jurisdiction (see [40], [41], [46], [47], [50], [51], below); *Lloyd's Register of Shipping v Société Campenon Bernard* Case C-439/93 [1995] All ER (EC) 531 applied.

(2) It was not open to the claimant to challenge the decision of the decision of the judge to stay the proceedings in favour of Panama on the basis that it was made without jurisdiction. The court was bound by authority to hold that the judge had jurisdiction to stay the proceedings (see [48]–[51], below); *Ace Insurance SA-NV v Zurich Insurance Co* [2001] 1 All ER (Comm) 802 followed.

**Notes**

For matters giving rise to special jurisdiction, see 8(1) *Halsbury's Laws* (4th edn reissue) para 643.

For the Civil Jurisdiction and Judgments Act 1982, Sch 3C, art 5, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1206.

**Cases referred to in judgments**

*Ace Insurance SA-NV v Zurich Insurance Co* [2001] EWCA Civ 173, [2001] 1 All ER (Comm) 802.

*Agnew v Lansförsäkringsbølagens AB* [2000] 1 All ER 737, [2001] 1 AC 223, [2000] 2 WLR 497, HL.

*Hill (Edwin) & Partners (a firm) v First National Finance Corp plc* [1988] 3 All ER 801, [1989] 1 WLR 225, CA.

*Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565, ECJ.

*Kleinwort Benson Ltd v Glasgow City Council* [1997] 4 All ER 641, [1999] 1 AC 153, [1997] 3 WLR 923, HL.

*Lloyd's Register of Shipping v Société Campenon Bernard* Case C-439/93 [1995] All ER (EC) 531, [1995] ECR I-961, ECJ.

*Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* Case 34/82 [1983] ECR 987, ECJ.

*Myrto, The* [1977] 2 Lloyd's Rep 243; *varied* [1978] 1 Lloyd's Rep 11, CA.

*Kaliningrad and Nadezhda Krupskaya, The* [1997] 2 Lloyd's Rep 35.

*Schotte SAR GmbH v Parfums Rothschild SARL* Case 218/86 [1987] ECR 4905, ECJ.

*Somafer SA v Saar-Ferngas AG* Case 33/78 [1978] ECR 2183, ECJ.

**Case referred to in skeleton arguments**

*Harrods (Buenos Aires) Ltd, Re (No 2)* [1991] 4 All ER 348, [1992] Ch 72, [1991] 3 WLR 397, CA.

**Appeal**

Anton Durbeck GmbH appealed from the order of Nigel Teare QC sitting as an additional judge of the Queen's Bench Division dated 13 June 2002 ([2002] EWHC 1173, [2002] All ER (D) 67 (Jun)) that the court had no jurisdiction to entertain its claim against the defendant, Den Norske Bank ASA. The facts are set out in the judgment of Lord Phillips of Worth Matravers MR.

*Nigel Meeson QC* (instructed by *Swinnerton Moore*) for the claimants.

*Luke Parsons* (instructed by *Stephenson Harwood*) for the defendants.

**LORD PHILLIPS OF WORTH MATRAVERS MR.**

[1] This is an appeal by a German company (the claimants) from the judgment of Mr Nigel Teare QC sitting as an additional judge of the Queen's Bench Division dated 13 June 2002 ([2002] EWHC 1173, [2002] All ER (D) 67 (Jun)). The judge held that the court had no jurisdiction to entertain the claim which the claimants seek to bring against a Norwegian company (the defendants).

[2] The appeal raises two issues of general importance on which the judge gave permission to appeal. The first is whether the provisions of art 5(5) of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (as set out in Sch 3C to the Civil Jurisdiction and Judgments Act 1982) (the Lugano Convention) confer jurisdiction on the English court. The second is whether, if the English court has jurisdiction under art 5(5), it has jurisdiction to stay the proceedings under the doctrine known in the jurisprudence of private international law as 'forum non conveniens'. The judge gave a negative answer to the first question. We have to decide whether he was right to do so. Had he not done so, he indicated he would have stayed the proceedings on the ground that Panama and not England was the convenient forum.

[3] The claimants would wish to challenge his jurisdiction to stay the proceedings if they were properly founded under the Lugano Convention. They accept, however, that binding authority precludes them from doing so in this court. If they win on the first point, they accept that they must lose on the second, but will seek permission to appeal to the House of Lords.

[4] I wish at the outset to pay tribute to the admirable clarity of the judgment below. I could not improve upon, and will gratefully incorporate, some of the early passages of the judgment.

THE CLAIM

[5] The claim which the claimants seek to bring against the defendants is an action in tort based on the line of authorities ending with *The Myrto* [1977] 2 Lloyd's Rep 243. It is alleged that the defendants, who were mortgagees of the vessel Tropical Reefer, wrongly interfered with the claimants' contracts for the carriage of a cargo of bananas by arresting the vessel in Panama in or about July 2001. The defendants contend that the principle set out in *The Myrto* conflicts with the principle that a secured creditor is entitled to enforce his security

without regard to the effects on third parties. On that account *The Myrto* is not to be followed. They rely on *Edwin Hill & Partners (a firm) v First National Finance Corp plc* [1988] 3 All ER 801, [1989] 1 WLR 225 and *The Kaliningrad and Nadezhda Krupskaya* [1997] 2 Lloyd's Rep 35. As the judge observed, the merits of this dispute do not need to be considered at this stage.

THE FACTS

[6] By a loan agreement dated 1 December 1997, the defendants, who are a Norwegian bank with a branch in London, agreed to provide a loan of $US 6m to three borrowing companies for the purchase or refinancing of three vessels, Spring Reefer, Blue Reefer and Tropical Reefer. The security for the loan included mortgages on each vessel. The ultimate beneficial owners of the vessels and the managers of the vessels were Cuban. The loan was entered into by, and administered from, the London branch of the defendants. The loan agreement was governed by English law. The mortgages and the deeds of covenant which regulated them were subject to the law of Cyprus.

[7] Between 10 and 16 July 2001 a cargo of bananas was loaded on board Tropical Reefer in Guayaquil and Puerto Bolivar, Ecuador, for shipment to Europe. The bananas were to be delivered to the claimants who purchased them for $US 1,192,013.

[8] On 24 July 2001 Tropical Reefer was arrested in Panama in an action in rem against the vessel commenced by the defendants on the instructions of their London branch, having received approval from head office in Oslo. The defendants claim that over $US 2m is outstanding on the loan.

[9] On 10 September 2001 the claimants considered that the cargo of bananas was a constructive total loss and on 12 September 2001 it was discharged overboard at sea. On 16 October 2001 the vessel was sold by order of the Panamanian court. On 22 November 2001 the claimants commenced proceedings in rem in Panama against the proceeds of sale claiming damages for breach of the contract of carriage.

[10] On 19 December 2001 the defendants applied in Panama to commence an action for a declaration that they were not liable to the claimants. On 20 December 2001 the claimants issued the claim form in the present action in this court and served it on the London branch of the defendants. On 20 March 2002 the Panamanian court gave permission to the defendants to bring their claim for a declaration of non-liability.

THE LUGANO CONVENTION

[11] The Lugano Convention is incorporated into the domestic law of the United Kingdom by s 3A(1) of the 1982 Act, as amended. The following provisions of the Lugano Convention are relevant:

> *'Section 1—General Provisions*
>
> *ARTICLE 2*
>
> Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State ...

*ARTICLE 3*

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title ...

*Section 2—Special Jurisdiction*

*ARTICLE 5*

A person domiciled in a Contracting State may, in another Contracting State, be sued: (1) in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged; (2) in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties; (3) in matters relating to tort, delict or quasi delict, in the courts for the place where the harmful event occurred; (4) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings; (5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.'

THE APPROACH TO THE INTERPRETATION OF ART 5 OF THE LUGANO CONVENTION

**[12]** Section 3B(2) of the 1982 Act provides that the report on the Lugano Convention by Mr P Jenard and Mr G Möller (OJ 1990 C189 p 57) shall be given such weight as is appropriate when interpreting the Lugano Convention. The material provisions of art 5 of the Lugano Convention are, as is most of the Lugano Convention, in the same terms as those of the earlier Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as set out in Sch 1 to the 1982 Act) (the Brussels Convention). They fall to be interpreted in the same manner. Thus, decisions of the Court of Justice of the European Communities (the European Court) on art 5 of the Brussels Convention apply, and reference may be made to the report of Mr Jenard on the Brussels Convention (OJ 1979 C59 p 1) (see the observations of Lord Hope of Craighead in *Agnew v Lansförsäkringsbølagens AB* [2000] 1 All ER 737, at 756–757, [2001] 1 AC 223 at 251).

**[13]** Jenard and Möller set out a number of fundamental principles that apply to the two conventions. The third of these begins with the statement that a defendant's domicile is the point on which the rules on jurisdiction hinge. The fourth principle states that the provisions of art 5 relate to 'proceedings which can be considered as having a particularly close link with the court before which the proceedings are brought'. It describes the provisions of art 5 as special in that both conventions directly specify which court has jurisdiction.

[14] Jenard and Möller have a specific commentary on art 5(5) to which I shall revert when I outline the submissions made by Mr Parsons on behalf of the defendants.

[15] In his report on the Brussels Convention Jenard remarks of art 5 that adoption of the special rule of jurisdiction is justified by the fact that there must be a close connection factor between the dispute and the court with jurisdiction to resolve it. This proposition is echoed by an observation of the European Court in *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* Case 34/82 [1983] ECR 987 at 1001. In *Kleinwort Benson Ltd v Glasgow City Council* [1997] 4 All ER 641 at 646, [1999] 1 AC 153 at 164, Lord Goff of Chieveley cited the same case in support of the proposition that—

> 'it is clearly recognised that art 5 is in derogation from the basic principle of domicile in art 2 ... and that as a result the provisions of art 5 are to be construed restrictively (see *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 at 5585 (para 19)).'

THE JUDGE'S FINDINGS IN RELATION TO ART 5(3)

[16] In the court below the claimants argued that they could establish jurisdiction under art 5(3) on the ground that England was the place where the harmful event occurred. The basis of this submission was that the loan and mortgage were transactions of the London branch of the defendants and that the decision of the London branch to enforce the mortgage by arresting the vessel was the event which gave rise to the damage. The judge gave the following reasons for rejecting this submission:

> '[15] In one sense the decision of the branch of the defendants in London can be said to have given rise to and to be the origin of the damage because the arrest is executed pursuant to that decision. However, it can also be said that the arrest is the event which gives rise to the damage and is the origin of the damage because, without the arrest, there would be no interference with the contracts of carriage. Having regard to the principles adumbrated in *Kleinwort Benson Ltd v Glasgow City Council* [1997] 4 All ER 641, [1999] 1 AC 153 the court should adopt a restrictive approach to the application of art 5 bearing in mind that the defendant can always be sued in his place of domicile. To conclude that the place where the decision is taken to commit a tort is the place where the event which gives rise to the damage occurs rather than the place where the first component of the tort occurs is to adopt a broad approach to art 5(3) rather than a restrictive approach. Further, I do not consider that the place of the decision to arrest can be said to be a "particularly close connecting factor" between the dispute and the English court. It is a connecting factor between the dispute and the English court but in circumstances where the contract of carriage is interrupted in Panama by an arrest in Panama it is not a particularly close connecting factor between the dispute and the English court. For those reasons it seems to me that Panama, rather than London, is the place where the event which gave rise to the damage occurred.'

There is no appeal against this part of the judgment.

THE JUDGE'S FINDINGS IN RELATION TO THE STAY APPLICATION

**[17]** The following findings of the judge in relation to the stay application have some relevance to this appeal.

> 'WHERE THE TORT WAS COMMITTED
>
> [33] The interference with the contracts of carriage occurred in Panama where the arrest took place and was maintained. The bananas became a constructive total loss by reason of being detained in Panama. I consider that the substance of the tort was committed in Panama.'

**[18]** Under the Private International Law (Miscellaneous Provisions) Act 1995 the judge held that the proper law of the tort was the law of Panama.

**[19]** While some evidence, including evidence as to the state of the loans secured by the vessel, when it was in default and to what extent, would emanate from London, this was not, on the judge's analysis, likely to be a significant factor.

THE JUDGE'S FINDINGS IN RELATION TO ART 5(5)

**[20]** It was and is common ground that the defendants' London branch was 'a branch, agency or other establishment' within the meaning of art 5(5). The issue was whether the fact that it was a decision taken by the London branch that led to the arrest of the Tropical Reefer in Panama meant that the dispute was one arising out of the operations of the branch. The judge summarised the claimants' submissions ([2002] All ER (D) 67 (Jun) at [24]) as follows:

> '... in circumstances where the loan documentation referred to the defendants as acting through their branch in London, where the notices of default were sent out from London, where correspondence concerning the default was with the branch and its London solicitors, where the instructions to arrest came from London and where the decision to maintain the arrest was taken in London, the action plainly arose from the activities of the defendants' London branch.'

In rejecting the claimants' submissions the judge said:

> '[25] In one sense the dispute can fairly and realistically be said to arise out of the decision to arrest which was taken by the branch of the defendants' in London. However, in another and more restrictive sense the dispute can be said to arise out of the arrest in Panama rather than out of the decision to arrest in London because it is the arrest which causes the interference with the contracts of carriage and hence gives rise to the dispute. Without that interference there would be no dispute. The court is required to give art 5(5) a restrictive construction. Strictly, it is the arrest which gives rise to the dispute. The arrest is an "activity" of the branch but it is an activity in which the branch is "engaged" in Panama rather than in London where the branch is established on behalf of the defendants (using the phraseology of the *Somafer* case). Furthermore, the connection between the dispute and London, though real, is not as close as that between the dispute and the place of arrest. I do not consider that the connection between the dispute and London can be said to be a "particularly close connecting factor". For these reasons I prefer the submission made on behalf of the defendants.'

The decision to which the judge referred is *Somafer SA v Saar-Ferngas AG* Case 33/78 [1978] ECR 2183.

SUBMISSIONS MADE TO US

**[21]** For the claimants, Mr Meeson QC repeated the submissions which had not found favour before the judge. He submitted, in essence, that the words of art 5(5) fell to be given their natural meaning. He accepted that there had to be a link between the activities carried on by the branch and a dispute so that it could properly be said that the dispute was one arising out of the activities of the branch. He submitted, however, that on the facts of this case this requirement was clearly satisfied. The arrest arose out of a London branch loan. It was the London branch which decided to arrest the vessel and it was the London branch which gave power of attorney to the Panamanian lawyers to enable them to arrest the vessel.

**[22]** For the defendants, Mr Parsons submitted that the judge's analysis was correct. What had to be demonstrated was a link between the dispute and the English court, not merely with the English branch of the bank. To establish such a link, it was necessary that the activities of the branch should constitute an element in the cause of action. Where a claim was brought in tort, the activities of the branch had to have produced the harmful event within the jurisdiction if the link was to be established. Mr Parsons submitted that in the present case there was no link at all between the dispute and the English court. He relied upon the findings made by the judge in relation to the place where the tort was committed and the proper law of the tort to which I have referred at [17], above.

**[23]** In support of his submissions Mr Parsons relied heavily on the decision in the *Somafer* case. He accepted that part of the reasoning in that case had not survived the subsequent decision of the European Court in *Lloyd's Register of Shipping v Société Campenon Bernard* Case C-439/93 [1995] All ER (EC) 531, [1995] ECR I-961. That part, however, related to claims in contract. So far as claims in tort were concerned, the observations of the court in the *Somafer* case remained authoritative.

**[24]** Counsels' submissions call for a careful analysis of the effect of the *Somafer* case and of the *Lloyd's Register* case. The issue in the *Somafer* case was whether a company which had its principal place of business in France had a 'branch, agency or other establishment' in Germany within the meaning of art 5(5). The questions referred to the European Court related to the tests to be applied in resolving that issue.

**[25]** The findings of the court appear from the following paragraphs of their judgment ([1978] ECR 2183 at 2192–2193):

> '11 Having regard to the fact that the concepts referred to give the right to derogate from the principle of jurisdiction of Article 2 of the Convention their interpretation must show without difficulty the special link justifying such derogation. Such special link comprises in the first place the material signs enabling the existence of the branch, agency or other establishment to be easily recognized and in the second place the connexion that there is between the local entity and the claim directed against the parent body established in another Contracting State.
>
> 12 As regards the first issue, the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly

with such parent body but may transact business at the place of business constituting the extension.

13 As regards the second issue the claim in the action must concern the operations of the branch, agency or other establishment. This concept of operations comprises on the one hand actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there. Further it also comprises those relating to undertakings which have been entered into at the above-mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body. It is in each case for the court before which the matter comes to find the facts whereon it may be established that an effective place of business exists and to determine the legal position by reference to the concept of "operations" as above defined.'

**[26]** Paragraph 13 appears to be addressing the question of what it is necessary to establish in order to demonstrate the necessary nexus between the operations of the branch and the claim. The court had not been asked to provide guidance on this, but may have been influenced by the opinion of the Advocate General (Mayras) that part of the test of a branch was whether the branch carried out operations that were independent of its parent.

**[27]** The observations of the court ([1978] ECR 2183 at 2192–2193 (para 13)) appeared severely to circumscribe the effect of art 5(5). It was not enough that the branch should have entered into an undertaking in favour of the claimant if the undertaking was not one which had to be performed in the country where the branch was established. It would seem to follow that, if the claim was in tort, jurisdiction would not lie under art 5(5) unless the activities of the branch constituted or directly brought about the harmful event. It seems to me that, were the observations in the *Somafer* case (at 2192–2193 (para 13)) to represent the law, they would provide unshakeable support for the conclusion reached by the judge.

**[28]** In *Lloyd's Register of Shipping v Société Campenon Bernard* [1995] All ER (EC) 531, [1995] ECR I-961 the Advocate General (Elmer) observed that what the court had to say about 'operations' had been the subject of criticism both in academic writings and in the opinion of the Advocate General (Sir Gordon Slynn) in *Schotte SAR GmbH v Parfums Rothschild Sarl* Case 218/86 [1987] ECR 4905 at 4914–4915. In that opinion Sir Gordon stated:

'For my part, but for paragraph 13 of the judgment, I would have given "dispute arising out of the operations of a branch" a wider meaning. Equally, but for that paragraph, I would find it difficult to spell out of Article 5(5) the limitation that undertakings entered into "must be performed in the Contracting State where the place of business is established".'

**[29]** I turn to the facts of the *Lloyd's Register* case. Lloyd's Register of Shipping is an English registered charity established in London. It maintained a branch in France. Campenon Bernard, a French company, contacted the French branch in

order to arrange for the testing of concrete reinforcing steel which it was to use in the construction of a motorway in Kuwait. Following negotiations, in a letter of 3 December 1985, Campenon Bernard placed the order with the French branch of Lloyd's Register. That letter specified that inspection would take place in Spain and would be carried out by the Spanish branch of Lloyd's Register. It also stated that payment would be effected in pesetas. On 9 December 1985 the French branch communicated its acceptance.

**[30]** Although the Spanish branch of Lloyd's Register issued certificates of compliance, the Kuwait Ministry of Public Works, for whom the concrete was being produced, refused to accept the concrete reinforcing steel on the ground that it did not comply with the United States technical standard.

**[31]** On 2 February 1988 Campenon Bernard paid the invoice issued by the Spanish branch of Lloyd's Register, having been pressed to do so by the French branch, but without prejudice to its rights. Alleging that Lloyd's Register had wrongly stated that the steel complied with the United States technical standard, it then brought a claim for damages in the Tribunal de Commerce in Paris. Lloyd's Register challenged the jurisdiction.

**[32]** The Cour d'Appel held that the Tribunal de Commerce had jurisdiction, pursuant to art 5(5). The Cour de Cassation referred to the European Court the question of whether the application of art 5(5) was restricted to cases where the dispute concerned obligations to be performed in the state in which the branch, agency or other establishment was situated. This put in issue the correctness of *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183 at 2192–2193 (para 13).

**[33]** In his opinion, the Advocate General (Elmer) observed that the geographical limit imposed by the court in the *Somafer* case was in the nature of an obiter dictum. He went on to express his own view ([1995] All ER (EC) 531 at 539–540, [1995] ECR I-961 at 971–972):

> '16. ... decisive importance must be attached to the fact that art 5(5) would to all intents and purposes be devoid of independent content if it were applicable only to disputes regarding obligations which must be performed in the contracting state in which the branch, agency or other establishment is situated. The courts for the place of performance of the obligation already have jurisdiction under art 5(1) in matters relating to a contract, and the courts for the place where the harmful event occurred already have jurisdiction under art 5(3) in matters relating to tort, delict or quasi-delict. As emphasised by Campenon Bernard, the United Kingdom, the Greek government and the Commission, with such a limitation of art 5(5) would actually be reduced to cases of choice between several jurisdictions within the individual contracting state.
>
> 17. ... Rather than creating clarity, a geographical limitation such as that at issue raises a series of problems and thus gives rise to legal uncertainty.
>
> 18. Furthermore, art 5(5) serves two purposes. Partly to make it easier for the plaintiff to take proceedings in cases in which there is—"a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension" (*Somafer* [1978] ECR 2183 at 2192 (para 12).) —and partly, as mentioned in the United

Kingdom's observations, to approximate the situation just described to the point of departure of the first paragraph of art 2 of the convention regarding general jurisdiction arising from the domicile of the defendant. For agencies such as those listed in art 5(5)—non-legal persons—there is by definition no such jurisdiction arising from domicile. Article 5(5) should therefore in my view be interpreted according to its clear wording, which entails no geographical limitation.'

[34] The decision of the court echoed the opinion of the Advocate General ([1995] All ER (EC) 531 at 542, [1995] ECR I-961 at 980–981):

'16. First, the actual wording of art 5(5) of the convention in no way requires that the undertakings negotiated by a branch should be performed in the contracting state in which it is established in order for them to form part of its operations.

17. Secondly, the interpretation put forward by the appellant in the main proceedings would render art 5(5) almost wholly redundant. Since art 5(1) already allows the plaintiff to bring an action in contract in the courts for the place of performance of the obligation in question, art 5(5) would duplicate that provision if it applied solely to undertakings entered into by a branch which were to be performed in the contracting state in which the branch was established. At the very most it would create a second head of special jurisdiction where, within the contracting state of the branch, the place of performance of the obligation in question was situated in a judicial area other than that of the branch.

18. Thirdly, it should be noted that an ancillary establishment is a place of business which the appearance of permanency such as the extension of a parent body, has a management and is equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, whose seat is in another contracting state, do not have to deal directly with such parent body (see *Somafer* [1978] ECR 2183 at 2191 (para 12)).

19. A branch, agency or other ancillary establishment within the meaning of art 5(5) is therefore an entity capable of being the principal, or even exclusive, interlocutor for third parties in the negotiation of contracts.

20. There does not necessarily have to be a close link between the entity with which a customer conducts negotiations and places an order and the place where the order will be performed. Accordingly, undertakings may form part of the operations of an ancillary establishment within the meaning of art 5(5) of the convention even though they are to be performed outside the contracting state where it is situated, possibly by another ancillary establishment.

21. That interpretation is, moreover, in conformity with the objective of the special rules of jurisdiction. As the Jenard Report (OJ 1979 C 59, p 22) makes clear, those rules allow the plaintiff to sue the defendant in courts other than those of his domicile because there is a specially close connecting factor between the dispute and the court with jurisdiction to resolve it.

22. In the light of the foregoing considerations, the answer to the question referred by the Cour de Cassation must be that the expression "dispute arising out of the operations of a branch, agency or other establishment" in art 5(5) of the convention does not presuppose that the undertakings in

question entered into by the branch in the name of its parent body are to be performed in the contracting state in which the branch is established.' a

[35] Mr Parsons made the following submissions in relation to these two cases. First, he drew our attention to certain passages in Ch VI of the Jenard and Möller report under the heading: 'Judgments of the Court of Justice of the European Communities Concerning the Interpretation of the Brussels Convention of 27 September 1968.' Under the heading 'General' is this paragraph (p 97): b

'As stated in the comments on Protocol 2 (see points 112 and 116) in the negotiations on the Lugano Convention it was agreed that the provisions of the Brussels Convention should be construed as interpreted by the Court of Justice and that the report would mention the various judgments handed down by the Court. This Chapter meets the latter stipulation.' c

[36] Mr Parsons submitted that the effect of this was that the findings in relation to the Brussels Convention of the European Court, as interpreted in the report, should be treated as definitive of the meaning of similar provisions in the Lugano Convention, unless expressly overruled by subsequent decisions of the European Court. d

[37] Next, Mr Parsons referred us to this commentary of the Jenard and Möller report on the *Somafer* case:

'The Court has given an *autonomous* interpretation to the concepts of "operations of a branch, agency or other establishment"—(a) the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension; (b) the concept of "operations" comprises—(1) actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there, (2) actions relating to undertakings which have been entered into at the above mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established, (3) actions concerning non-contractual obligations in which the branch, agency or other establishment has engaged at the place in which it is established on behalf of the parent body.' e f g h

[38] Mr Parsons submitted that this passage made it plain that the *Somafer* case was intended to be the definitive and exclusive definition of 'operations of a branch, agency or other establishment' that were capable of giving rise to a dispute that fell within the jurisdiction accorded by art 5(5) (see [1978] ECR 2183 at 2192–2193 (para 13)). The adverse comment on the geographical limitation in para 13 made by Advocate General (Sir Gordon Slynn) in *Schotte SAR GmbH v Parfums Rothschild SARL* Case 218/86 [1987] ECR 4905 was made in relation to a contract case. Advocate General Elmer only described the geographical limit in para 13 of the *Somafer* case as obiter dictum in so far as it was made in relation to j

contract disputes in a case concerned with non-contractual obligations. The *Somafer* case remained authority for the proposition that, in a non-contractual claim, the activities of the branch had to bring about the harmful event giving rise to the dispute within the jurisdiction of the court if art 5(5) were to be engaged.

**[39]** I consider this argument to be over-sophisticated and unsound. The effect of decisions of the European Court on provisions which are common to the Brussels and Lugano Conventions should not be artificially circumscribed in the manner suggested by Mr Parsons. They must be given their natural effect.

**[40]** In my judgment, the decision in *Lloyd's Register of Shipping v Société Campenon Bernard* [1995] All ER (EC) 531, [1995] ECR I-961 robs the geographical limit in para 13 of the *Somafer* case of such authority as it might otherwise have had, bearing in mind that it was an obiter dictum on a matter not referred to the court and in respect of which no submissions had been made to it. This must be true of claims in tort as well as claims in contract. What the *Lloyd's Register* case demonstrates is that there must be such nexus between the branch and the dispute as to render it natural to describe the dispute as one which has arisen out of the activities of the branch. Where the claim is in contract, that nexus can be derived from the negotiations between the claimant and the branch which gave rise to the contractual obligation the alleged breach of which is the subject of the dispute. Where the claim is in tort or delict, there will be no such nexus.

**[41]** The events which give rise to liability in tort can vary widely—compare the liability of the publishers of a defamatory book with the vicarious liability of a company for the negligent driving of an employee in the course of his employment. In these circumstances, I do not think it desirable to attempt to formulate any test to determine whether a dispute has arisen out of the activities of a branch. The answer to that question must depend on the facts of the individual case. I would, however, venture some general observations.

**[42]** As Laws LJ observed in the course of argument, para (5) of art 5 differs from the other paragraphs of that article. The other paragraphs address different specific causes of action. Paragraph 5 is of general application. It would seem designed to cover situations where the connection of the claim with the activities of the branch, agency or other establishment is such to make it appropriate in the interests of the due administration of justice to permit suit to be brought in the state where the branch, agency or other establishment is situated.

**[43]** I would endorse the conclusions of the Advocate General in the *Lloyd's Register* case that one purpose of art 5(5) is to approximate the place where a branch carries on business with third parties to the point of departure of art 2(1). Article 5(5) provides a quasi-defendant's domicile basis for jurisdiction. Once the existence of an entity which qualifies as a 'branch, agency or other establishment' of the defendant is established in a state, it accords with the due administration of justice from the viewpoint of the defendant, the claimant and the court to permit suit to be brought in that state in relation to disputes which arise out of the activities of the branch, agency or establishment, regardless of where those activities take effect.

**[44]** I have set out positive reasons for giving art 5(5) a meaning which is not subject to the geographical limitation suggested by the court in *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183. There are, however, powerful negative reasons which point in the same direction. In the *Lloyd's Register* case, which was a case involving contract, the court observed that the *Somafer* interpretation would render art 5(5) almost wholly redundant having regard to the provisions

of art 5(1). Advocate General Elmer made a similar observation in relation to matters relating to tort, delict or quasi-delict, having regard to the provisions of art 5(3). The only such claim that Mr Parsons could suggest in respect of which, on his interpretation, art 5(5) would make a difference was a claim in restitution.

**[45]** In considering the application of art 5(5), the judge considered it pertinent to compare the connection between the dispute and London with the connection between the dispute and Panama. Mr Meeson suggested that this was not a helpful comparison. Rather, the judge should have compared the connection between the dispute and London with the connection between the dispute and Norway. Had he done so, he would have reached the conclusion that this was a case in which it could properly be said that the dispute arose out of the activities of the defendants' London branch.

**[46]** I think that Mr Meeson is correct. The actions giving rise to the dispute arose out of London banking business, conducted by the defendants' London branch. The loan in respect of which the security over the vessel was taken was negotiated in London. The decision to enforce the security was taken in London. The London branch gave instructions to enforce the security and the power of attorney to enable it to be done. Giving the words of art 5(5) their natural meaning, the dispute in this case has arisen out of the activities of the London branch. It is true that in this case these factors do not point to London as the most convenient forum. If the jurisdiction to stay is soundly based, the action will be fought in Panama and not here. It seems to me, however, that if considerations of, or akin to, domicile are to govern the available forum, it makes good sense and accords with the due administration of justice that London should be available to the parties as an alternative to Norway.

**[47]** For these reasons I would allow the first limb of the appeal.

**[48]** That leaves the judge's alternative decision that the decisions should be stayed in favour of Panama. No attack has been made on that decision on the merits. It is not open to the claimants to challenge that decision in this court on the basis it was made without jurisdiction. It is common ground that we are bound by the decision in *Ace Insurance Co v Zurich Insurance Co* [2001] 1 Lloyd's Rep 618 to hold that the judge had jurisdiction to stay the proceedings.

**[49]** Accordingly, I would replace the judge's order with one staying the action. If my Lords, or at least one of them, are in agreement, it will remain to consider the application that I anticipate will follow for permission to appeal to the House of Lords against the imposition of a stay.

**BROOKE LJ.**

**[50]** I agree.

**LAWS LJ.**

**[51]** I also agree.

*Appeal allowed in part. Permission to appeal to the House of Lords granted.*

Kate O'Hanlon Barrister.

# R v Drew

## [2003] UKHL 25

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HUTTON, LORD MILLETT AND LORD RODGER OF EARLSFERRY

26, 27 MARCH, 8 MAY 2003

*Sentence – Life imprisonment – Life imprisonment for second serious offence – Whether imposition on mentally ill offender of automatic life sentence for second serious offence compatible with provisions of human rights convention – Mental Health Act 1983, s 37 – Crime (Sentences) Act 2000, s 109 – Human Rights Act 1998, Sch 1, Pt I, art 3.*

The appellant was convicted in 1995 of two offences which were 'serious offences' within s 109[a] of the Powers of Criminal Courts (Sentencing) Act 2000. Under s 109, other than in 'exceptional circumstances', a court was required to impose an automatic life sentence on a person convicted of a serious offence committed after September 1997, who had previously been convicted of another serious offence. In 1999 the appellant committed another serious offence (wounding with intent to cause grievous bodily harm) to which he pleaded guilty. The appellant was known to be mentally ill; he displayed psychotic symptoms and messianic delusions whilst in custody following his arrest, and was then admitted to a psychiatric hospital. However, he was not insane when he committed the 1999 offence, nor was he unfit to be tried when he pleaded guilty and appeared for sentence. The sentencing judge would have accepted a psychiatric recommendation that a hospital order be made under s 37[b] of the Mental Health Act 1983, together with an unlimited restriction order, but was precluded from making such an order since s 37 of the 1983 Act did not apply to a person convicted of an offence punishable by imprisonment where the sentence, inter alia, fell to be imposed under s 109 of the 2000 Act . The appellant was accordingly sentenced to life imprisonment with a minimum term of two years and eight months. His condition deteriorated sharply in prison without medication which had been prescribed for him in hospital but which the prison could not prescribe. After eight days the Secretary of State for the Home Department authorised his transfer from prison to the hospital, under his power contained in s 47[c] of the 1983 Act to direct the transfer of an imprisoned offender whose mental condition required treatment in hospital. The transfer was coupled with a restriction order. The appellant appealed against sentence on the grounds that it was wrong in principle to impose a punitive sentence of imprisonment on a person who was mentally ill and so not criminally culpable; that the imposition of an automatic life sentence on such a person was 'inhuman or degrading treatment or punishment' prohibited by art 3[d] of the European

a Section 109, so far as material, is set out at [5], below

b Section 37, so far as material, is set out at [8], below

c Section 47, so far as material, provides: '(1) If in the case of a person serving a sentence of imprisonment the Secretary of State is satisfied … (a) that the said person is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and (b) that the mental disorder … is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment … the Secretary of State may … by warrant direct that that person be removed to and detained in such hospital …'

Convention on Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998); and that s 109 of the 2000 Act and s 37 of the 1983 Act were, accordingly, incompatible with art 3. The Court of Appeal dismissed the appeal and the appellant's subsequent appeal against that decision was considered by an appellate committee of the House of Lords.

**Held** – (1) Under both national law and the jurisprudence of the European Court of Human Rights a sentence of imprisonment could be passed on a mentally disordered defendant who was criminally responsible and fit to be tried. In the instant case the appellant had not claimed to be unfit to plead and had advanced no defence of insanity. His mental illness could properly be relied on as mitigating the criminality of his conduct but not as absolving him from all responsibility for it (see [16], [17], below); *R v Birch* (1989) 11 Cr App R (S) 202 and *X v UK* App No 5229/71 (5 October 1972, unreported) considered.

(2) The effect of s 109 of the 2000 Act read with s 37 of the 1983 Act was not a ground for challenging the compatibility of those sections with art 3 of the convention as their effect was not to deny a mentally disordered defendant qualifying for an automatic life sentence the medical treatment which his condition required, since the Secretary of State was obliged to act compatibly with the convention, and s 47 of the 1983 Act gave him power to transfer a defendant sentenced to imprisonment to a hospital where he would receive any medical treatment he needed. In the instant case, while the interruption of the appellant's medication during the eight days following sentence had caused him ill effects, those were not of sufficient severity to engage the operation of art 3 (see [18], [19], below); *Ireland v UK* (1978) 2 EHRR 25 and *Aerts v Belgium* (1998) 5 BHRC 382 considered.

(3) In a case where the evidence showed that the assumption on which s 109 was founded, that a defendant who had been convicted of two qualifying serious offences presented such a serious and continuing danger to the safety of the public that he should be liable to indefinite incarceration, was soundly based, no issue of incompatibility with the convention was likely to arise. In the case of a defendant who appeared to present no danger to the public his convention rights would not be contravened if courts applied the section, using their powers where the circumstances were exceptional, so that it did not result in offenders being sentenced to life imprisonment when they did not constitute a significant risk to the public. Moreover, that approach applied equally to a mentally disordered defendant, relieving the court of the need to impose an automatic life sentence, and permitting the making of a hospital order, if it were established that there was no need to protect the public against him in future. Thus a complaint of arbitrariness and excessive force which could otherwise be made under the convention would be met first, by pointing to the court's release from the obligation to impose a life sentence where a defendant was shown not to be dangerous and, secondly, where a life sentence was passed, by the imposition of a minimum term reflecting the culpability of the individual defendant. Accordingly, the appeal would be dismissed (see [20], [23], below); *R v Offen* [2001] 2 All ER 154 approved.

d Article 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

**Notes**

For the prohibition on inhuman and degrading treatment or punishment, see 8(2) *Halsbury's Laws* (4th edn reissue) para 124, and for automatic life sentences for a second serious offence, see Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1202B.1.

For the Mental Health Act 1983, s 37, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 895.

For the Powers of Criminal Courts (Sentencing) Act 2000, s 109, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1885.

**Cases cited in the report**

*Aerts v Belgium* (1998) 5 BHRC 382, ECt HR.

*A-G's Ref No 32 of 1996 (R v Whittaker)* [1997] 1 Cr App R (S) 261, CA.

*Ireland v UK* (1978) 2 EHRR 25, [1978] ECHR 5310/71, ECt HR.

*Keenan v UK* (2001) 10 BHRC 319, ECt HR.

*R (on the application of Von Brandenburg (aka Hanley)) v East London and The City Mental Health NHS Trust* [2001] EWCA Civ 239, (2001) 61 BMLR 206, [2002] QB 235, [2001] 3 WLR 588.

*R v Birch* (1989) 11 Cr App R (S) 202, CA.

*R v Buckland* [2000] 1 All ER 907, [2000] 1 WLR 1262, CA.

*R v H* [2003] UKHL 1, [2003] 1 All ER 497, [2003] 1 WLR 411.

*R v Hodgson* (1967) 52 Cr App R 113, CA.

*R v Howell* (1985) 7 Cr App R (S) 360, CA.

*R v Hutchinson* [1997] 2 Cr App R (S) 60, CA.

*R v Lichniak, R v Pyrah* [2002] UKHL 47, [2002] 4 All ER 1122, [2002] 3 WLR 1834.

*R v London South and South West Region Mental Health Review Tribunal, ex p Moyle* [2000] Lloyd's Rep Med 143.

*R v Mbatha* (1985) 7 Cr App R (S) 373, CA.

*R v Mitchell* [1997] 1 Cr App R (S) 90, CA.

*R v Offen* [2001] 2 All ER 154, [2001] 1 WLR 253, CA.

*R v Pither* (1979) 1 Cr App R (S) 209, CA.

*R v Wilkinson* (1983) 5 Cr App R (S) 105, CA.

*X v UK* App No 5229/71 (5 October 1972, unreported), E Com HR.

**Cases referred to in list of authorities**

*Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, [1993] 3 WLR 154, HL.

*Guzzardi v Italy* (1980) 3 EHRR 333, [1980] ECHR 7367/76, ECt HR.

*Johnson v UK* (1997) 27 EHRR 296, [1997] ECHR 22520/93, ECt HR.

*Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

*R (on the application of Anderson) v Secretary of State for the Home Dept* [2001] EWHC Admin 181, [2001] HRLR 693; *affd* [2001] EWCA Civ 1698, [2002] 2 WLR 1143; *rvsd in part* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837, [2002] 3 WLR 1800.

*R v A* [2001] 1 WLR 789.

*R v Fairhurst* [1996] 1 Cr App R (S) 242, CA.

*R v Fleming* (1993) 14 Cr App R (S) 151, CA.

*R v Haynes* (1981) 3 Cr App R (S) 330, CA.

*R v Kelly, A-G's Ref (No 53 of 1998)* [1999] 2 All ER 13, [2000] QB 198, [1999] 2 WLR 1100, CA.

*R v Morris* [1961] 2 All ER 672, [1961] 2 QB 237, [1961] 2 WLR 986, CA.
*R v Moses* [1996] 2 Cr App R (S) 407, CA.
*R v Newman* (2000) 57 BMLR 123, CA.
*R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.
*R v Secretary of State for the Home Dept, ex p Hickey (No 1), R v Secretary of State for the Home Dept, ex p H, F, B and W* [1995] 1 All ER 479, [1995] QB 43, [1994] 3 WLR 1110, CA.
*Weeks v UK* (1987) 10 EHRR 293, [1987] ECHR 9787/82, ECt HR.
*Winterwerp v Netherlands* (1979) 2 EHRR 387, [1979] ECHR 6301/73, ECt HR.
*X v UK* (1981) 4 EHRR 188, [1981] ECHR 7215/75, ECt HR.

**Appeal against sentence**

The appellant, Anthony James Drew, appealed with permission of the Appeal Committee of the House of Lords given on 7 October 2002 from the order of the Court of Appeal (Kennedy LJ, Bell and Cooke JJ) ([2001] EWCA Crim 2861, [2002] 2 Cr App R (S) 189) on 19 December 2001 dismissing his appeal against the sentence of life imprisonment with a specified period of three years and eight months imposed on him on 1 March 2001 under the statutory predecessor of s 109 of the Powers of Criminal Courts (Sentencing) Act 2000 following his conviction on 1 August 2000 of wounding with intent to do grievous bodily harm contrary to s 18 of the Offences against the Person Act 1861. The court certified that the following points of law of general public importance were involved in its decision: '(i) The Appellant was sentenced to a term of life imprisonment under s 109 of the [2000 Act]. He had been mentally ill at the time of the offence and was still so at the date of sentence. Had he not been liable to an "automatic life sentence" then the Appellant would have been made the subject of a hospital order subject to an indefinite restriction upon his release; (ii) Does the "automatic life sentence" in the case of an offender such as the Appellant amount to inhuman or degrading treatment or punishment in the terms of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms?; (iii) Is the requirement that the Court shall impose an "automatic life sentence" upon an offender such as the Appellant incompatible with Article 3 of the Convention'? The Secretary of State for the Home Department was joined as an interested party to the appeal under s 5 of the Human Rights Act 1998. The facts are set out in the report of the Appellate Committee.

*Huw Davies QC* and *Andrew Jones* (instructed by *Hornby Baker Jones & Wood*, Newport) for the appellant.
*Bruce Houlder QC* and *Duncan Penny* (instructed by the *Crown Prosecution Service*) for the Crown.
*David Perry* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Their Lordships took time for consideration.

8 May 2003. The following report was delivered.

**LORD BINGHAM OF CORNHILL.**

[1] This is the considered opinion of the Committee.

[2] At issue in this appeal against sentence is the compatibility of s 109 of the Powers of Criminal Courts (Sentencing) Act 2000 and s 37 of the Mental Health

Act 1983, when applied to mentally ill offenders, with art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[3] The appellant was born on 1 May 1963. His career after leaving school was marked by criminal activity and drug abuse. On 4 August 1995 he was convicted of two offences of causing grievous bodily harm with intent contrary to s 18 of the Offences against the Person Act 1861. He was sentenced to concurrent terms of six years' imprisonment for these offences and was released in April 1999. On 19 November 1999 he committed an offence of wounding with intent to cause grievous bodily harm contrary to s 18 of the 1861 Act. He pleaded guilty to this offence (and also to a more minor offence, irrelevant for present purposes) in the Crown Court at Cardiff on 1 August 2000. This wounding offence was a 'serious offence' for purposes of s 2 of the Crime (Sentences) Act 1997 and s 109 of the 2000 Act which replaced s 2.

[4] The appellant was not insane when he committed the 1999 offence, nor was he unfit to be tried when he pleaded guilty in the Crown Court and (later) appeared for sentence. But he was known to be mentally ill. While in custody following his arrest in November 1999 he manifested psychotic symptoms and messianic delusions and in June 2000 was admitted to a psychiatric hospital where, with treatment, his mental condition improved. Two approved consultant psychiatrists were of opinion that he was suffering from schizophrenia and would be a serious danger to the public if released. They recommended that a hospital order be made under s 37 of the 1983 Act with a restriction on his release, unlimited in time, under s 41 of the Act. This was a recommendation which the Recorder of Cardiff, before whom the appellant appeared for sentence on 1 March 2001, would have accepted had s 109 of the 2000 Act allowed him to do so. But the offences of which the appellant had been convicted in 1995, like that to which he had pleaded guilty in August 2000, were 'serious offences' within the meaning of s 2 and s 109 of the 1997 and 2000 Acts respectively, and s 109 of the 2000 Act, read with s 37 of the 1983 Act, precluded the making of such an order in the absence of exceptional circumstances. So, as the section required, the Recorder imposed a sentence of life imprisonment, although he did so with an expression of regret. He fixed the minimum term to be served at two years and eight months' imprisonment. On being sentenced the appellant was returned to prison where his mental condition deteriorated sharply for want of a drug which had been prescribed for him in hospital but which the prison could not prescribe. On 9 March 2001, following urgent and repeated representations by HMP Cardiff where the appellant was confined, the Home Secretary, acting with expedition, authorised the transfer of the appellant from prison to the psychiatric hospital where he had been treated before. This transfer, made under ss 47 and 49 of the 1983 Act, took effect at once, eight days after sentence. The interruption in the appellant's medication had a harmful effect on his mental health and it took several months after his return to hospital for the doctors to gain full control of his symptoms.

[5] Stripped to its bare essentials, the argument of Mr Huw Davies QC for the appellant rested on three main propositions. (1) It is wrong in principle to impose a punitive sentence of imprisonment on those who, like the appellant, are mentally ill and so not criminally culpable. Accordingly (2) the imposition of an automatic life sentence on such defendants is 'inhuman or degrading treatment or punishment' within the unqualified prohibition in art 3 of the convention. Therefore (3) ss 109 and 37 of the 2000 and 1983 Acts respectively, in requiring

imposition of such a sentence in cases such as the appellant's, even where the offender is mentally ill, are incompatible with art 3 of the convention. Before considering these contentions it is necessary to cite the key provisions to which they relate.

SECTION 109 OF THE 2000 ACT

Section 109(1)–(4) provide as follows:

> '(1) This section applies where—(a) a person is convicted of a serious offence committed after 30th September 1997; and (b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence.
>
> (2) The court shall impose a life sentence, that is to say—(a) where the offender is 21 or over when convicted of the offence mentioned in subsection (1)(a) above, a sentence of imprisonment for life, (b) where he is under 21 at that time, a sentence of custody for life under section 94 above, unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so.
>
> (3) Where the court does not impose a life sentence, it shall state in open court that it is of that opinion and what the exceptional circumstances are.
>
> (4) An offence the sentence for which is imposed under subsection (2) above shall not be regarded as an offence the sentence for which is fixed by law.'

There follows in sub-s (5) a list of criminal offences all of which are serious offences for purposes of the section if committed in England and Wales. The list includes offences related to murder (although not murder itself, for which a mandatory life sentence is prescribed elsewhere), manslaughter, offences under s 18 of the 1861 Act, rape and attempted rape, unlawful sexual intercourse with a girl aged under 13, certain of the most serious firearms offences and robbery involving the possession of a firearm or imitation firearm. All are offences carrying a maximum penalty of imprisonment for life. In sub-ss (6) and (7) the section contains broadly comparable lists of serious offences committed in Scotland and Northern Ireland.

**[6]** Section 109 reproduces (in its application to England and Wales) s 2 of the 1997 Act. The enactment of s 2 was preceded by a White Paper (*Protecting the Public: The Government's Strategy on Crime in England and Wales* (March 1996) (Cm 3190)), Ch 10 of which was entitled 'Automatic Life Sentences for Serious Violent and Sex Offenders' and explained the rationale of the government's proposal:

> '10.3. A wide range of serious violent and sex offences carry a maximum sentence of life imprisonment, including manslaughter, rape and the most serious woundings. In these cases the court has the discretion to impose a life sentence either because the offence is so serious that it merits the maximum available penalty, or because the trial judge feels unable to determine when it will be safe to release the offender. In either case, the trial judge will specify the tariff which must be served, and at the end of that period the Parole Board will determine whether the offender can safely be released.
>
> 10.4. The great advantage of the life sentence is its flexibility. It recognises that there are two separate considerations: the length of time the offender

should serve as punishment for the offence he or she has committed (the tariff), and the question whether he or she can safely be released at the end of that period. However courts make very little use of the discretionary life sentence. In 1994, for example, 434 offenders were convicted of rape or attempted rape, but only 12 were sentenced to life imprisonment. In 1994, 217 offenders were convicted of a second serious violent or sexual offence, but only 10 received a discretionary life sentence.

10.5. This does not necessarily mean that the sentences imposed on violent and sex offenders are too lenient: long sentences are frequently imposed on offenders convicted of violent and sex offences ... But if a determinate sentence is imposed the offender must be released once that sentence has been served, even if there is every reason to believe that he or she will commit further serious offences. That has led to a number of tragic cases where offenders convicted of violent or sex offences have been released only to repeat their offences almost immediately.

10.6. It is essential that the public receives proper protection from serious, dangerous and persistent offenders. Long sentences are not sufficient, of themselves, to provide that protection: before potentially dangerous offenders are released an assessment must be made to see whether they still pose a risk. If an offender cannot safely be released he or she must continue to be detained—if necessary indefinitely.

10.7. This proposal is not designed to increase the time such offenders spend in prison as punishment for the offences they have committed. That will continue to be the responsibility of the trial judge, who will be expected to set a tariff appropriate to the seriousness of the offence, just as the judge would if he or she were imposing a determinate sentence. This will enable the risk presented by the offender to be assessed towards the end of the tariff, when it will be known in the case of a sex offender, for example, whether that offender had undertaken the sex offender treatment programme, and how he or she had responded to it. The proposal will ensure that when the tariff ordered by the court expires, offenders who represent a real risk to the public are not released unless and until the Parole Board is satisfied that it is safe to do so. Once released, they will remain on licence and subject to recall in the same way as other life sentence prisoners.'

It was said (para 10.10) to be one of the key elements of the government's proposal that—

> 'the court will also have discretion not to pass the automatic life sentence in genuinely exceptional cases. This is intended to allow for occasional quite unforeseeable circumstances where it would plainly be unjust and unnecessary to impose the life sentence. But it should be emphasised that this provision will be designed to cover only genuinely exceptional cases. The court will be required to explain what were the exceptional circumstances which justified some other sentence in place of a life sentence ...'

The chapter concluded (para 10.11):

> 'Too often in the past, those who have shown a propensity to commit serious violent or sex offences have served their sentences and been released only to offend again. In many such cases, the danger of releasing the offender has been plain for all to see—but nothing could be done, because

once the offender has completed the sentence imposed, he or she has to be released. Too often, victims have paid the price when the offender has repeated the same offences. The Government is determined that the public should receive proper protection from persistent violent or sex offenders. That means requiring the courts to impose an automatic indeterminate sentence, and releasing the offender if and only if it is safe to do so.'

[7] The thrust of s 2, carried over into s 109, is not open to doubt. Those who have committed two qualifying serious offences have shown themselves to be a danger to the public. To protect the public an indeterminate sentence of imprisonment is required to ensure that they are not released, as may happen on completion of a determinate sentence, when they are still a source of danger. The criteria applied by the courts in imposing discretionary life sentences (laid down in cases such as *R v Hodgson* (1967) 52 Cr App R 113, *R v Pither* (1979) 1 Cr App R (S) 209, *R v Wilkinson* (1983) 5 Cr App R (S) 105, and *A-G's Ref No 32 of 1996 (R v Whittaker)* [1997] 1 Cr App R (S) 261) lead to insufficient use of the power to impose such sentences and thus to the imposition of determinate sentences on those who will remain a source of danger to the public on release. Thus where the qualifying conditions are met a life sentence must be automatically imposed unless the circumstances are exceptional. The court is not to enjoy the discretion (expressly conferred by ss 3(2)(b) and 4(2)(b) of the 1997 Act and reproduced in ss 110(2)(b) and 111(2)(b) of the 2000 Act in relation to repeated offences of drug trafficking and burglary) to decline to impose the statutory sentence where the court is of opinion that there are specific circumstances which would make that sentence unjust in all the circumstances.

SECTION 37 OF THE 1983 ACT

[8] As it now stands, s 37 of the 1983 Act, so far as relevant to this appeal, provides:

'*Powers of courts to order hospital admission or guardianship.*—(1) Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law or falls to be imposed under section 109(2) of the Powers of Criminal Courts (Sentencing) Act 2000, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified.

(1A) In the case of an offence the sentence for which would otherwise fall to be imposed under subsection (2) of section 110 or 111 of the Powers of Criminal Courts (Sentencing) Act 2000, nothing in that subsection shall prevent a court from making an order under subsection (1) above for the admission of the offender to a hospital.

(1B) For the purposes of subsections (1) and (1A) above, a sentence fails to be imposed under section 109(2), 110(2) or 111(2) of the Powers of Criminal Courts (Sentencing) Act 2000 if it is required by that provision and the court is not of the opinion there mentioned.

(2) The conditions referred to in subsection (1) above are that—(a) the court is satisfied, on the written or oral evidence of two registered medical

practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that either—(i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition; or (ii) in the case of an offender who has attained the age of 16 years, the mental disorder is of a nature or degree which warrants his reception into guardianship under this Act; and (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section ...

(4) An order for the admission of an offender to a hospital (in this Act referred to as "a hospital order") shall not be made under this section unless the court is satisfied on the written or oral evidence of the registered medical practitioner who would be in charge of his treatment or of some other person representing the managers of the hospital that arrangements have been made for his admission to that hospital ... and for his admission to it within the period of 28 days beginning with the date of the making of such an order; and the court may, pending his admission within that period, give such directions as it thinks fit for his conveyance to and detention in a place of safety.

(5) If within the said period of 28 days it appears to the Secretary of State that by reason of an emergency or other special circumstances it is not practicable for the patient to be received into the hospital specified in the order, he may give directions for the admission of the patient to such other hospital as appears to be appropriate instead of the hospital so specified; and where such directions are given—(a) the Secretary of State shall cause the person having the custody of the patient to be informed, and (b) the hospital order shall have effect as if the hospital specified in the directions were substituted for the hospital specified in the order ...

(7) A hospital order or guardianship order shall specify the form or forms of mental disorder referred to in subsection (2)(a) above from which, upon the evidence taken into account under that subsection, the offender is found by the court to be suffering; and no such order shall be made unless the offender is described by each of the practitioners whose evidence is taken into account under that subsection as suffering from the same one of those forms of mental disorder, whether or not he is also described by either of them as suffering from another of them.

(8) Where an order is made under this section, the court shall not—(a) pass sentence of imprisonment or impose a fine or make a probation order in respect of the offence ... but the court may make any other order which it has power to make apart from this section; and for the purposes of this subsection "sentence of imprisonment" includes any sentence or order for detention.'

[9] It is unnecessary to review the detailed statutory provisions governing the admission of offenders to hospital under s 37 since their effect was clearly and authoritatively explained by the Court of Appeal (Criminal Division) (Mustill LJ, Saville and McKinnon JJ) in *R v Birch* (1989) 11 Cr App R (S) 202 at 210:

'Once the offender is admitted to hospital pursuant to a hospital order or transfer order without restriction on discharge, his position is almost exactly the same as if he were a civil patient. In effect he passes out of the penal system and into the hospital regime. Neither the court nor the Secretary of State has any say in his disposal. Thus, like any other mental patient, he may be detained only for a period of six months, unless the authority to detain is renewed, an event which cannot happen unless certain conditions, which resemble those which were satisfied when he was admitted, are fulfilled. If the authority expires without being renewed, the patient may leave. Furthermore, he may be discharged at any time by the hospital managers or the "responsible medical officer." In addition to these regular modes of discharge, a patient who absconds or is absent without leave and is not retaken within 28 days is automatically discharged at the end of that period (section 18(5)) and if he is allowed continuous leave of absence for more than six [now twelve] months, he cannot be recalled (section 17(5)). Another feature of the regime which affects the disordered offender and the civil patient alike is the power of the responsible medical officer to grant leave of absence from the hospital for a particular purpose, or for a specified or indefinite period of time: subject always to a power of recall (except as mentioned above). There are certain differences between the positions of the offender and of the civil patient, relating to early access to the Review Tribunal and to discharge by the patient's nearest relative, but these are of comparatively modest importance. In general the offender is dealt with in a manner which appears, and is intended to be, humane by comparison with a custodial sentence. A hospital order is not a punishment. Questions of retribution and deterrence, whether personal or general, are immaterial. The offender who has become a patient is not kept on any kind of leash by the court, as he is when he consents to a probation order with a condition of inpatient treatment. The sole purpose of the order is to ensure that the offender receives the medical care and attention which he needs in the hope and expectation of course that the result will be to avoid the commission by the offender of further criminal acts.'

**[10]** As this passage makes plain, the detention of an offender admitted to hospital under s 37 alone may not be renewed if the medical conditions which justified admission cease to be met, and if those medical conditions cease to be met at any time the duty of the responsible medical officer, exercising a medical judgment, is to discharge the offender from hospital. Understandably, this benign regime was thought to provide insufficient protection in the case of offenders whose release might present a serious risk of danger to the public. Thus s 37 is fortified by the additional provisions of ss 41 and 42 which, so far as relevant to this appeal, provide:

'*Restriction orders*

**41.** *Power of higher courts to restrict discharge from hospital.*—(1) Where a hospital order is made in respect of an offender by the Crown Court, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in

this section, either without limit of time or during such period as may be specified in the order; and an order under this section shall be known as "a restriction order" ...

(3) The special restrictions applicable to a patient in respect of whom a restriction order is in force are as follows—(a) none of the provisions of Part II of this Act relating to the duration, renewal and expiration of authority for the detention of patients shall apply, and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under the said Part II or absolutely discharged under section 42, 73, 74 or 75 below; (b) no application shall be made to a Mental Health Review Tribunal in respect of a patient under section 66 or 69(1) below; (c) the following powers shall be exercisable only with the consent of the Secretary of State, namely—(i) power to grant leave of absence to the patient under section 17 above; (ii) power to transfer the patient in pursuance of regulations under section 19 above or in pursuance of subsection (3) of that section; and (iii) power to order the discharge of the patient under section 23 above; and if leave of absence is granted under the said section 17 power to recall the patient under that section shall vest in the Secretary of State as well as the responsible medical officer; and (d) the power of the Secretary of State to recall the patient under the said section 17 and power to take the patient into custody and return him under section 18 above may be exercised at any time; and in relation to any such patient section 40(4) above shall have effect as if it referred to Part II of Schedule 1 to this Act instead of Part I of that Schedule ...

(5) Where a restriction order in respect of a patient ceases to have effect while the relevant hospital order continues in force, the provisions of section 40 above and Part I of Schedule 1 to this Act shall apply to the patient as if he had been admitted to the hospital in pursuance of a hospital order (without a restriction order) made on the date on which the restriction order ceased to have effect.

(6) While a person is subject to a restriction order the responsible medical officer shall at such intervals (not exceeding one year) as the Secretary of State may direct examine and report to the Secretary of State on that person; and every report shall contain such particulars as the Secretary of State may require.

**42.** *Powers of Secretary of State in respect of patients subject to restriction orders.*—(1) If the Secretary of State is satisfied that in the case of any patient a restriction order is no longer required for the protection of the public from serious harm, he may direct that the patient cease to be subject to the special restrictions set out in section 41(3) above; and where the Secretary of State so directs, the restriction order shall cease to have effect, and section 41(5) above shall apply accordingly.

(2) At any time while a restriction order is in force in respect of a patient, the Secretary of State may, if he thinks fit, by warrant discharge the patient from hospital, either absolutely or subject to conditions; and where a person is absolutely discharged under this subsection, he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly.

(3) The Secretary of State may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally

discharged under subsection (2) above by warrant recall the patient to such hospital as may be specified in the warrant.'

**[11]** An offender subject to a hospital order under s 37 coupled with a restriction order under s 41 has statutory rights of application to a Mental Health Review Tribunal under ss 70, 72 and 73 of the 1983 Act, but his position is radically different from that of the unrestricted offender. This again was recognised by the Court of Appeal in *R v Birch* (1989) 11 Cr App R (S) 202 at 210–211:

'In marked contrast with the regime under an ordinary hospital order, is an order coupled with a restriction on discharge pursuant to section 41. A restriction order has no existence independently of the hospital order to which it relates; it is not a separate means of disposal. Nevertheless, it fundamentally affects the circumstances in which the patient is detained. No longer is the offender regarded simply as a patient whose interests are paramount. No longer is the control of him handed over unconditionally to the hospital authorities. Instead the interests of public safety are regarded by transferring the responsibility for discharge from the responsible medical officer and the hospital to the Secretary of State alone (before September 30, 1983) and now to the Secretary of State and the Mental Health Review Tribunal. A patient who has been subject to a restriction order is likely to be detained for much longer in hospital than one who is not, and will have fewer opportunities for leave of absence.'

**[12]** This, inevitably very summary, account of the hospital order regime omits reference to two problematical situations which have at different times attracted the attention of the legislature. The first is that of the defendant who is sentenced to a term of imprisonment but whose mental condition requires treatment in hospital. In such a case the Home Secretary may by warrant under s 47(1) direct the transfer of the offender to a named hospital. Such a transfer direction has the same effect as a hospital order (see s 47(3)) and may under s 49 be coupled with a restriction order. These are the powers exercised by the Home Secretary in the appellant's case.

**[13]** The second problematical situation arises where neither a sentence of imprisonment nor a hospital order, on its own, appears appropriate in the case of a particular offender and where the mutually exclusive operation of such disposals appears unsatisfactory. This problem was acknowledged in the White Paper (*Protecting the Public*) quoted above. In Ch 8, 'Sex Offenders and Mentally Disordered Offenders', it was said:

'8.12. The Government proposes changes in the arrangements for the remand, sentencing and subsequent management of mentally disordered offenders to provide greater protection for the public and to improve access to effective medical treatment for those offenders who need it. The central change, if adopted, would be the provision of a "hybrid order" for certain mentally disordered offenders for whom the present form of hospital order is unsatisfactory, particularly those who are considered to bear a significant degree of responsibility for their offences. The order would enable the courts, in effect, to pass a prison sentence on an offender and at the same time order his immediate admission to hospital for medical treatment.

8.13. The hybrid order, together with other proposals amending the detail of the Mental Health Act 1983, would substantially increase the flexibility of

arrangements for dealing with mentally disordered offenders at all stages from remand through to rehabilitation. In particular, it would enable the courts to deal with some of the most difficult cases in a way which took proper account of the offender's need for treatment; the demands of justice; and the right of other people to be protected from harm.

8.14. Existing sentencing arrangements for offenders who are mentally disordered require the court to decide either to order the offender's detention in hospital for treatment, or to sentence him to imprisonment, or to make some other disposal. In some cases, an offender needs treatment in hospital but the circumstances of the offence also require a fixed period to be served in detention. This may be because the offender is found to bear some significant responsibility for the offence notwithstanding his disorder, or because the link between the offending behaviour and the mental disorder is not clear at the time of sentencing. The hybrid disposal would be a way of enabling the requirements of sentencing in such cases to be met. Under the order, an offender would remain in hospital for as long as his mental condition required, but if he recovered or was found to be untreatable during the fixed period set by the court, he would be remitted to prison. The hybrid order was recommended for use in sentencing offenders suffering from psychopathic disorder by the Department of Health and Home Office Working Group on Psychopathic Disorder. The Government is considering whether it might be made available in respect of offenders suffering from all types of mental disorder currently covered by mental health legislation.'

Legislative effect was given to this proposal by s 45A of the 1983 Act, inserted by s 46 of the 1997 Act. So far as relevant the section provides:

'(1) This section applies where, in the case of a person convicted before the Crown Court of an offence the sentence for which is not fixed by law—(a) the conditions mentioned in subsection (2) below are fulfilled; and (b) except where the offence is one the sentence for which falls to be imposed under section 2 of the Crime (Sentences) Act 1997, the court considers making a hospital order in respect of him before deciding to impose a sentence of imprisonment ("the relevant sentence") in respect of the offence.

(2) The conditions referred to in subsection (1) above are that the court is satisfied, on the written or oral evidence of two registered medical practitioners—(a) that the offender is suffering from psychopathic disorder; (b) that the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and (c) that such treatment is likely to alleviate or prevent a deterioration of his condition.

(3) The court may give both of the following directions, namely—(a) a direction that, instead of being removed to and detained in a prison, the offender be removed to and detained in such hospital as may be specified in the direction (in this Act referred to as a "hospital direction"); and (b) a direction that the offender be subject to the special restrictions set out in section 41 above (in this Act referred to as a "limitation direction").

(4) A hospital direction and a limitation direction shall not be given in relation to an offender unless at least one of the medical practitioners whose evidence is taken into account by the court under subsection (2) above has given evidence orally before the court.

(5) A hospital direction and a limitation direction shall not be given in relation to an offender unless the court is satisfied on the written or oral evidence of the registered medical practitioner who would be in charge of his treatment, or of some other person representing the managers of the hospital that arrangements have been made—(a) for his admission to that hospital; and (b) for his admission to it within the period of 28 days beginning with the day of the giving of such directions; and the court may, pending his admission within that period, give such directions as it thinks fit for his conveyance to and detention in a place of safety ...

(8) Section 38(1) and (5) and section 39 above shall have effect as if any reference to the making of a hospital order included a reference to the giving of a hospital direction and a limitation direction.

(9) A hospital direction and a limitation direction given in relation to an offender shall have effect not only as regards the relevant sentence but also (so far as applicable) as regards any other sentence of imprisonment imposed on the same or a previous occasion.

(10) The Secretary of State may by order provide that this section shall have effect as if the reference in subsection (2) above to psychopathic disorder included a reference to a mental disorder of such other description as may be specified in the order.'

This section confers a power exercisable in the case of those upon whom automatic life sentences were required to be imposed under s 2 of the 1997 Act and (by virtue of para 1(4) of Sch 11 to the 2000 Act) s 109 of the 2000 Act, but the section only applies to those suffering from psychopathic disorder since the power conferred by sub-s (10) to extend the application of the section to other descriptions of mental disorder has not been exercised in England and Wales. This is perhaps surprising, given that in Scotland s 59A of the Criminal Procedure (Scotland) Act 1995, inserted by s 6(1) of the Crime and Punishment (Scotland) Act 1997, provides for a disposal by means of a sentence of imprisonment and an allied hospital order in any appropriate case, whatever the nature of the mental disorder.

THE COURT OF APPEAL DECISION

**[14]** Before the Court of Appeal (Criminal Division) (Kennedy LJ, Bell and Cooke JJ) ([2001] EWCA Crim 2861, [2002] 2 Cr App R (S) 189) Mr Davies for the appellant made submissions to very much the same effect as those before the House, although he placed some reliance on art 5 of the convention as well as art 3. The court rejected those submissions. Having heard argument on behalf of the Crown and the Home Secretary, as the House also has done, the court did not accept that the appellant was other than criminally culpable and held (at [27]) that it had been open to Parliament to say, as it had in 1997, that—

'in certain defined cases there is an assumption that the offender presents such a serious and continuing danger to the safety of the public that a hospital order with a restriction order will afford inadequate protection, and there must therefore be a sentence of life imprisonment. Given that a sentence of life imprisonment does afford greater protection to the public, and that the assumption is rebuttable, and that there is no evidence to show that an offender sentenced to life imprisonment will not receive appropriate medical treatment, we find it impossible to see how the

introduction of the statutory assumption can be said to have infringed the appellant's Convention rights.'

THE ISSUES

**[15]** We return to the argument for the appellant, summarised in [5], above.

**[16]** It may be accepted that a sentence of life imprisonment, passed under s 109 of the 2000 Act, is, in part at least, punitive in purpose and effect. The minimum term specified by the judge to be served before release is imposed as retribution for the crime committed. It may also be accepted as wrong in principle to punish those who are unfit to be tried or who, although fit to be tried, are not responsible for their conduct because of insanity: see, generally, *R v H* [2003] UKHL 1, [2003] 1 All ER 497, [2003] 1 WLR 411. But the appellant did not claim to be unfit to plead and advanced no defence of insanity. Instead, he pleaded guilty to an offence of which an essential ingredient was an intention to cause grievous bodily harm to another. The Recorder of Cardiff did not regard the appellant as other than criminally culpable. Had he done so he would not have specified a minimum term based on a notional sentence of eight years. The appellant's mental illness could properly be relied on as mitigating the criminality of his conduct but not as absolving him from all responsibility for it. Mr Davies laid stress on the stigma attaching to a sentence of life imprisonment, which he criticised as unfair in the case of a mentally disordered defendant such as the appellant. It is of course true that conviction of serious violent crime carries a stigma. But the appellant will have been stigmatised less by the sentence passed upon him than by his voluntary admission of guilt.

**[17]** Section 82 of the 2000 Act imposes additional duties on sentencing courts where offenders appear to be mentally disordered. Save where a custodial sentence is fixed by law (as in cases of murder) or falls to be imposed under s 109, the court must consider the offender's mental condition before imposing a custodial sentence. The humanity and fairness of this requirement are obvious. But it cannot, as a matter of national law, be stigmatised as wrong in principle to pass a sentence of imprisonment on a mentally disordered defendant who is criminally responsible and fit to be tried. This is made clear by the terms of s 37 of the 1983 Act, for even where the conditions in sub-s (2)(a)(i) or (ii) are found to be satisfied the court may make a hospital order only if it is also of opinion under sub-s (2)(b) that a hospital order is 'the most suitable method of disposing of the case'. If it is not of that opinion, a sentence of imprisonment may be imposed even on an offender in whose case the conditions in sub-s (2)(a)(i) or (ii) are satisfied. The Court of Appeal in *R v Birch* (1989) 11 Cr App R (S) 202 at 215, pointed out that prison might be chosen as an alternative to hospital either because the offender was dangerous and no suitable secure hospital accommodation was available or because there was an element of culpability in the offence which merited punishment, as might happen where there was no connection between the mental disorder and the offence or where the offender's responsibility for the offence was reduced but not wholly extinguished. There is no divergence in this respect between national law and Strasbourg jurisprudence: in *X v UK* App No 5229/71 (5 October 1972, unreported) the Commission rejected as manifestly inadmissible a complaint by a mentally disordered defendant that he should be held in a psychiatric hospital and not in a prison.

**[18]** There would be strong grounds for challenging the compatibility of s 109 of the 2000 Act with art 3 of the convention if its effect, read with s 37(1) of the 1983 Act, were to deny a mentally disordered defendant qualifying for an

automatic life sentence the medical treatment which his condition required. To subject such a defendant to unnecessary suffering, humiliation, distress and deterioration of his mental condition could properly be regarded as inhuman or degrading treatment or punishment. But that is not a necessary result of these provisions, since s 47 of the 1983 Act gives the Home Secretary power to transfer a defendant sentenced to imprisonment to a hospital where he will receive any medical treatment he needs, and the Home Secretary is obliged to act compatibly with the convention. Thus, as the Recorder observed in this case, the effect of the sentence may be very much the same whether he is sentenced to imprisonment or made subject to a hospital order.

**[19]** If it were shown that a mentally disordered defendant was held in prison, that he was there denied medical treatment, available in hospital, which his mental condition required and that he was suffering serious consequences as a result of such denial, he would have grounds for seeking judicial review of the Home Secretary's failure to direct his transfer to hospital under s 47 of the 1983 Act: see *Keenan v UK* (2001) 10 BHRC 319. But this would not be a challenge based on the compatibility of ss 109 and 37 with art 3. Nor is it the ground of challenge which the appellant makes, or could make, in this case, since the Home Secretary exercised his transfer power promptly. While the interruption of the appellant's medication during the eight days following sentence caused him ill effects, these were not in our opinion of sufficient severity to engage the operation of art 3: see *Ireland v UK* (1978) 2 EHRR 25 at 79 (para 162), *Aerts v Belgium* (1998) 5 BHRC 382 at 404, (para 66).

**[20]** In *R v Buckland* [2000] 1 All ER 907 at 912–913, [2000] 1 WLR 1262 at 1268, the Court of Appeal described s 2 of the 1997 Act as—

> 'founded on an assumption that those who have been convicted of two qualifying serious offences present such a serious and continuing danger to the safety of the public that they should be liable to indefinite incarceration and, if released, should be liable indefinitely to recall to prison.'

In a case where the evidence showed this assumption to be soundly based no issue of compatibility with the convention was likely to arise, but there were very obvious issues of compatibility in any case where it appeared that the court was required to pass a sentence of life imprisonment on a defendant who appeared to present no danger to the public. This was the problem which confronted the Court of Appeal (Lord Woolf CJ, Steel and Richards JJ), after the Human Rights Act 1998 came into force, in *R v Offen* [2001] 2 All ER 154, [2001] 1 WLR 253. The court neatly resolved the problem by holding ([2001] 2 All ER 154 at 171, [2001] 1 WLR 253 at 272 (para 79)):

> 'It therefore can be assumed the section was not intended to apply to someone in relation to whom it was established there would be no need for protection in the future. In other words, if the facts showed the statutory assumption was misplaced, then this, in the statutory context was not the normal situation and in consequence, for the purposes of the section, the position was exceptional.'

Taking advantage of the interpretative licence conferred by s 3 of the 1998 Act, the court concluded ([2001] 2 All ER 154 at 175, [2001] 1 WLR 253 at 277 (para 97)):

'In our judgment, s 2 [of the 1997 Act] will not contravene convention rights if courts apply the section so that it does not result in offenders being sentenced to life imprisonment when they do not constitute a significant risk to the public.'

In his argument for the Home Secretary, Mr David Perry expressly accepted the correctness of this approach, as would we. He moreover accepted that it would apply equally to a mentally disordered defendant, relieving the court of the need to impose an automatic life sentence, and permitting the making of a hospital order, if it were established that there was no need to protect the public against him in future. The making of a hospital order in such circumstances is expressly envisaged by s 37(1B) of the 1983 Act. Thus the complaint of arbitrariness and excessive punishment which might otherwise be made with some force under arts 3 and 5 of the convention is met, first, by pointing to the court's release from the obligation to impose a life sentence where a defendant is shown not to be dangerous and, secondly, where a life sentence is passed, by the imposition of a minimum term reflecting the culpability of the individual defendant (see *R v Lichniak, R v Pyrah* [2002] UKHL 47 at [16], [2002] 4 All ER 1122 at [16], [2002] 3 WLR 1834).

[21] Interpreted in accordance with *R v Offen*, s 109 does not lack an objectively justifiable protective purpose. (1) Defendants sentenced to determinate sentences of imprisonment must be released after serving a specified proportion of their sentences and are subject to recall for a limited period only. If on release they are still dangerous, they are a source of risk to the public. (2) Defendants made subject to hospital orders, whether restricted or not, are entitled to release when the medical conditions justifying their original admission cease to be met: see *R v London South and South West Region Mental Health Review Tribunal, ex p Moyle* [2000] Lloyd's Rep Med 143 at 150, *R (on the application of Von Brandenburg (aka Hanley)) v East London and The City Mental Health NHS Trust* [2001] EWCA Civ 239 at [18], (2001) 61 BMLR 206 at [18], [2002] QB 235. Further, they are liable to recall only on medical grounds. They may be a source of danger to the public even though these medical conditions are not met. While it is possible to argue, as Mr Davies did, about the magnitude of this risk, it cannot be said not to exist. (3) A defendant sentenced to life imprisonment under s 109 is not deprived of all his rights. He may appeal against imposition of the sentence. He may appeal against the minimum term specified by the judge. He is eligible for release on the expiry of that term and is entitled to be released if he is no longer a source of danger to the public. But the decision whether it is safe to release him will be taken by the Parole Board, as an independent body acting judicially, which will not be confined to the medical considerations of which, alone, a Mental Health Review Tribunal may take account, and he is liable to recall indefinitely if he appears to present a danger to the public, the grounds of recall, again, being broader than in the case of a restricted patient. In short, an automatic life sentence affords a measure of control not available under the other available orders. Had it been open to the Recorder to make an order under s 45A (which it was not, because the appellant was not suffering from psychopathic disorder) it seems likely that he would have done so. This would have avoided the ill effects which the appellant undoubtedly suffered as a result of his confinement in prison. We hope that further thought may be given to exercise of the power conferred by s 45A(10).

[22] In the course of his argument for the Home Secretary, Mr Perry gently suggested that Court of Appeal decisions generally encouraging the making of hospital orders where the relevant medical criteria were met might, in the absence of adversarial argument, have given less than adequate weight to the differing conditions governing the release and recall of restricted patients as opposed to life sentence prisoners. He instanced authorities such as *R v Howell* (1985) 7 Cr App R (S) 360, *R v Mbatha* (1985) 7 Cr App R (S) 373, *R v Mitchell* [1997] 1 Cr App R (S) 90, *R v Hutchinson* [1997] 2 Cr App R (S) 60. There may be some force in this criticism, and we would accept that these differing conditions are a matter to which sentencing judges and appellate courts should try to give appropriate weight. The difficulties caused to prison managements by the presence and behaviour of those who are subject to serious mental disorder are, however, notorious, and we would need to be persuaded that any significant change in the prevailing practice was desirable.

RECOMMENDATION

[23] We agree with the Court of Appeal that ss 109 and 37 of the 2000 and 1983 Acts respectively are not incompatible with art 3 (or, for that matter, art 5) of the convention and the appeal should therefore be dismissed. We so recommend.

*Appeal dismissed.*

Kate O'Hanlon Barrister.

# Inter Lotto (UK) Ltd v Camelot Group plc

[2003] EWCA Civ 1132

COURT OF APPEAL, CIVIL DIVISION

PILL, KEENE AND CARNWATH LJJ

8, 9, 30 JULY 2003

*Trade mark – Registration – Effect of registration – Whether owner of registered trade mark having statutory right to use mark overriding another person's common law passing off rights – Trade Marks Act 1994, ss 2, 5(4), 9(1).*

The claimant operated lotteries in public houses under the registered trade mark HOTSPOT. The defendant operated the National Lottery under licence from the National Lottery Commission (NLC). Both parties used the name HOTPICK in relation to their own lottery games. The claimant contended that it had chosen the name HOTPICK in July 2001, had begun to promote that name in August 2001, and that by 17 October 2001 several hundred pubs had already signed up for the game, although it was not until 28 November 2001 that operation of the claimant's HOTSPOT game with a HOTPICK feature was actually commenced. The defendant contended that it chose the name HOTPICKS for its game in August 2001. On 17 October 2001 it caused the NLC to apply to register that name as a trade mark for lottery services. The defendant's HOTPICKS game first became available for play by the public in July 2002. The defendant's application for registration of the sign was opposed by the claimant. In January 2003 the claimant brought proceedings against the defendant for trade mark infringement and passing off. A preliminary issue was ordered to be tried, namely whether 17 October 2001 (the date of the defendant's application for registration as a trade mark, from which the rights of the proprietor of a registered trade mark took effect), was the relevant date at which the claimant's reputation and goodwill for its claim in passing off fell to be assessed. The judge held that the relevant date was the date upon which the defendant had started using the sign HOTPICKS in relation to its product, not the date of the trade mark application. The defendant appealed. It argued, inter alia, that whilst it could not use its trade mark application to defeat any rights acquired by the claimant prior to the application, if no such 'earlier rights' were established by the claimant under s 5(4)[a] of the Trade Marks Act 1994 then any infringing use post-application would be unlawful and could not be relied upon in support of a passing off claim, since to allow it to do so would undermine the 'exclusive rights' given by s 9[b] of the 1994 Act to the proprietor of the trade mark registration. Section 2(2)[c] of the 1994 Act provided that nothing in the Act 'affects the law relating to passing off'.

**Held** – On its proper construction, the clear effect of s 2(2) of the 1994 Act was to confirm that the law of passing off, and accordingly for the purposes of the instant case, the principle that liability in passing off fell to be determined as at the date when the defendant went to the market under the mark or name in question, was

a Section 5, so far as material, is set out at [9], below
b Section 9, so far as material, is set out at [10], below
c Section 2, so far as material, is set out at [8], below

preserved, notwithstanding any apparent conflict or overlap with the provisions of the Act. Whilst the 1994 Act 'by s 5' gave special recognition to rights acquired by use before the date of application for registration of a trade mark, there was no equivalent recognition of the possibility of superior rights being acquired by use after that date. However, that did not mean that such subsequent use was to be disregarded in determining the extent of any potentially competing rights. Section 2(2) left no room in the context of the instant case for the implication of terms, designed by purposive interpretation, to resolve an apparent conflict with passing off law. Accordingly, the appeal would be dismissed (see [35], [36], [44], [45], [53], [54], [56], below).

Decision of Laddie J [2003] 3 All ER 191 affirmed.

**Notes**

For rights conferred by registered trade mark and date from which right runs, see 48 *Halsbury's Laws* (4th edn) (2000 reissue) paras 79, 80.

For the Trade Marks Act 1994, ss 2, 5, 9, see 48 *Halsbury's Statutes* (4th edn) (2001 reissue) 110, 114, 119.

**Cases referred to in judgments**

*British Telecommunications plc v One In A Million Ltd* [1998] 4 All ER 476, [1999] 1 WLR 903, CA.

*Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] 1 All ER 213, [1981] 1 WLR 193, PC.

*Campomar Sociedad Ltda v Nike International Ltd* (2000) 169 ALR 677, Aust HC.

*Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135.

*Percy v Hall* [1996] 4 All ER 523, [1997] QB 924, [1997] 3 WLR 573, CA.

*R v Johnstone* [2003] UKHL 28, [2003] 3 All ER 884, [2003] 1 WLR 1736.

**Appeal**

The defendant, Camelot Group plc, appealed from the decision of Laddie J on 6 June 2003 ([2003] EWHC 1256 (Ch), [2003] 3 All ER 191) whereby, upon determination of a preliminary issue, set out at [4], below in proceedings for passing off brought against the defendant, by the claimant, Inter Lotto (UK) Ltd, he held that the relevant date for assessing Inter Lotto's reputation and goodwill for its claim in passing off was the date upon which Camelot started using the sign HOTPICKS in relation to its product, not the date of the application by Camelot for registration of the mark HOTPICKS. The facts are set out in the judgment of Carnwath LJ.

*Michael Silverleaf QC* and *Michael Hicks* (instructed by *Jones Day Gouldens*) for Camelot.

*Geoffrey Hobbs QC* and *Philip Roberts* (instructed by *McDermott Will & Emery*) for Inter Lotto.

*Cur adv vult*

30 July 2003. The following judgments were delivered.

**CARNWATH LJ.**

INTRODUCTION

[1] The defendant, Camelot, operates the National Lottery under licence from the National Lottery Commission (NLC). The claimant, Inter Lotto, operates lotteries in public houses, under the name, 'HOTSPOT'. The present proceedings concern a particular feature of the lottery organised by Inter Lotto, which enables a player to ask for draw numbers to be selected randomly, and the similar name of a lottery game run by Camelot.

[2] Inter Lotto uses the name 'HOTPICK'. According to its case, the name 'HOTPICK' was chosen in July 2001. In August 2001 it began promoting HOTPICK in conjunction with its registered trade mark 'HOTSPOT', through a sales force targeting public houses in the United Kingdom. Until the middle of September 2001, use of the name HOTPICK was oral, but at that time it was used in printing tickets. It claims that by 17 October 2001 (one of the critical dates for the present proceedings) a total of almost 7,000 pubs had been visited, of which 424 were signed up with Inter Lotto. However, it was not until 28 November 2001 that there was actual operation of its HOTSPOT game, with the 'HOTPICK' feature.

[3] Turning to Camelot's case, it says that it chose the name 'HOTPICKS' for its game in August 2001. On 17 October 2001 it caused the NLC to apply to register the name as a trade mark for lottery services. That application was accepted by the Registrar of Trade Marks and advertised for opposition on 7 August 2002, under the number 2283392. It was opposed by Inter Lotto on 7 November 2002. In the meantime, on 29 April 2002 Camelot had announced the re-naming of the National Lottery draw as 'Lotto' and had begun to advertise the launch of a new 'Lotto Hotpicks' game. The 'Lotto Hotpicks' game first became available for play by the public on 10 July 2002.

[4] In January 2003 Inter Lotto brought proceedings against Camelot for trade mark infringement and passing off. It claims that it has suffered, and is continuing to suffer, significant commercial damage as a result of the confusion between the two games. The present appeal concerns a preliminary issue ordered on 19 March 2003 by Patten J with the consent of the parties in the following terms:

> 'Is the 17th October 2001 (the date on which the National Lottery Commission applied under application 2283392 to register the designation HOTPICKS as a trade mark) the relevant date at which the claimant's reputation and goodwill for its claim in passing off falls to be assessed?'

[5] This issue requires a little elaboration to understand its significance in the context of these proceedings. We are concerned with the relationship of trade mark law and passing off law. Inter Lotto seeks to rely on the well-established principle that liability in passing off falls to be determined as at the date when the defendant goes to the market under the mark or name in question. On this basis its claim is to be judged not earlier than April 2002 when Lotto Hotpicks was first launched, and by which time, according to its case, its own HOTPICK game was well established.

[6] Camelot, however, contends that the relevant date is 17 October 2001, the date of its application for registration. It argues that, under the terms of the Trade Marks Act 1994, it was entitled to register the mark as at that date, unless Inter

Lotto was able to establish a passing off claim by virtue of its own use prior to that date; and that any use since then by Inter Lotto should be regarded as unlawful, and not therefore such as to reinforce Inter Lotto's claim in passing off.

THE RELEVANT LAW

[7] There is no material dispute as to the applicable law of passing off. A trader may not conduct his business so as to lead to the belief that his goods or services are the goods or services of another. To bring such an action the plaintiff must establish a goodwill or reputation attached to his goods or services. The relevant date for that purpose is the date of the commencement of the conduct complained of (see *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] 1 All ER 213 at 221, [1981] RPC 429 at 494 per Lord Scarman). Accordingly, apart from the effect of trade mark law, Inter Lotto would be entitled to rely on any goodwill built up at least by the time Camelot began to market their new game in April 2002.

[8] The debate in this case therefore turns on the interaction of this law with the provisions of the Trade Marks Act 1994. For present purposes, the relevant provisions are as follows. Section 2 provides:

> '(1) A registered trade mark is a property right obtained by the registration of the trade mark under this Act and the proprietor of a registered trade mark has the rights and remedies provided by this Act.
> (2) No proceedings lie to prevent or recover damages for the infringement of an unregistered trade mark as such; but nothing in this Act affects the law relating to passing off.''

[9] Section 3 ff deal with grounds for refusal of registration. Section 5(4) is material to this case:

> '(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented—(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or ...
> A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an "earlier right" in relation to the trade mark.'

[10] Section 9 deals with the rights conferred by a registered trade mark. Subsection (1) provides that the proprietor of a registered trade mark has 'exclusive rights' in the trade mark which 'are infringed by its use in the United Kingdom without his consent'. By subsection (3):

> '(3) The rights of the proprietor have effect from the date of registration (which in accordance with section 40(3) is the date of filing of the application for registration):
> Provided that—(a) no infringement proceedings may be begun before the date on which the trade mark is in fact registered; and (b) no offence under section 92 (unauthorised use of trade mark, &c in relation to goods) is committed by anything done before the date of publication of the registration.'

Section 40(3), there cited, provides that the trade mark when registered is registered 'as of the date of filing of the application for registration', which date is 'deemed for the purposes of this Act to be the date of registration'. Section 92

creates a number of criminal offences of using a trade mark with a view to gain without the consent of the proprietor.

**[11]** Section 32 provides for applications for registration. It requires the applicant to state that the mark is being used in connection with services specified, or that he has a bona fide intention that it should be so used. The registration procedure is covered by s 37 ff. The Registrar makes an initial examination to satisfy herself that the application satisfies the requirements of the Act (s 37). It is then published, and there is an opportunity for any person within the prescribed time to give notice of opposition to the registration stating the grounds of opposition (s 38). If no opposition is given within the prescribed period, or if all opposition proceedings have been withdrawn or decided in favour of the applicant, the Registrar must register the mark, unless matters coming to her notice since she accepted the application show that it was accepted in error (s 40).

**[12]** As already noted, the registration takes effect as of the date of the filing of the application. The trade mark is initially registered for ten years, with the possibility of renewal (ss 42–43). However, a registration may be revoked if it has not been put to genuine use within five years (s 46(1)(a)); or if—

> 'in consequence of the use made of it by the proprietor ..., it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.' (s 46(1)(d).)

The registered mark may also be declared invalid on the ground that it was registered in breach of the requirements for registration, including the ground—'that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied.' (s 47(2)(b).) The right to challenge a registered trade mark on the basis of an earlier right (as defined in s 5(4)) is lost if the owner of the earlier right has for five years knowingly acquiesced in the use of the registered mark (s 48).

DERIVATIONS

**[13]** In the court below, and in the skeleton arguments before us, there was lengthy discussion of the background of the various provisions, going back (in this country) to the Trade Marks Registration Act 1875, and (in the European context) to the 1980 Commission proposals which led in due course to First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1) and Council Regulation (EC) 40/94 (on the Community trade mark) (OJ 1994 L11 p 1).

**[14]** Such historical analysis has to be approached with caution. The background of the 1994 Act was described recently in the House of Lords (see *R v Johnstone* [2003] UKHL 28, [2003] 3 All ER 884 per Lord Walker of Gestingthorpe):

> '[62] The law of trade marks has ancient origins which are preserved in the non-statutory law of passing off. Statutory regulation of trade marks, including a system of registration, was introduced by the Trade Marks Act 1875 and the Trade Marks Registration Act 1875. For much of the twentieth century the operative statute was the Trade Marks Act 1938. In recent times the whole of trade mark law has been re-shaped by the 1994 Act, which was enacted (as its long title states)—"to make new provision for registered trade marks, implementing Council Directive No. 89/104/EEC of 21st December 1988 to approximate the laws of the Member States relating to trade marks;

to make provision in connection with Council Regulation (EC) No. 40/94 of 20th December 1993 on the Community trade mark; to give effect to the Madrid Protocol Relating to the International Registration of Marks of 27th June 1989, and to certain provisions of the Paris Convention for the Protection of Industrial Property of 20th March 1883, as revised and amended; and for connected purposes."

[63] In construing the 1994 Act your Lordships have to approach it as a new statute, the main purpose of which is to implement the directive. Council Directive (EEC) 89/104 to approximate the laws of the member states relating to trade marks (OJ 1989 L40 p 1) (the directive) aims at the partial approximation (but not the complete harmonisation) of the trade mark laws of the member states. The 1994 Act must be construed accordingly (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I–4135 at 4159 (para 8)). But many of the basic concepts in the directive appear to be the same as, or closely similar to, those which have informed the previous domestic law. That is natural enough, since the basic purpose of a trade mark is the same in any national economic system.'

[15] As that summary makes clear, the 1994 Act is a hybrid. There are two main European sources: the Directive, aimed at harmonisation of the national trade marks laws, and the Regulation, introducing the new Community trade mark. However, many of the basic concepts are derived, in some cases solely, from previous domestic law. Old authorities may be of assistance, but:

'... it should not be forgotten at any point that the system is fundamentally different and frequently demands a fresh look.' (*Kerly's Law of Trade Marks and Trade Names* (13th edn, 2001) para 1–11.)

[16] The lack of a single historical point of reference is apparent in relation to the provisions most directly in issue in this case. Section 2(2), on which Inter Lotto principally relies has its counterpart in previous domestic legislation, but the wording has changed. Section 2 of the Trade Marks Act 1938 stated:

'2. No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark, but *nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.*' (My emphasis.)

In the 1994 Act the italicised words have become 'nothing in this Act affects the law relating to passing off'. In the court below it was assumed that this was intended simply to reproduce the existing law, merely simplifying the language. I will return to this point.

[17] Mr Hobbs also referred to parallels in the European context. The preamble to the Directive includes the following:

'... the Directive does not deprive the Member States of the right to continue to protect trade marks acquired through use but takes them into account only in regard to the relationship between them and trade marks acquired by registration; ...

... this Directive does not exclude the application to trade marks of provisions of law of the Member States other than trade mark law, such as

a the provisions relating to unfair competition, civil liability or consumer protection; ...'

(The second paragraph, it seems, represents the reversal, following criticism by the Economic and Social Committee, of the original 1980 proposal, which was expressed in terms designed to *exclude* the application of 'other rules of law of the Member States, such as the provisions relating to fair competition'.) Similarly, b the Regulation makes clear that the new Community system is without prejudice to existing domestic laws; art 106(2) provides:

'This Regulation shall, unless otherwise provided for, not affect the right to bring proceedings under the civil, administrative or criminal law of a Member State or under provisions of Community law for the purpose of c prohibiting the use of a Community trade mark to the extent that the use of a national trade mark may be prohibited under the law of that Member State or under Community law.'

[18] Turning to the grounds of objection to registration, ss 3 and 5 of the 1994 Act ('absolute' and 'relative' grounds for refusal) follow closely the format of d arts 7 and 8 of the Regulation, and conform to arts 3 and 4 of the Directive. In particular, the concept of an 'earlier right', as defined in s 5(4), reflects art 8(4) of the Regulation and art 4(4)(b) and (c) of the Directive. It has no direct parallel in the Trade Marks Act 1938, although there is some overlap with s 11 of that Act (prohibition of deceptive matter; see *Kerly* para 8–104 n14). By contrast, s 7, e which preserves for limited purposes the concept of 'honest concurrent user', has no basis in the Directive (see *Kerly* para 8–112ff).

[19] Section 9(1) of the 1994 Act, defining the rights conferred by a registered trade mark, follows art 9 of the Regulation and art 5 of the Directive. There is, however, no direct parallel in the European provisions for s 9(3) (applying s 40(3)), by which such rights, having been registered, are treated as effective f from the date of the application.

[20] This aspect of the 1994 Act is apparently derived from domestic legislation. Section 19(1) of the 1938 Act provided that a trade mark when registered 'shall be registered ... as of the date of the application for registration'. By contrast, under art 5(1) of the Directive, the rights there defined are conferred g by 'the registered trade mark'; there is no provision for retrospective effect.

[21] Article 9(3) of the Regulation goes a little further than the Directive. It provides that the rights conferred by a Community trade mark 'shall prevail against third parties from the date of publication of registration', but adds:

'Reasonable compensation may, however, be claimed in respect of matters h arising after *the date of publication of a Community trade mark application*, which matters would, after publication of the registration of the trade mark, be prohibited by virtue of that publication. The court seized of the case may not decide upon the merits of the case until the registration has been published.' (My emphasis.)

j Thus, under the Community system, although the mark does not 'prevail' before registration, 'reasonable compensation' can be claimed back to the date of *publication of the application* (not the date of the application itself, as under s 9).

[22] These examples confirm the view that the safest course is to concentrate on the terms of the 1994 Act. Under the *Marleasing* principle, it may be necessary to refer to the terms of the Directive to ensure conformity with the mandatory

European rules for harmonisation. But reference to previous legislation in this country, or cases based on it, is likely to be of limited assistance in resolving problems created by the interaction and reconciliation of the two systems.

THE JUDGMENT BELOW

**[23]** There is some disagreement as to whether the judge correctly understood Camelot's case. Early in the judgment, he summarised the respective contentions as follows:

> '[5] ... Because of the exclusive rights which will exist in NLC's trade mark, all use of Inter Lotto's mark after the date of registration is to be treated as unlawful. As a result, Inter Lotto cannot rely upon any reputation or goodwill generated by such unlawful use (ie after 17 October 2001) in support of its passing off case. ...
>
> [7] ... because Inter Lotto's use of its mark after 17 October 2001 was unlawful, it was, per se, incapable of giving rise to any goodwill and reputation which a court would be prepared to protect. The date of registration of Camelot's mark therefore acts as a guillotine. Only rights accrued before then can be taken into account in support of Inter Lotto's case of passing off.
>
> [8] Inter Lotto's case is that it can rely on all the goodwill built up by its alleged use of the HOT PICK mark from 4 August 2001 until Camelot commenced using HOTPICKS in July 2002. It is not disputed that, absent the special defence which is central to this application, it is the date when the defendant started using its mark which is relevant for determining the passing off claim. ...' ([2003] EWHC 1256 (Ch) at [5]–[8], [2003] 3 All ER 191 at [5]–[8].)

**[24]** That summary, as I understand it, fairly encapsulates the issue before us. However, the judge understood that Camelot was also putting forward a broader case. He explained the two possible formulations in this way ([2003] 3 All ER 191 at [11]):

> 'It is possible to formulate a defence to the passing off action in two ways. First, it could be said that Inter Lotto has no enforceable goodwill and reputation. If that is the case, the claim will fail. Inter Lotto will have no rights which it can assert. The sword is taken from its hand. Second, it could be said that, even if Inter Lotto does have enforceable goodwill and reputation, Camelot cannot be restrained because it has an overriding *entitlement* to do the acts of which complaint is made. In such a case Camelot would have a personal shield. ...'

The judge understood that Camelot's case, as developed in argument, relied on the latter proposition:

> '[Mr Silverleaf] asserted that Camelot's ownership of the '392 mark provided it with an entitlement to use it. He said that his client had a "better" claim than Inter Lotto to the marks in suit. He said that the issue was one of priority of rights and "hierarchy". His client's right to use its registered trade mark overrode any common law rights Inter Lotto might have.'

Much of the rest of his judgment was directed to that second formulation, which he did not accept.

[25] Before us Mr Silverleaf says that the judge misunderstood his case. As he puts in his skeleton argument:

> '27 The judge appears to have started from the basis that Camelot was arguing that trade mark rights are in some way superior to and override passing off rights, even when the passing off rights were acquired prior to the registration of the registered mark: see eg paragraphs 32, 34 (especially the last two sentences), 40 and 41 of the judgment. This is no part of Camelot's case and is obviously wrong. As set out above, registered trade mark rights are only superior to passing off rights which are not established at the date of registration. Passing off rights which are established at the date of registration are earlier rights which invalidate the registration. That is what the 1994 Act provides.'

This he says 'coloured the judge's entire approach to the preliminary issue'. Accordingly, he failed to deal properly with the more limited case that Camelot was putting forward, based on the unlawfulness of any use by Inter Lotto after 17 October 2001.

[26] He accepts that the judge having dealt with the broader issue, correctly formulated the narrower issue (in the introduction to [42]) as follows:

> 'Is Inter Lotto precluded from relying on reputation and goodwill built up on the back of use of the trade mark which, in the circumstances presumed for this application, constituted infringement of the '392 mark?'

However, he says the judge wrongly dealt with that as a question of general 'unlawfulness', rather than in relation to the relative rights of the two parties.

[27] In that part of his judgment, the judge treated the case as based on the principle 'ex turpi causa non oritur actio'. He characterised (at [44]) the 'underlying principle' as being that 'the behaviour of the party has been so heinous that the court will not assist it'. He rejected its application in this case; he said (at [45]):

> 'First, whether or not a party's behaviour has been so bad as to merit exclusion from protection by the court is an issue of fact. Second, the wrongdoing has to be substantial and go to the heart of the right sued on. In my view it is unarguable that trade mark infringement without more amounts to wrongdoing of such a level of depravity as to engage the doctrine. ...'

He also accepted Mr Hobbs' contention (for Inter Lotto) that the principle could not be limited in application to the relations between the two parties to these proceedings. He rejected (at [43]) the possibility that—

> '... the claimant's goodwill and reputation would be simultaneously lawful and protectable against third parties but unlawful and not protectable against the owner of the registered trade mark.'

[28] Mr Silverleaf says that his argument was much less far-reaching than the judge thought. The scheme of the Act is that 'earlier rights' (as defined in s 5(4)) are protected against an applicant for trade mark registration, but subsequent rights are not. That is the effect, on the one hand, of the protection of earlier rights under s 5(4), and, on the other, of the retrospective effect of registration, back to the date of application. As between the parties, that means that the rights

must be defined as at the date of application for registration. How this would affect third parties is not in point; nor is any general principle relating to the 'ex turpi causa' rule.

DISCUSSION

**[29]** The real dispute, in my view, is masked by the form of the preliminary question:

> 'Is the 17th October 2001 ... the relevant date at which the claimant's reputation and goodwill for its claim in passing off falls to be assessed?'

As formulated, this is a question relating to the law of passing off. As such, it answers itself. It is common ground that, under that law, the relevant date is the date of the commencement of the conduct complained of, which, in this case was not earlier than April 2002. The date mentioned—that of the application under the Trade Marks Act—has no direct relevance to passing off law.

**[30]** Camelot's case, as I understand it, does not depend on challenging that aspect of the established law of passing off. It is directed, not so much to the relevant date for the claim, as to what is to be taken into account in determining it. Infringing use after the date of the application must be ignored because it is (prospectively) unlawful.

**[31]** The argument has the following stages: (i) If Inter Lotto can establish its reputation and goodwill as at the date of the application, then it will be able to defeat the registration by virtue of an 'earlier right' as defined in s 5(4). Even after registration, its 'earlier right' would enable it to seek a retrospective 'declaration of invalidity' (s 47(2)(b)). Such an earlier right is only defeated if the owner acquiesces for five years in the use of the registered trade mark (s 48(1)). (ii) By contrast, if it is unable to establish an 'earlier right' as at that date, it will have no valid grounds for opposing registration. The mark once registered will have retrospective effect from the date of application, and Inter Lotto will in principle be liable in damages for any infringing use from that date. (iii) Thus, the date of the application is the critical date for establishing the relative rights of the two parties. Camelot cannot use its trade mark application to defeat any rights of Inter Lotto, acquired by virtue of use before that date. Conversely, if Inter Lotto has acquired no rights by that date, any subsequent infringing use will be unlawful as against Camelot, and cannot therefore be relied on to improve its passing off claim. To allow it to do so would undermine the exclusive rights given by s 9 to the proprietor of the trade mark registration. (iv) The fact that the unlawfulness will only be established retrospectively, following actual registration, cannot affect the principle of the matter. Furthermore, delay caused by opposition proceedings, which on this hypothesis would be unfounded, should not be allowed to improve the objector's rights. (v) This view of the scheme of the 1994 Act is reinforced by s 48. That contains specific provision for the effects of acquiescence by owners of 'earlier rights', as defined in s 5, including rights under passing off law. There is no equivalent recognition of the possibility of 'later rights'—that is, rights acquired, or improved, by use between the dates of application and actual registration.

**[32]** The argument as so put is much narrower than that dealt with by the judge. It is unnecessary to determine whether he correctly understood the submissions made to him at that stage. It is enough to record that Mr Silverleaf does not submit before us that a registered trade mark confers a statutory right to use the mark, which overrides other rights. He accepts, as the

judge said, that the right acquired by registration is a negative right, that is, a right to prevent others infringing.

[33] Furthermore, before us Mr Silverleaf had not based his argument on the 'ex turpi causa' (or 'illegality') principle. In my view he is right not to do so. The difficulties in determining the scope of the principle are notorious (see Law Commission Consultation Paper, *The Illegality Defence in Tort* (Law Com no 160)). However, the starting point is criminal illegality, or (possibly) 'other reprehensible or grossly immoral conduct' (ibid para 1.14; the Law Commission could only find one case, in the 19th century, where the principle had been successfully invoked in relation to conduct which was not also criminal). As the judge observed (at [44]), there is some precedent for its application in the context of trade mark and passing off, where there has been misrepresentation amounting to 'a fraud on the public'. However, nothing of that kind is alleged here. Furthermore, the legislation has provided that, until publication of actual registration, infringing use does not involve any criminal offence (s 9(3)(b)). Given that specific indication in the statute, I do not see how it can be open to us to hold that such use is to be disregarded under some more general 'illegality' principle.

[34] The argument therefore has to be based on the effect, express or implied, of the 1994 Act. In essence, the submission must be that it is inconsistent with the scheme of that Act, and the nature of the exclusive right conferred by registration under it, that it should be overridden by use rights acquired since the date of application.

[35] If we were required or permitted to treat the 1994 Act as a comprehensive legislative scheme governing the relationship between registered trade marks and passing off, I could see much force in this submission. By defining and providing for 'earlier rights', the Act does give special recognition to rights acquired by use before the date of application. There is no equivalent recognition of the possibility of superior rights being acquired by use after that date. The natural implication might be that, in determining the extent of any potentially competing rights, such subsequent use is to be disregarded.

[36] However, I do not think that course is open to us. It is ruled out by s 2(2), which provides expressly that the Act does not affect the law of passing off. This wording, as already noted, is even clearer than the corresponding provision in the 1938 Act. If the section had referred simply to its effect on 'rights of action ... for passing off' there might have been some room for a narrower interpretation: for example, limiting it to rights of action enjoyed by the owner of the trade mark (as the judge suggested at [30]), or rights acquired by another party before the application for registration. However, the clear effect of the section in its present form, in my view, is to confirm that the law of passing off is preserved, notwithstanding any apparent conflict or overlap with the provisions of the Act.

[37] It is fair to say that this position is not wholly unqualified. There is at least one aspect of the 1994 Act which impinges directly on the law of passing off, that is the loss of rights by acquiescence (s 48). However, this is an express provision. In my view, s 2(2) leaves no room in the present context for the implication of terms, designed by purposive interpretation to resolve an apparent conflict with passing off law.

[38] This conclusion is less surprising when one has regard to the history of the two systems of law. Since the beginning of the 20th century trade mark rights have been based on registration, while passing off rights have based on use (see

*British Telecommunications plc v One In A Million Ltd* [1998] 4 All ER 476 at 483–484, [1999] 1 WLR 903 at 910–911, where the history is summarised by Aldous LJ). There has sometimes been an uneasy relationship between the two, but it has never been doubted that they are to be considered separately (see *Campomar Sociedad Ltda v Nike International Ltd* (2000) 169 ALR 677, 46 IPR 481, for a recent authoritative review by the High Court of Australia). The 1994 Act might have been designed to achieve a tidier relationship, but that is contradicted by s 2(2).

**[39]** I acknowledge that this leaves open some questions which may arise in the future, either in this case if and when Camelot's mark is finally registered, or in other more extreme circumstances. The judge ([2003] 3 All ER 191 at [34]) suggested a notional example:

> 'A trader starts to use a trade mark "X". He uses it extensively in relation to particular goods and builds up a valuable reputation and goodwill. At the same time another trader applies to register "X" as a trade mark which he does not use in respect of the same class of goods. At the outset, each trader is ignorant of the existence of the other. After four-and-a-half years, the second trader decides to start using his registered mark. He learns of the first trader and sues for infringement. The [first] trader sues for passing off. Mr Silverleaf argues that not only does the second trader succeed on the infringement proceedings, but the first trader cannot succeed in passing off. The result is that the second trader is entitled to take all the goodwill and reputation which the first trader had built up.'

**[40]** Mr Silverleaf stands by that submission. He says that it is misleading to speak of the second trader 'taking' goodwill and reputation built up by the first trader. He has only done so by use which, by virtue of s 9, is an infringement of the second trader's rights, and for which he has a statutory right to claim damages.

**[41]** Mr Hobbs' position on the notional example is less clear. He accepts, as I understand it, that the first trader's use would in principle be an infringement of the second trader's trade mark rights, as from the date of the application, and that he could claim damages for loss caused by that use (although the measure of damages might be open to question). As to future use, he seemed to have three possible answers. The first was that the first trader would be able to secure revocation of the trade mark under s 46(1)(d), on the basis that its use would be liable to mislead. Alternatively, he submits that both traders would be entitled to injunctions to restrain each other. Finally as a last resort, he falls back on the comforting Latinism—*solvitur ambulando*; in other words, 'things will sort themselves out'.

**[42]** None of these suggestions seems wholly satisfactory, but I do not think that we can resolve this issue within the terms of the preliminary question. The consequences of retrospective effect, in the new Community-led system, may not have been fully worked out in the Act (cf *Percy v Hall* [1996] 4 All ER 523, [1997] QB 924 for the analogous problem of retrospective invalidity in public law). However, these potential future difficulties do not persuade me that, contrary to the clear effect of s 2(2), we can read into the 1994 Act provisions designed to reconcile the two systems for the purposes of the limited question before us.

**[43]** Finally, I should note Mr Silverleaf's submission that, if we were against him, there should be a reference to the Court of Justice of the European

Communities to determine whether this conclusion is compatible with the registration scheme laid down by the Directive and the Regulation. I do not agree. The issue arises from the retrospective effect given by English law to a registered mark back to the date of application. In that respect, as I have already noted, English law provides greater protection for the registered right than is required by the Directive. The problems which it creates are ones of domestic law, and would not be a proper matter for a reference.

[44] For these reasons, which differ in some respects from those of the judge, I would dismiss the appeal.

**KEENE LJ.**

[45] I agree.

**PILL LJ.**

[46] I gratefully adopt Carnwath LJ's summary of the facts. Inter Lotto and Camelot each run lotteries. Inter Lotto used the name HOTPICK for a particular feature of their game, and used it first. They canvassed many public houses to promote the game in the summer of 2001. They began to operate it on 28 November 2001.

[47] Camelot did not begin to operate the game until 10 July 2002, though they had about two months earlier begun to advertise. They had, however, on 17 October 2001 applied (by the National Lottery Commission) to register the name HOTPICKS under the Trade Marks Act 1994 (the 1994 Act) as a trade mark for lottery services.

[48] The preliminary question has been framed with a view to deciding the date at which the respective rights of the parties in the name are to be determined. Mr Silverleaf QC, for Camelot, submits that a complete solution is provided by the 1994 Act and in particular by s 5(4) and s 40(3). It is submitted that the 1994 Act comprehensively provides for the resolution of any conflict which arises between competing claims to particular trade marks, whether the claims arise by virtue of competing registrations or by conflict between registrations and common law rights of action for passing off gained by a user.

[49] Section 5(4) provides:

> 'A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented—(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or (b) by virtue of an earlier right other than those referred to in subsections (1) to (3) or paragraph (a) above, in particular by virtue of the law of copyright, design right or registered designs.
>
> A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an "earlier right" in relation to the trade mark.'

Subsections (1)–(3) specify circumstances in which a trade mark shall not be registered if there is an earlier trade mark, an entity as defined in s 6. Section 40(3) provides:

> 'A trade mark when registered shall be registered as of the date of filing of the application for registration; and that date shall be deemed for the purposes of this Act to be the date of registration.'

[50] Section 5 makes provision for protection of earlier rights but makes the date of application for registration crucial to the resolution of competing claims, it is submitted. Rights crystallise at that date. Under s 5(4) registration should be refused if there existed at the date of application a conflicting passing off right, but a right which comes into existence after the date of application does not affect the grant of registration. Where a trader claims he has a right to sue for passing off which prevents a second trader obtaining a trade mark registration, he has to show that the right existed at the date of application for registration. If he establishes that it does, the application should be refused (or if it has already been granted, it should be declared invalid and removed from the register (s 47(2)). If, on the other hand, a trader claiming that he has a passing off right cannot show that the right existed at the date of application for registration by a second trader, the second trader is entitled to registration and to complain of the use by the first trader of the trade mark from the date of application for registration, though he cannot bring an action for infringement until the mark is registered (s 9(3)). That is so even if the first trader has between the date of application and the grant of registration (which may include the period between the date of application and the second trader's first use of the mark), built up a reputation and goodwill under the mark.

[51] The court has not been told why Inter Lotto did not apply to register HOTPICK when they began their canvass. If Mr Silverleaf's submission is correct, they are plainly in a much weaker position in that they can rely only on events before 17 October 2001 as establishing a claim to reputation and goodwill sufficient to support a claim in passing off against Camelot and not also on events up to the date on which Camelot began to use the mark.

[52] The beguiling feature of Mr Silverleaf's submission is the clear-cut solution it provides. Considerations as to use are subjected to the overriding importance of the application date. It also avoids the potential future difficulties which Carnwath LJ has considered in [41], [42], above. (On the other hand, the apparent unfairness of a mere applicant for registration (with the necessary intent) taking priority over and having a claim for damages against someone who has used the mark for several years subsequent to the date of application is avoided on Inter Lotto's interpretation.)

[53] I agree with Carnwath LJ that the presence in the 1994 Act of s 2(2), which provides in terms that 'nothing in this Act affects the law relating to passing off', is fatal to Camelot's claim on the preliminary point. Carnwath LJ has referred to the principle that liability in passing off falls to be determined as at the date when the defendant goes to the market under the mark or name in question and that principle is preserved. The European sources described by Mr Hobbs QC, for Inter Lotto, and considered by Carnwath LJ in his judgment, demonstrate that the application to trade marks of provisions of domestic law other than trade mark law, such as provisions relating to unfair competition, is not excluded by First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1). The presence of s 2(2) in the 1994 Act in my judgment defeats the submission that the statute creates a scheme whereby the provisions of s 5(4), together with provisions as to the retrospective effects of registration, which are a feature of the statute, prevent any reliance upon reputation and goodwill established by Inter Lotto between the date of Camelot's application and the date at which Camelot began to use the mark.

[54] Section 5 makes detailed provision for the protection of earlier rights, including rights in passing off but it does not follow that passing off rights cannot be acquired after the date of application for registration by the competing party. In specifying circumstances in which a trade mark shall not be registered by reason of the existence of earlier rights, the section does not in my judgment have the effect of preventing later use forming the basis for a claim in passing off. The law of passing off is expressly stated in s 2(2) not to be affected by the Act and the long-recognised possibility of establishing rights by use is thereby preserved.

[55] I see some force in Mr Silverleaf's submission that s 2(2) cannot be given full effect because the Act itself, in s 48, provides a derogation from it, as explained by Carnwath LJ in [37], above. That derogation is a specific and limited one, however, relating to a time limit, and does not defeat the otherwise comprehensive effect of s 2(2). Passing off rights based on use continue to exist at least to the extent that Camelot's claim that all turns upon the date of application for registration cannot in my judgment be accepted.

[56] For those reasons, and the reasons given by Carnwath LJ, I too would dismiss this appeal.

*Appeal dismissed. Leave to appeal refused.*

Kate O'Hanlon Barrister.

# Sharratt v London Central Bus Co Ltd and other appeals (The Accident Group Test Cases) Hollins v Russell and other appeals

[2003] EWCA Civ 718

COURT OF APPEAL, CIVIL DIVISION

BROOKE, HALE AND ARDEN LJJ SITTING WITH CHIEF MASTER HURST AS ASSESSOR

18, 19, 20, 21 MARCH, 22 MAY 2003

*Costs – Order for costs – Conditional fee agreement – Receiving party relying on conditional fee agreement – Receiving party put to his election whether to disclose agreement to paying party or to prove entitlement to costs by other means – Guidance to costs judges where paying party alleges agreement unenforceable because of breach of statutory provisions – Courts and Legal Services Act 1990, s 58 – Conditional Fee Agreements Regulations 2000.*

Conditional fee agreements (CFAs) in relation to the provision of advocacy or litigation services were regulated, inter alia, by the Courts and Legal Services Act 1990. Section 58(1)[a] of the 1990 Act provided that only a CFA which satisfied all of the conditions applicable to it by virtue of that section was enforceable. The conditions included that prescribed information be provided. The prescribed information was specified in the Conditional Fee Agreements Regulations 2000. In costs assessments, although all relevant documents had to be filed with the court, there was no automatic disclosure to the paying party. Paragraph 40.14[b] of the Costs Practice Direction provided that the court could direct the receiving party to produce any document which in the opinion of the court was necessary to enable it to reach its decision and the court could ask the receiving party to elect whether to disclose a particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence. Under the CFA regime defendant liability insurers examined CFAs very closely for defects when they were produced to them and demanded to see claimants' CFAs during costs assessments proceedings, resulting in an increase in disputed assessments and protracted costs proceedings. Six appeals were consolidated in order to address, inter alia, (i) the circumstances in which a court should put a receiving party in detailed costs assessment proceedings to its election, so that it had to choose whether to disclose its CFA to the paying party, or to endeavour to prove its claim by other means; and (ii) the proper construction of the words 'satisfies all of the conditions applicable to it' in s 58(1) of the 1990 Act, and whether any costs or disbursements were recoverable from a paying party in the event of non-compliance with the Conditional Fee Agreements Regulations 2000.

**Held** – (1) Where there was a CFA a costs judge should normally exercise his discretion under the Costs Practice Direction and the procedure by which, where a factual issue was raised which was real and relevant and not a sham or fanciful

a Section 58, so far as material, is set out at [12], [19], [20], below

b Paragraph 40, so far as material, is set out at [55], below

dispute, a claimant was required to prove the facts on which he relied, so as to require the receiving parties (subject to their right of election preserved by para 40.14 of the Costs Practice Direction) to produce a copy of their CFAs to the paying parties in order that they might see whether the 2000 regulations had been complied with and, where a CFA provided for a success fee, whether the liability of the receiving party to pay that success fee was indeed enforceable. If the CFA contained confidential information which was not required to be disclosed for the purposes of fairly determining the receiving party's claim to costs, it might be suitably redacted before disclosure took place. Attendance notes and other correspondence should not ordinarily be disclosed, but the judge conducting the assessment might require the disclosure of material of that kind unless there was a genuine issue as to whether there the CFA was unenforceable as a result of failure to satisfy the applicable conditions (see [71], [72], [80], [81], [220], below); *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185, *Goldman v Hesper* [1988] 3 All ER 97 applied; *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570 distinguished.

(2) A CFA would only be unenforceable if in the circumstances of the particular case the conditions applicable to it by virtue of s 58 of the 1990 Act had not been sufficiently complied with in the light of their statutory purposes to safeguard the administration of justice and afford protection to the client. Costs judges should ask themselves whether the particular departure from a regulation or a requirement in s 58, either on its own or in conjunction with any other such departure in the particular case, had had a materially adverse effect either upon the protections afforded to the client or upon the proper administration of justice. Thus the judge conducting the assessment should first consider the position as between solicitor and client. If the court considered that as between solicitor and client the client would have just cause for complaint because some requirement introduced for his protection was not satisfied, or that the CFA otherwise offended public policy, then the CFA would be unenforceable, and the indemnity principle would operate in favour of the paying party. Even then, however, the client should be able to recover the disbursements which he or she had already financed, whether personally or through a loan, and any after-the-event insurance premium (see [53], [105], [107], [114], [115], [221]–[223], below).

Per curiam. District judges and costs judges must be astute to prevent satellite litigation about costs from being protracted by allegations about breaches of the 2000 regulations where the breaches do not matter. They should remember that the law does not care about very little things, and that they should only declare a CFA unenforceable if the breach does matter and if the client could have relied on it successfully against his solicitor (see [226], below).

Decision of Chief Master Hurst [2003] 1 All ER 353 affirmed.

**Notes**

For the meaning and nature of conditional fee agreements, see Supp to 44(1) *Halsbury's Laws* (4th edn reissue) paras 188, 189.

For the Courts and Legal Services Act 1990, s 58, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1346.

For the Conditional Fee Agreements Regulations 2000, see 11 *Halsbury's Statutory Instruments* (2003 issue) 54.

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## Appeals

*Sharratt v London Central Bus Co Ltd and other appeals (The Accident Group Test Cases)*

The London Central Bus Co Ltd and other appellants in a number of costs-only proceedings known as The Accident Group Test Cases appealed with permission of Chief Master Hurst granted on 12 December 2002 from his decision on 27 November 2002 ([2003] 1 All ER 353) in proceedings between the appellants and Gerald Sharratt and the other defendants in The Accident Group Test Cases.

The Law Society was granted permission to intervene by Brooke LJ on 13 February 2003. The facts are set out in the judgment of the court.

*Hollins v Russell*

The appellant, Bradley Hollins, appealed with permission of Brooke LJ granted on 17 January 2003 from the order of Judge Tetlow on 28 November 2002 in the Oldham County Court allowing the appeal of the respondent, S H Russell from the order of District Judge Simpson on 9 August 2002 in costs-only proceedings between the appellant and the respondent. The Law Society was granted permission to intervene by Brooke LJ on 17 January 2003. The facts are set out in the judgment of the court.

*Tichband v Hurdman*

The appellant, Mark Edward Tichband, appealed with permission of Brooke LJ granted on 13 December 2002 from the order of Judge Holman on 24 October 2002 in the Altrincham County Court allowing the appeal of the respondent, B Hurdman from the order of Deputy District Judge Brooks on 17 July 2002 in costs-only proceedings. The Law Society was granted permission to intervene by Brooke LJ on 13 February 2003. The facts are set out in the judgment of the court.

*Dunn v Ward*

The appellant, Helen Ward, appealed with permission of Brooke LJ granted on 15 December 2002 from the order of Judge Barnett in the Chester County Court on 30 October 2002 allowing the appeal of the respondent, Alison Dunn, from the order of District Judge Wallace in the Chester County Court on 10 June 2002 in costs-only proceedings. The Law Society was granted permission to intervene by Brooke LJ on 13 February 2003. The facts are set out in the judgment of the court.

*Pratt v Bull*

The appellant, Daniel David Michael Bull, appealed from the order of Judge Cotterill in the Taunton County Court on allowing the appeal of the respondent, Dora May Pratt, from the order of Deputy District Judge Roach in costs-only proceedings. The Law Society was granted permission to intervene by Brooke LJ on 13 February 2003. The facts are set out in the judgment of the court.

*Worth v McKenna*

The appellant, James Joseph McKenna, appealed with permission of Brooke LJ granted on 3 December 2002, from the order of Judge Marshall-Evans in the Liverpool County Court on 6 November 2002 allowing the appeal of the respondent, John Joseph Worth from the order of District Judge Wright on 24 April 2002 in costs-only proceeding. The Law Society was granted permission to intervene by Brooke LJ on 13 February 2003. The facts are set out in the judgment of the court.

*Ian Burnett QC, Deborah Taylor* and *Benjamin Williams* (instructed by *Beachcroft Wansbroughs, Carters Solicitors*, Peterborough and *Vizards Wyeth*, Dartford) for the appellants in the TAG Test Cases appeal.

*Timothy Charlton QC* and *Nicholas Bacon* (instructed by *Rowe Cohen*, Manchester) for the respondents in the TAG Test Cases appeal.

*Richard Drabble QC* and *David Holland* for the Law Society as intervenor in all the appeals.

*Richard Drabble QC* and *David Holland* (instructed by *Gruber Garratt*) for the appellants in the Hollins appeal.

*Ian McLaren QC* and *Andrew Hogan* (instructed by *DLA*, Manchester) for the respondents in the Hollins appeal.

*Guy Mansfield QC* and *Nicholas Bacon* (instructed by *Colemans-CTTS*, Manchester) for the appellant in the Tichband appeal.

*Ian McLaren QC* and *Andrew Hogan* (instructed by *DLA*, Manchester) for the respondents in the Tichband appeal.

*Guy Mansfield QC* and *Nicholas Bacon* (instructed by *Amelans*, Manchester) for the appellant in the Ward appeal.

*Ian McLaren QC* and *Andrew Hogan* (instructed by *DLA*, Manchester) for the respondents in the Ward appeal.

*Jonathan Dingle* (instructed by the *Stokes Partnership*) for the appellant in the Bull appeal.

*Ian McLaren QC* and *Andrew Hogan* (instructed by *DLA*, Manchester) for the respondents in the Bull appeal.

*Nicholas Bacon* (instructed by *Irvings*, Liverpool) for the appellant in the McKenna appeal.

*Ian McLaren QC* and *Andrew Hogan* (instructed by *DLA*, Manchester) for the respondents in the McKenna appeal.

*Cur adv vult*

22 May 2003. The following judgment of the court was delivered.

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**BROOKE LJ.**

1. CONDITIONAL FEE AGREEMENTS: THE HISTORY

(i) *The Courts and Legal Services Act 1990*

[1] Until Parliament intervened by legislation in 1990 it was always considered to be contrary to public policy, and therefore unlawful, in this jurisdiction for the financial reward which a lawyer received for his services in connection with litigation to vary depending on the outcome of the litigation.

[2] In 1988 the report of the Review Body on Civil Justice (*Civil Justice Review*, Cm 394) pp 68–69 (paras 384–389) encouraged the Lord Chancellor to re-examine the prohibition on what it described as 'contingency fees and other incentive schemes'. In 1989 the government took this suggestion forward, first in a Green Paper, *The Work and Organisation of the Legal Profession* (Cm 570) and then in a White Paper, *Legal Services: A Framework for the Future* (Cm 740) later that year. These developments led in turn to the enactment of the Courts and Legal Services Act 1990. In s 58 of that Act Parliament decided to permit conditional fee agreements (CFAs) in relation to the provision of advocacy or litigation services in certain narrowly prescribed circumstances.

[3] This section provided the enabling machinery. It was brought into force in July 1993. Two years later CFAs became lawful for the first time. They could only lawfully be made in connection with one or other of the six types of legal proceedings mentioned in art 2(1) of the Conditional Fee Agreements Order 1995, SI 1995/1674. They also had to comply as to form with the Conditional Fee Agreements Regulations 1995, SI 1995/1675.

[4] When he sought approval of the 1995 order in the House of Lords on 12 June 1995 (564 HL Official Report (5th series) cols 1543–1547) the then Lord Chancellor said that the whole purpose of permitting conditional fees in these cases was to extend access to justice. He also wished to increase consumer choice. He had sought to balance the need for clients and solicitors to be free to reach an agreement which reflected their mutual interests according to individual circumstances with the need for a framework which provided appropriate protection for the client. His aims could not be achieved by stifling the scheme with over-regulation.

[5] Against this background the 1995 regulations were comparatively simple. In short, a lawful CFA had to be in writing and state (reg 3):

> '(a) the particular proceedings or parts of them to which it relates ... (b) the circumstances in which the legal representative's fees and expenses ... are

payable; (c) what, if any, payment is due—(i) upon partial failure of the specified circumstances to occur; (ii) irrespective of the specified circumstances occurring; and (iii) upon termination of the agreement for any reason; (d) the amount payable in accordance with sub-paragraphs (b) or (c) above or the method to be used to calculate the amount payable; and in particular whether or not the amount payable is limited by reference to the amount of any damages which may be recovered on behalf of the client.'

[6] The agreement also had to state that immediately before it was entered into the legal representative had drawn the client's attention to the four matters specified in reg 4(2) of the 1995 regulations. One of these matters related to the circumstances in which the client might be liable to pay the fees and expenses of the legal representative in accordance with the agreement (see reg 4(2)(b)).

[7] In those days legal aid was available for those of limited means for a much wider range of legal proceedings than it is today. Although the 1995 order prescribed that fees might be increased (in the event of success) to a maximum of 100%, the Law Society encouraged its members to limit the amount they actually recovered by way of success fee to 25% of the damages recovered. It was not possible between July 1995 and April 2000 for a successful client to recover her solicitor's success fee from the other side. We have been advised by our assessor (see [43], below) that solicitors for the most part accepted the Law Society's recommendations.

[8] In 1998 a new Conditional Fee Agreements Order 1998, SI 1998/1860 repealed the 1995 order. This made CFAs permissible in all proceedings other than criminal proceedings and the family proceedings specified in s 58(10) of the 1990 Act. By a parallel development litigants were being encouraged to obtain legal expenses insurance to protect them from costs orders in favour of the other party if they were unsuccessful. Here, too, they were not able to recover the premium they paid for such insurance from the other party by way of costs if they were successful in the litigation.

(ii) *Three forces at work in the late 1990s*

[9] In the closing years of the last century three forces were at work in parallel with the civil justice reforms associated with Lord Woolf's name which led from his *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (July 1996) through the Civil Procedure Act 1997 to the implementation of the Civil Procedure Rules in April 1999. These three forces were characterised by a greater willingness to look critically at the old shibboleths which used to prohibit any kind of 'contingency fee agreement'; a feeling that more should be done by way of consumer protection for clients who found themselves saddled with financial commitments they did not anticipate when they entered into one of the new CFAs; and the government's desire to move with all reasonable speed towards a radical reform of the demand-led state-funded arrangements for both legal advice and legal aid in litigation.

[10] As to the first of these forces, in February 1998 this court decided the case of *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65, [1998] QB 781. A solicitor had agreed with his wife in March 1993 that he would act for her in litigation on the understanding that he would only recover his profit costs if she succeeded in the action. Millett LJ, with whom Kennedy and Hutchison LJJ agreed, held that this agreement did not offend public policy. He distinguished this type of agreement from a contingency fee agreement which entitled a solicitor to a

reward over and above his ordinary profit costs if he won. The latter was an arrangement which had always been condemned by English courts as tending to corrupt the administration of justice.

**[11]** The Solicitors' Practice Rules 1987 provided that a solicitor engaged in any contentious business might not enter into any arrangement to receive a contingency fee (being defined as a fee payable only in the event of success in the proceedings). Millett LJ, however, was of the view that the fact that a professional rule prohibited a particular practice did not of itself make the practice contrary to law. In saying this he overlooked the decision of the House of Lords in *Swain v Law Society* [1982] 2 All ER 827, [1983] 1 AC 598 where it was made clear that the Solicitors' Practice Rules had the force of a statute, being rules made by the Council of the Law Society with parliamentary sanction for the protection of that section of the public who might be in need of legal advice, assistance or oversight. Indeed, failure to comply may result in a complaint to the Solicitors Disciplinary Tribunal (see Solicitors Act 1974, s 31(2)).

**[12]** In November 1998 the Divisional Court in *Hughes v Kingston upon Hull City Council* [1999] 2 All ER 49, [1999] QB 1193 declined to follow the decision in the *Thai Trading* case for this reason. This court had not, however, pronounced on the matter when what was to become the Access to Justice Act 1999 was going through Parliament. Parliament decided to put the position beyond doubt when it provided in s 27 of the 1999 Act that a new section should be substituted for the existing s 58 of the 1990 Act, and that it should say in terms:

> '(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but ... any other conditional fee agreement shall be unenforceable.'

**[13]** Rule 8 of the Solicitors' Practice Rules 1990, as amended, now provides:

> '(1) A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding, *save one permitted under statute or by the common law*.' (My emphasis.)

**[14]** The words we have emphasised were added in January 1999, following the decision in the *Thai Trading* case. The inclusion of the last five of them soon proved to be unnecessary. In November 1999 this court finally put to rest any lingering confusion. In *Awwad v Geraghty & Co (a firm)* [2000] 1 All ER 608 at 634–635, [2001] QB 570 at 600 per May LJ, with whom Lord Bingham of Cornhill CJ agreed, it refused to follow the *Thai Trading* case and made it clear that there would no longer be any common law developments in this field. Now that Parliament had modified the law which had prohibited all arrangements for receiving a contingency fee in relation to litigation services, there was no room for the court to go beyond that which Parliament had now permitted.

(iii) *The Access to Justice Act 1999*

**[15]** In the meantime the Lord Chancellor had initiated a public debate about the ways in which alternative methods of funding litigation and access to justice might be taken forward, particularly in the light of the pending withdrawal of legal aid from a wide field of litigation. During 1998 this debate was triggered off by the publication of a consultation paper in March (*Access to Justice with Conditional Fees*) and the publication of the responses to that consultation four

months later (*Conditional Fees Consultation—Summary of Responses*). The debate then flowed into Parliament, and in July 1999 the 1999 Act was enacted. Part I created the arrangements for the new Legal Services Commission, and Pt II, which is of concern on these appeals, is entitled 'Other Funding of Legal Services'. a

**[16]** It is unnecessary for the purposes of this judgment to consider the whole of the new arrangements. This court has in any event already covered much of the ground in its judgment in *Callery v Gray, Russell v Pal Pak Corrugated Ltd* [2001] EWCA Civ 1117 at [10]–[13], [2001] 3 All ER 833 at [10]–[13], [2001] 1 WLR 2112, and in the more detailed examination that followed this passage in that judgment. For present purposes it is sufficient to concentrate only on s 27 of the 1999 Act, which is headed 'Conditional Fee Agreements'. b

**[17]** The method by which Parliament chose to proceed was by repealing s 58 of the 1990 Act and substituting two new sections, ss 58 and 58A. This parliamentary device meant that these new provisions found themselves in Pt II of the 1990 Act, which takes its signature tune from its opening subsection. This provides, so far as is material: c

> '17(1) The general objective of this Part is the development of legal services in England and Wales (and in particular the development of ... litigation ... services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.' d

**[18]** We have already recited the substituted s 58(1) of the 1990 Act in full (see [12], above). Section 58(2) makes it clear that for the purposes of this legislation a CFA is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances (see s 58(2)(a)). This covers the type of agreement in the *Thai Trading* case. Further, a CFA provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances (see s 58(2)(b)). Section 58(4) and 58(5) make further provision with which we need not be at present concerned. e f

**[19]** Sections 58(3) and 58A(3), on the other hand, lie close to the heart of the matters we have to decide. Section 58(3) provides: g

> 'The following conditions are applicable to every conditional fee agreement—(a) it must be in writing; (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and (c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.' h

**[20]** Section 58A(3), for its part, provides:

> 'The requirements which the Lord Chancellor may prescribe under section 58(3)(c)—(a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).' j

**[21]** It will be seen that the general effect of these two sections, situated in a part of the statute which promotes the parliamentary purpose of making provision for new or better ways of providing litigation services, is to 'legalise' by

virtue of s 58(1) any CFA which satisfies all the conditions applicable to it. If a CFA does not satisfy all these conditions it will be unenforceable.

(iv) *The indemnity principle*

**[22]** Defendant liability insurers, who have viewed with disfavour the increased financial burden imposed on them by a combination of the 'front-end loading' of the Woolf reforms and the new liability to pay after-the-event (ATE) insurance premiums and success fees to successful claimants pursuant to other provisions contained in Pt II of the 1999 Act, have seized the opportunity of challenging the enforceability of many CFAs by pointing to breaches of one or more of the 'conditions applicable to it'. They argued that, even if they only succeeded in establishing a single breach, they could escape liability to pay any of the costs (and possibly also the disbursements) that were referable to the unenforceable CFA. In other words, it is not only the solicitor's success fee which is at risk, but the cost of all the solicitor's services (or the services of counsel, if rendered under an enforceable CFA), which may on occasion run to many thousands of pounds.

**[23]** Liability insurers were able to take this course through the operation of the indemnity principle (for which see *Harold v Smith* (1860) 5 H & N 381 at 385, 157 ER 1229; *Gundry v Sainsbury* [1910] 1 KB 645 at 649, 653; and *General of Berne Insurance Co v Jardine Reinsurance Management Ltd* [1998] 2 All ER 301, [1998] 1 WLR 1231). This common law principle, by which a paying party cannot be ordered to pay a receiving party more by way of costs than the receiving party is himself liable to pay, is now enshrined in statute, so far as solicitors are concerned, by s 60(3) of the 1974 Act which provides:

> 'A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement.'

**[24]** In 1999 Parliament showed itself well aware of the possible application of the indemnity principle in the context of the reforms it introduced in the 1999 Act, because by s 31 it provided:

> 'In section 51 of the Supreme Court Act 1981 (costs), in subsection (2) (rules regulating matters relating to costs), insert at the end "or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs".'

This section, however, has not yet been brought into force. (It will be noticed that these two sections state the principle in different ways, but that need not concern us for the purposes of these appeals.)

(v) *Concerns about consumer protection*

**[25]** In the autumn of 1999, therefore, the way was clear for the Lord Chancellor to prepare new regulations pursuant to the substituted s 58(3) of the 1990 Act. In the meantime there had been two significant developments in relation to matters of consumer protection (the second of the forces we mentioned in [9], above). The first was the publication by the Law Society in September 1999 of the Solicitors' Costs Information and Client Care Code (the client care code). The other was the publication of a research study by Stella

Yarrow and Pamela Abrams, funded by the Nuffield Foundation, entitled *Nothing to Lose? Clients' Experiences of Using Conditional Fees* (1999).

**[26]** The effect of the client care code was to require solicitors to be much more open in the way they explained to their clients their methods of charging for their services and the potential liabilities their clients might face. 'Costs information' was to be given to the client at the outset of any matter, and also at appropriate stages thereafter, and any information given orally was to be confirmed to the client in writing as soon as possible.

**[27]** The Yarrow and Abrams study provided a snapshot of the experiences of 40 clients and 20 solicitors under the CFA regime that was introduced in 1995. It will be remembered that under this regime clients had to pay their solicitors' success fee out of the damages they recovered (subject to the 25% cap on such recovery which was recommended by the Law Society). This study revealed a considerable degree of ignorance among clients about the ways CFAs worked. Most of them had not been involved in litigation before, and the expression 'no win no fee' could lead to false expectations that no other costs were involved. The authors felt that the 1995 regulations did not set out in sufficient detail solicitors' obligations to inform clients. Although they were aware of the introduction of the client care code it was yet to be seen what impact this would have.

**[28]** It was in this climate that the Lord Chancellor issued a new consultation paper in September 1999 entitled *Conditional Fees: Sharing the Risks of Litigation*. Three of the questions posed in that paper were whether a solicitor should be under an obligation to explain a CFA to the client in addition to providing written information about it; whether he should be required to discuss with the client the desirability of insurance cover in a CFA; and whether he should be under an obligation to advise on the relative advantages and disadvantages of the available insurance products.

**[29]** In February 2000 the Lord Chancellor published the government's conclusions following this consultation (*Conditional Fees: Sharing the Risks of Litigation: The Government's Conclusions Following Consultation*). Although the Law Society and the senior costs judge (see para 84 of that publication) had told the government that they believed the new client care code adequately covered the need to provide additional information about CFAs, the government decided on balance to prefer the views put forward by other respondents and to strengthen that part of the new regulations which required the provision of such information. It also decided to 'draw on the example of the Solicitors Client Care Code' to require the legal representative to provide explanations of the different possibilities open to the client on the insurance front. This part of the paper (para 83) concludes:

> 'If the legal representative recommends a particular product, but also has an interest in doing so, for example because he or she will receive a commission or is a member of the insurers panel of solicitors, then this must also be disclosed to the client.'

(vi) *The Conditional Fee Agreements Regulations 2000*

**[30]** Because the government was committed to introducing its reforms to the legal aid scheme at the beginning of April 2000, it had no opportunity for consultation on the detailed drafting of the new regulations. Instead, the Conditional Fee Agreements Regulations 2000, SI 2000/692 (which we will call

quite simply the CFA regulations or the new regulations in view of their importance in this case) were laid before Parliament on 10 March 2000, and came into force 22 days later. The Conditional Fee Agreements Order 2000, SI 2000/823 was made on 20 March, as was a commencement order (SI 2000/774) which brought ss 27–30 of the Access to Justice Act 1999 into force on 1 April. Mr Guy Mansfield QC, who appeared for two of the claimants and who in a different capacity was concerned on behalf of the Bar Council in these matters, told us that it was his recollection that copies of the new regulations were sent by the Lord Chancellor's Department to the Bar Council and the Law Society for the first time about a week before they were due to come into force. They differed from their predecessors in a number of significant respects.

**[31]** Regulation 2 of the new regulations is very similar to reg 3 of the 1995 regulations (for which see [5], above). It starts by saying that a CFA 'must specify' as opposed to 'an agreement shall state'. The first three matters that have to be specified are very similar to their predecessors. Regulation 2(1)(d) refers to—

> 'the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client.'

This differs from reg 3(d) of the 1995 regulations in using the conjunction 'whether' rather than 'whether or not'.

**[32]** Regulation 2(2) of the new regulations provides:

> 'A conditional fee agreement to which regulation 4 applies must contain a statement that the requirements of that regulation which apply in the case of that agreement have been complied with.'

This is similar to reg 4(1) of the 1995 regulations, which required a CFA to state that various specified matters had been drawn to the client's attention immediately before the agreement was made.

**[33]** Regulation 3 of the new regulations contains requirements for the contents of CFAs providing for success fees. For the purposes of this judgment it is necessary only to set out the terms of reg 3(1) and (2)(a):

> '(1) A conditional fee agreement which provides for a success fee—(a) must briefly specify the reasons for setting the percentage increase at the level stated in the agreement, and (b) must specify how much of the percentage increase, if any, relates to the cost to the legal representative of the postponement of the payment of his fees and expenses.
>
> (2) If the agreement relates to court proceedings, it must provide that where the percentage increase becomes payable as a result of those proceedings, then—(a) if—(i) any fees subject to the increase are assessed, and (ii) the legal representative or the client is required by the court to disclose to the court or any other person the reasons for setting the percentage increase at the level stated in the agreement, he may do so …'

**[34]** Regulation 4 of the new regulations is a considerably expanded version of reg 4 of the 1995 regulations, as foreshadowed in the paper setting out the government's conclusions (*Conditional Fees: Sharing the Risks of Litigation: The Government's Conclusions Following Consultation*). It provides, so far as is material:

'4. **Information to be given before conditional fee agreements made**

(1) Before a conditional fee agreement is made the legal representative must—(a) inform the client about the following matters, and (b) if the client requires any further explanation, advice or other information about any of those matters, provide such further explanation, advice or other information about them as the client may reasonably require.

(2) Those matters are—(a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement, (b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so, (c) whether the legal representative considers that the client's risk of incurring liability for costs in respect of the proceedings to which the agreement relates is insured against under an existing contract of insurance, (d) whether other methods of financing those costs are available, and, if so, how they apply to the client and the proceedings in question, (e) whether the legal representative considers that any particular method or methods of financing any or all of [the costs in respect of the proceedings to which the agreement relates] is appropriate and, if he considers that a contract of insurance is appropriate or recommends a particular such contract—(i) his reasons for doing so, and (ii) whether he has an interest in doing so.

(3) Before a conditional fee agreement is made the legal representative must explain its effect to the client ...

(5) Information required to be given under paragraph (1) about the matters in paragraph 2[(c)] and the explanation required by paragraph (3) must be given both orally and in writing.'

**[35]** It will be noted that reg 4(2)(e)(ii) gives effect to the government's identification of the need for a legal representative to disclose any interest he may have when he recommends a particular insurance product.

**[36]** Both the Law Society and the Bar Council published new model forms of CFA very soon after the new regulations came into effect. The Law Society's April 2000 model CFA was replaced three months later by their July 2000 model CFA. The later model made a change to a provision in the earlier model which has come under attack in these proceedings. No doubt if the new regulations had not been introduced in such a rush the Law Society would have had more time to identify any imperfections in their original draft. Time, however, did not allow for this. It is against this background that we have to consider the merits of the defendants' contentions that any such imperfection rendered the whole CFA unenforceable with the result that the solicitor who achieved a successful result for his client without a fee would be left seriously out of pocket.

(vii) *Two other contemporary concerns*

**[37]** Before we consider the appeals there are two other contrasting contemporary concerns that we should mention. The first is that the government was also concerned at the same time with the activities of unregulated claims assessors who had no legal qualifications and who were acting for clients usually on a 'no win no fee' contingency basis. This may be linked to a perception that people are becoming too 'litigation minded', pursuing compensation for minor injuries which they would previously have shrugged off. On the other hand there was the growing perception in some quarters that traditional methods of conducting legal business were regarded quite widely as

being not particularly 'client friendly', and that many people who had suffered injuries through someone else's fault were not pursuing their right to compensation for this reason.

**[38]** In early 2000 the Lord Chancellor published the report of a committee chaired by Mr Brian Blackwell into the first of these matters (*Report of the Lord Chancellor's Committee to Investigate the Activities of Non-Legally Qualified Claims Assessors and Employment Advisers* (the Blackwell Report)). The committee reported that one claims management company believed that 11·2 million accidents occurred in this country each year, and that in over two million of these the injured person blamed someone else for the accident. Only 350,000 made compensation claims, so that on this reckoning there was a potential market of 1·7 million additional claims for personal injury compensation each year. Although the committee noted certain deficiencies in the services rendered by some of these unregulated claims assessors, the majority of the committee considered that it had not unearthed sufficient public disquiet about their activities to justify a ban on their activities, particularly as such a ban could restrict consumer choice and access to justice.

**[39]** The views of one experienced solicitor on this developing scene are best reflected in the evidence given by Mr Stewart McCulloch in *The Accident Group (TAG) Test Cases*. He is head of the personal injury department in a firm of solicitors in Huyton, and has had 18 years' experience in that field of practice. He described how the higher levels of client care and service demanded in the 1990s by both legal expenses insurers and the Legal Aid Board demanded a level of investment in IT systems which could only be supported by an increase in the volume of work undertaken by the firm. The demise of legal aid and the arrival of the new ways of doing business facilitated by Pt II of the 1999 Act persuaded him that there was a pressing need to be able to process cases in large numbers without diluting quality.

**[40]** He was of the view that his profession would have to look at innovative ways of providing a national or regional service without losing the essential qualities previously offered to clients on the basis of a bespoke local service. His hope was that in this way access to justice would be maintained and that a higher quality service would emerge in time such as would also reduce the number of hopeless claims.

## 2. THE SIX APPEALS

### (i) *The issues they raise*

**[41]** To an increasing degree defendant liability insurers have not been content merely to scour CFAs for defects when they have been produced to them. They have also been demanding to see the claimant's CFA during the assessment proceedings. Resistance to this demand has also led to a significant amount of litigation. We understand that whereas disputed assessments were once comparatively rare, they have now become commonplace.

**[42]** Because of the prevalence of these challenges, the Civil Appeals Office have brought together a number of different appeals that illustrate different elements of the trench warfare which is now being waged between claimants' solicitors and solicitors acting for liability insurers before district judges and circuit judges up and down the country. Most of them have now come to this court as second appeals because they raise important points of practice. One, an

appeal from Master Hurst, the senior costs judge, has been directed to be heard by this court as a first appeal for similar reasons.

**[43]** It was agreed between the parties that the appeals raised three distinct issues: (i) the circumstances in which a court should put a receiving party in detailed assessment proceedings to its election, so that it must choose whether to disclose its CFA to the paying party or to endeavour to prove its claim by other means (*Pratt v Bull, Worth v McKenna*); (ii) the proper construction of the words 'satisfies all of the conditions applicable to it' in s 58(1) of the 1990 Act and whether any costs or disbursements are recoverable from a paying party in the event of non-compliance with the CFA regulations (all cases); (iii) whether, on particular facts, the requirements contained in one or other of regs 2, 3 and 4 of the CFA regulations were not complied with (*Hollins v Russell* (see reg 2), *Tichband v Hurdman* (see regs 2 and 3), *Pratt v Bull, Dunn v Ward* and the *TAG Test Cases* (see reg 4)). Master Hurst sat as our assessor for the first two days of the hearing, when we were concerned with issue (i) and the first four appeals mentioned under issue (iii), and we benefited from his wise advice.

(ii) *The concerns of the interveners*

**[44]** Before we come to consider and determine these six appeals, there are two other matters to which we must refer. In addition to the parties the Civil Appeals Office, on Brooke LJ's instructions, invited submissions from a few representative organisations who were known to have an interest in the outcome of these appeals. As a result we received helpful written submissions from the Association of Personal Injury Lawyers (APIL), the Motor Accident Solicitors' Society (MASS), and the Forum of Insurance Lawyers (FOIL). We also received helpful written and oral submissions from the Law Society.

**[45]** APIL's paper in particular described vividly the difficulties faced by claimants' solicitors up and down the country as a consequence of defendant insurers' uncompromising tactics. APIL has 5,000 members who are solicitors and barristers practising on behalf of claimants in the fields of personal injury and clinical negligence. They thought that we might be helped by knowing of the experience of their members in the daily operation of the CFA regulations, and how issues such as those now being argued were having and might yet have, in their opinion, a significant impact on citizens' access to justice.

**[46]** It appears that 40–60% of the CFA caseload of a significant number of members of APIL is now affected by technical challenges like these, which often evaporate as the date of detailed assessment approaches. These tactics are delaying the payment of costs. This leads inevitably to a serious effect on cashflow for those undertaking professional work of this kind, and a backlog of fee recovery work not only in members' offices but also in local courts. Their submission contained the following comments:

> 'Our members talk about the uncertainty of undertaking claimants' personal injury work when it is impossible to know whether they will ever be paid for the work they are doing ... A disproportionate amount of solicitors' time is being spent sorting out these cases ... [Our members] fear that their clients are fast losing confidence in the legal system, seeing "technical challenges" as a means of depriving them of what has been recovered for them, if indeed they understand the matter at all ... Many of our members have used the word "bewildered" to describe their clients' states of mind when told about these challenges ... Many of our members

have indicated that they will not seek to recover any costs from the client in the event that the CFA is technically invalid. The loss will fall on the solicitor, who has done a competent job for his client and recovered damages for him, but will not be paid at all.'

[47] We should also point out that the delay and uncertainty will have damaging effects for those claimants who have paid, or borrowed money to pay, for disbursements on such things as medical reports and any ATE insurance premiums. One of the parties wrote to draw our attention to this particular problem.

[48] APIL fear that in the medium or longer term many of their members will simply not continue to offer legal services under CFAs. While not seeking to defend CFAs which are substantially defective, APIL urged us to adopt an approach to these appeals which would tend to uphold the enforceability of the CFAs as between solicitor and own client and to avoid bestowing windfalls on defendant insurers at the expense of claimants' solicitors in the short term and of access to justice in the longer term. We received a similar message, couched in varying terms, from the other bodies representing solicitors, and in particular from the Law Society. The Law Society's views deserve particular weight, as they represent all solicitors, acting for all kinds of party in all kinds of litigation. CFAs are now being used in many different types of case, including complex commercial litigation far removed from the simple personal injury claims in the cases before us. Whatever the approach to emerge from these cases, it must be appropriate to the wide variety of circumstances in which CFAs are now being made.

(iii) *The concerns of the House of Lords*

[49] On the other side of the coin, defendant insurers drew our attention to the anxieties expressed by different members of the House of Lords in *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000 in relation to the opportunities for abuse opened up by the new legislative regime. These stemmed largely from the fact that the client is unlikely to be very concerned about the details of a CFA because no liability will fall on her. If she wins, she will recover her costs, plus any additional liabilities, from the defendants. If she loses, she will be protected from paying the other side's costs by ATE insurance, which will often cover her own costs as well. If it does not, her solicitors will not charge her anything. Concerns about potential abuse are contained, for instance, in the speeches of Lord Bingham of Cornhill (at [5] and [10]) and Lord Nicholls of Birkenhead (at [12]–[16]).

(iv) *Matters of common ground*

[50] By the end of the four-day hearing into these six appeals, it was clear that there was common ground on two important matters. The first was that the maxim that the law does not care about very small matters must be applied when a court considers whether there has been compliance with any of the CFA regulations or what the effect of non-compliance will be. The second was that except to the extent discussed at [83]–[84], below the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) has no part to play in our consideration of these appeals. Although the applicability of art 1 of the First Protocol to the convention was much canvassed in some of the skeleton arguments, it was

eventually conceded by the claimants that neither the claimants' nor their solicitors' potential right to recover costs under a questionable CFA could possibly constitute 'possessions' within the meaning of that article. The Strasbourg case of *Marckx v Belgium* (1979) 2 EHRR 330 at 350 (para 50), [1979] ECHR 6833/74 is clear authority for the proposition that where there are no property rights which pre-exist the interference complained of, the article is not engaged.

3. DISCLOSURE OF CFAs

**[51]** In *Pratt v Bull* and *Worth v McKenna*, the paying parties sought to resist liability for any of the costs ordered against them on the grounds that the CFAs under which such costs were claimed were unenforceable by virtue of s 58 of the 1990 Act, and that accordingly it would be in breach of the indemnity principle to award any costs against them in the assessment of costs. Judge Cotterill and Judge Marshall-Evans QC were both of the view that the CFA entered into by the receiving party need not be disclosed to the paying party because the solicitor to the receiving party had certified on the bill of costs presented for assessment in the usual way that the costs claimed therein did not exceed the costs which the receiving party was required to pay to the receiving party's solicitors. In addition, they both found that the paying party had not demonstrated to their satisfaction any real ground for challenging the enforceability of the CFA and accordingly that this certificate raised a presumption that the indemnity principle was not infringed. The presumption was only a rebuttable presumption, but in the circumstances there was nothing to rebut it.

**[52]** The starting point is s 58(1) of the 1990 Act (set out at [12], above). Section 58 has to be read with the indemnity principle in mind, which (as explained at [22] and [23], above) itself has statutory force. It follows that the paying party will not be liable to pay costs to the receiving party if the fees sought by the solicitor are sought under a CFA which is not rendered enforceable by s 58(1). This section does not provide that such an agreement shall be unenforceable only as between the paying party and his solicitor. We deal with the argument that it should be so construed at [92]–[95], below. For present purposes, it is enough to say that if that were its construction, it would cut across the well-established indemnity principle.

**[53]** Accordingly, we must take it to be the policy of Parliament that the paying party should be protected by the indemnity principle in relation to the CFA entered into by the receiving party. In other words, that he should be entitled to object to paying costs which he has been ordered to pay if they are made payable by a CFA which is not rendered enforceable by s 58(1).

**[54]** It is not as we see it the policy of the 1990 Act to allow recovery of success fees come what may, or to allow fees under a CFA to be recovered from the paying party come what may, even if that is necessary to ensure the financial viability of CFAs. Nor is it a question of the paying party being the only real policeman of CFAs, even though in practice, the receiving party is unlikely to have any incentive to take the point that the agreement between him and his solicitor is unenforceable. There is nothing to suggest that the paying party is the gatekeeper chosen by Parliament to ensure compliance with s 58(1).

**[55]** In order to explain our conclusions, it is necessary to describe the practice on assessment as respects the disclosure of documents to the paying party or his solicitors. Although all relevant documents must be filed with the court, there is no automatic disclosure of these documents to the paying party. However,

para 40.14 of the Costs Practice Direction provides (in relation to detailed assessment) as follows:

> 'The court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence.'

**[56]** Reference to the case law demonstrates the circumstances in which the court will exercise its discretion under this rule. In *Goldman v Hesper* [1988] 3 All ER 97, [1988] 1 WLR 1238, the Court of Appeal held that it would be rare to exercise this discretion under RSC Ord 62, r 29, which contained provisions now to be found in CPR 47.6 and that part of the Costs Practice Direction that relates to Pt 47. By lodging his documents with the court, the claimant waived his legal professional privilege to that extent. If there was a challenge in good faith to any item of costs, the taxing master could put the receiving party to his election and if the document was produced disclosure would be for the specific purpose of taxation of costs only. Accordingly, the privilege could be asserted on other occasions thereafter.

**[57]** This procedure was based on the judgment of Hobhouse J in *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185 at 190–191, [1985] 1 WLR 689 at 696–697. Hobhouse J held:

> 'The [costs judge] does not have any power to order discovery to be given; he does not have any power to override a right of privilege. But it is the duty of the [costs judge], if the respondent raises a factual issue, which is real and relevant and not a sham or fanciful dispute, to require the claimant to prove the facts on which he relies. The claimant then has to choose what evidence he will adduce and to what extent he will waive his privilege. That is a choice for the claimant alone. The [costs judge] then has to decide the issue of fact on the evidence. In considering whether he is satisfied by the evidence, the [costs judge] will no doubt take into account that the claimant may have a legitimate interest in not adducing the most obvious or complete evidence, and may prefer to rely on oral evidence rather than producing privileged legal documents.'

**[58]** In the later case of *Hazlett v Sefton Metropolitan BC* [2000] 4 All ER 887, the principle that there must be a genuine dispute raised by the paying party was reiterated by the Divisional Court (Lord Bingham of Cornhill CJ and Harrison J). Harrison J, giving the judgment of the court, said (at 893):

> 'The need for the complainant to give evidence to prove his entitlement to costs rather than relying on the presumption in his favour will not, however, arise if the defendant simply puts the complainant to proof of his entitlement to costs. If the defendant simply puts the complainant to proof of his entitlement to costs, the complainant would be justified in relying on the presumption in his favour. It would be necessary for the defendant to raise a genuine issue as to whether the complainant is liable for his solicitor's costs before the complainant should be called upon to adduce evidence to show that he is entitled to his costs.'

The court also held (at 892) that—

> 'there is normally a presumption that the complainant will be personally liable for his solicitor's costs and it should not normally be necessary for the complainant to have to adduce evidence to that effect.'

**[59]** Indeed, when the bill of costs is served, it is required to contain a certificate as to accuracy to the effect that the costs claimed in the bill do not exceed costs which the receiving party is required to pay to the solicitors presenting the bill. In *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570, the status of the certificate was elevated. In that case, the claimant succeeded in obtaining damages for personal injuries incurred in the course of his employment. The defendants agreed to pay damages together with costs to be assessed. The claimant was assisted financially by his union. When the bill was presented, the defendants objected to the hourly rate and to the claimant's solicitors' mark-up and asked for evidence that the bill was not in breach of the indemnity principle. In due course a letter was produced to the court from a union representative which stated that the union's relationship with the solicitor was on the basis that the solicitors were entitled to make a full solicitor/client charge. None the less, the district judge held that they were entitled to disclosure of the relevant material. The Court of Appeal (Butler-Sloss, Henry and Judge LJJ) were clearly very concerned about the prospect of satellite litigation in assessment proceedings. The court held that there was no breach of the indemnity principle merely because the successful litigant was a member of a trade union which provided financial support. It was accepted by the paying party that the costs judge was entitled, if he saw fit, to be provided with the information that he needed. Judge LJ held (at 572–573):

> 'The [costs] officer is exercising a judicial function, with substantial financial consequences for the parties. To perform it, he is trusted properly to consider material which would normally be protected from disclosure under the rules of legal professional privilege. If, after reflecting on the material available to him, some feature of the case alerts him to the need to make further investigation or causes him to wonder if the information with which he is being provided is full and accurate, he may seek further information. No doubt he would begin by asking for a letter or some form of written confirmation or reassurance as appropriate. If this were to prove inadequate he might then make orders for discovery or require affidavit evidence ... [I]t would theoretically be open to him to order interrogatories. However, if the stage has been reached where interrogatories might reasonably be ordered the conclusion that the receiving party had not been able to satisfy the [costs] officer about the bill, or some particular aspect of it, would seem inevitable ... [A]n emphatic warning must be added against the over enthusiastic deployment of these powers, particularly at the behest of the party against whom the order for costs has been made ... [T]he danger of "satellite litigation" is acute. As far as possible consistent with the need to arrive at a decision which does broad justice between the parties, it must be prevented or avoided, and the additional effort required of the parties kept to the absolute minimum necessary for the [costs] officer properly to perform his functions.'

**[60]** The court attached considerable importance to the fact that solicitors are officers of the court and that they are trusted not to mislead the court or to allow

it to be misled. Accordingly, the court indicated that it would expect solicitors to disclose the existence of a limit on the fees which they could recover from their client. Judge LJ said (at 575):

> 'They would not have produced and signed a bill of costs which included a claim for "reasonable costs" which would have fallen foul of the indemnity principle ... [I]n the ordinary case in which a "client care letter" has been provided (and certainly if and when the client care letter becomes obligatory), the hourly rate claimed in the bill of costs should coincide with the terms of that letter ... [I]n view of the increasing interest taken in this issue by unsuccessful parties to litigation, coupled with the developing practice in relation to conditional fees, the extension of the "client care" letter and contentious business agreements under s 60(3) [of the Solicitors' Act 1974], in future, copies of the relevant documents (where they exist) or a short written explanation ... should normally be attached to the bill of costs. This will avoid skirmishes which add unnecessarily to the costs of litigation.'

**[61]** Our assessor has drawn our attention to para 40.2(i) of the Costs Practice Direction, under which (if there is a dispute as to the receiving party's liability to pay costs to her solicitor) a copy of the client care letter must be produced to the costs judge. He tells us that the client care letter is also from time to time disclosed to the paying party. The client care letter, however, is not the same as the CFA although the CFA is often an integral part of the client care letter as we shall see in the *TAG Test Cases*.

**[62]** Henry LJ (at 575–576) also highlighted the importance of the signature by the solicitor to the bill of costs:

> 'In so signing he certifies that the contents of the bill are correct. That signature is no empty formality. The bill specifies the hourly rates applied, and the care and attention uplift claimed. If an agreement between the receiving solicitor and his client ... restricted (say) the hourly rate payable by the client, that hourly rate is the most that can be claimed or recovered on [detailed assessment] ... The signature of the bill of costs under the rules is effectively the certificate by an officer of the court that the receiving party's solicitors are not seeking to recover in relation to any item more than they have agreed to charge their client ... For the avoidance of doubt, I also agree that the [costs] officer may and should seek further information where some feature of the case raises suspicions that the whole truth may not been told. And the other side of a presumption of trust afforded to the signature of an officer of the court must be that breach of that trust should be treated as a most serious disciplinary offence.'

**[63]** The principles established in the case law we have just described have been seized upon by the respondents both here and below. They contend in essence that, once the solicitor has certified the accuracy of the costs due to his firm, the onus switches to the paying party to show some genuine ground why that certificate may be inaccurate. Specifically this would mean that the paying party in relation to a CFA would have to show some grounds why it may be unenforceable notwithstanding s 58(1) of the 1990 Act.

**[64]** In our judgment, *Bailey*'s case is distinguishable. It was directed to a very different type of challenge. The paying party was not saying that there was no liability at all to pay any costs to the receiving party. The challenge was directed

to the hourly rate and mark-up being applied. The challenge to a bill of costs must surely move several ratchets up the scale once the challenge changes from a challenge to the figures produced to a challenge to the principle of paying anything at all. It is, of course, true that in respect of many items in a bill the paying party cannot be sure that they are properly incurred without sight of the underlying document. But in most cases the solicitors' certificate as to accuracy will be sufficient (see [65], below) and paying parties are frequently content to rely on the costs judge. A potential challenge to the whole of a bill by reason of its non-compliance with s 58 of the 1990 Act is of a very different order.

**[65]** The second reason for distinguishing *Bailey*'s case is that the matters which are normally the subject of a certificate as to accuracy are conventional matters. They would include such matters as whether particular advice related to the proceedings, or the correctness of the charging rates. The position is very different with CFAs made under the new regulations. These introduced a level of complexity as then unknown. Moreover, many of the matters required to be covered by the new regulations are not conventional costs matters at all. This can be seen from the contents of the new regulations and the particular issues which have arisen in the appeals in *Tichband v Hurdman, Hollins v Russell* and *Dunn v Ward.*

**[66]** Our third reason for distinguishing *Bailey*'s case is that the measure of detail provided by a solicitors' bill in normal circumstances is far greater than the information which the paying party will receive about the success fee under the CPR and the Costs Practice Direction. The only documents under those rules which have to be served on the paying party merely because there is a success fee are: (a) Form N251 (this confirms that particular claims are funded by a conditional fee agreement of a specified date providing for a success fee. The requirement to produce this information is duplicated by para 19.4(2) of the Costs Practice Direction); (b) the solicitors' bill showing the amount of the success fee; (c) a statement showing the amount of the costs which have been summarily assessed or agreed and the percentage increase which has been claimed in respect of those costs (see para 32.5(1)(a) of the Costs Practice Direction); (d) a statement of the reasons for the percentage increase given in accordance with reg 3(1)(a) of the CFA regulations (see para 32.5(1)(b) of the Costs Practice Direction). The receiving party may disclose the risk assessment schedule for this purpose; (e) where points of dispute are served, information about other methods of financing the costs which were available to the receiving party (see para 35.7 of the Costs Practice Direction).

**[67]** In addition, the paying party will have the assurance of the certificate as to accuracy attached to the bill. However, the information listed above is extremely basic. There is, for example, no requirement in the CPR or the Costs Practice Direction to specify or disclose the circumstances in which the success fee became payable. Obviously, the solicitor certifying the accuracy of the bill cannot properly certify its accuracy if a success fee has not become payable. However, the condition of the payment of a success fee may not be success in obtaining an order for the payment of damages. It may be conditional, for example, upon receipt of some of those damages. Yet details of the circumstances in which the success fee becomes payable for the purpose of s 58(2) of the 1990 Act are not required to be served on the paying party. In a summary assessment only the risk assessment schedule forming part of the CFA is required to be produced to the court (see para 14.9(3) of the Costs Practice Direction).

[68] In our judgment, the solicitors' certificate as to accuracy, important though it is, may not be sufficient where the quality and quantity of the information served on the paying party about the success fee is less than would be made available in respect of the other aspects of the bill in the case of an assessment where there is no additional liability claimed.

[69] Our fourth reason for distinguishing *Bailey*'s case is that the question whether the CFA complies with the 1990 Act is principally a matter of law. The question whether costs are properly claimed and the amount of the charging rates and like issues raised by conventional bills are generally questions of fact likely to be within a solicitor's peculiar expertise. Matters of law are not. That factor, too, would lead to the conclusion that the certificate as to accuracy may not be sufficient in the context of CFAs.

[70] Fifthly, there are policy reasons for not extending the decision in *Bailey*'s case to CFAs. Given the complexity of the new regulations, it is not appropriate to impose on costs judges or district judges the responsibility of acting as a filter to see that the new regulations are complied with in every respect. This would be both a complex and time-consuming task, particularly as this would require reference to other documents (for example, attendance notes). Checking whether the CFA complies with the new regulations is likely to consume considerable court resources. Moreover, there will be many cases in which the costs judge or district judge simply cannot be satisfied that the regulations were fully complied with.

[71] In all the circumstances, we have come to the conclusion that the decision in *Bailey*'s case should not be extended beyond the facts with which it was dealing, namely that of a conventional bill, so as to obviate disclosure of the CFA as the norm. As we see it, where there is a CFA, a costs judge should normally exercise his discretion under the Costs Practice Direction and the procedure in *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185, [1985] 1 WLR 689 so as to require the receiving parties (subject to their right of election preserved by para 40.14 of the Costs Practice Direction and *Goldman v Hesper* [1988] 3 All ER 97, [1988] 1 WLR 1238) to produce a copy of their CFAs to the paying parties in order that they can see whether or not the new regulations were complied with and (where a CFA provides for a success fee) whether the liability of the receiving party to pay that success fee is indeed enforceable. We consider that this is appropriate where receiving parties may claim more than they would otherwise be entitled to in circumstances in which their whole claim may turn out to be unenforceable. Non-compliance may be sufficient to remove the paying party's liability. The court is entitled and bound to have regard to the interests of paying parties, and those to whom they pass on the costs (see in this connection the concerns of the House of Lords referred to at [49], above), as well as those of receiving parties. If these appeals are a fair measure of CFAs in general use, it is apparent that mistakes in complying with the new regulations are not uncommon. In these circumstances we consider that greater transparency is desirable. As Brandeis J, the great justice of the Supreme Court of the United States, once remarked extra-judicially, sunlight can often be the best of disinfectants.

[72] If the CFA contains confidential information which is not required to be disclosed for the purposes of fairly determining the receiving party's claim to costs, for example privileged material with respect to issues other than those which have been disposed of by the settlement of the claim, the costs judge may permit that material to be redacted before service. There may be other circumstances which lead the costs judge to conclude that in the particular case

he should not exercise his discretion in the manner indicated. However, as we have stated, the receiving party should normally be put to her election to produce the CFA to the paying party or rely on other evidence.

[73] We have considered carefully the concern expressed in *Bailey*'s case about satellite litigation. Any satellite litigation generated in any circumstances results in an application of resources for collateral purposes and thus may absorb money and court resources which could be more usefully deployed. It is neither fair to the receiving party nor to other litigants that the courts' resources should be tied up in satellite litigation. However, the concern expressed about satellite litigation in *Bailey*'s case applies with less force in the present situation: first, there is already considerable satellite litigation about disclosure which our approach should avoid; and secondly, however, on our interpretation of s 58(1) (see [106]–[109], below) there will be far less incentive for paying parties to raise an issue of non-compliance.

[74] Our conclusions do not necessitate any amendment to paras 14.3 (summary assessment) or 40.14 (detailed assessment) of the Costs Practice Direction. In our view the combination of the indemnity principle and a significant increase in the paying party's liabilities results in there ordinarily being a sufficient ground in cases involving a CFA (whether or not the CFA contains a success fee) for the paying party to require the receiving party to be put to her election to produce the CFA or rely on other evidence.

[75] The contention of the appellants is that the respondents are in any event not entitled to claim legal professional privilege in respect of their CFAs. In the alternative, they submit that the CFA has to be disclosed because the receiving party is seeking to rely on it. They rely on a passage from the judgment of Pumfrey J in *South Coast Shipping Co Ltd v Havant BC* [2002] 3 All ER 779 at 793 (para 29), where the judge held, with respect to privileged material produced to the costs judge:

> 'Once the document is of sufficient importance to be taken into account in arriving at a conclusion as to recoverability, then, unless otherwise agreed, it must be shown to the paying party or the receiving party must content itself with other evidence.'

Mr McLaren QC, who appeared for the appellants in these cases, also referred us to *Dickinson (t/a John Dickinson Equipment Finance) v Rushmer (t/a FJ Associates)* [2002] 1 Costs LR 128, in which Rimer J took the view that a client care letter was not privileged. Mr McLaren argued that by the stage of the assessment of costs, any privilege has been exhausted.

[76] We have heard very little argument in response to the appellants' argument on privilege. In *Worth v McKenna* it was common ground in the court below that the CFA was privileged. Accordingly, the point cannot be taken in that appeal at this stage. In *Pratt v Bull*, Mr Dingle did not put it at the forefront of his argument that the CFA is privileged. He contends in general terms that the appellants seek to conduct a fishing expedition into privileged documents. It was unnecessary for him to argue the question of privilege because of his contention on the effect of the certificate as to accuracy. The Law Society contends in its skeleton argument that the CFA is subject to both advice privilege and litigation privilege but this submission was not amplified orally. Accordingly, we have not heard full argument on the question of privilege.

[77] Legal professional privilege protects confidential communications between a solicitor and his client for the purpose of obtaining and giving legal

advice. There is a separate litigation privilege when litigation is contemplated, as it was in these cases at the time when the CFAs were signed. If it is clear that there is a sequence of exchange of information, the court has not adopted (per Lord Bingham of Cornhill CJ in *R v Crown Court at Manchester, ex p Rogers* [1999] 4 All ER 35 at 41, [1999] 1 WLR 832 at 839)—

> 'a narrow or nit-picking approach to documents and has ruled out an approach which takes a record of a communication sentence by sentence and extends the cloak of privilege to one and withholds it from another'.

However, legal professional privilege does not apply to every document generated in the course of a retainer. There must actually be a communication between the solicitor and the client. In *Ex p Rogers*, the police had sought disclosure from the applicant's solicitors of any record of the time at which the applicant arrived at the solicitors' premises on a particular date and like documents. The Divisional Court held that such records would not be privileged because they did not relate to legal advice or the subject matter of legal advice. The facts of the present case are not analogous to the record of appointment in that case. We have also considered the very recent decision of this court in *Three Rivers DC v Governor and Company of the Bank of England (No 7)* [2003] EWCA Civ 474, [2003] All ER (D) 59 (Apr), which was concerned with legal advice privilege, but there was no suggestion in that case that privilege did not attach to direct communications between a solicitor and his client.

[78] We note that in *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056 the issue arose in the course of litigation whether the CFA was privileged but by the time the case came to the Court of Appeal, the defendants had abandoned their application for disclosure. The Court of Appeal (Lord Woolf MR, Aldous and Chadwick LJJ) considered that it was inappropriate to express any concluded view on the question whether a CFA is at any stage of the proceedings subject to professional privilege. Lord Woolf MR, giving the judgment of the court, said ([1998] 2 All ER 673 at 682–683, [1998] 1 WLR 1056 at 1067):

> 'Before expressing a view, we would like to have before us a claim for privilege specifying the grounds upon which it is based. We would also like to hear the full argument that was not presented on this appeal in view of the approach now adopted by the defendants to their seeking to inspect the CFAs. We recognise that a distinction might exist between the position in relation to any advice given to a client about the advisability of entering into a CFA and the document itself. However, what follows from what we have said as to the effect of CFAs means that, absent exceptional circumstances which we cannot envisage, unless and until the other party to the proceedings makes an application for an order making the legal advisers personally liable for costs, the existence or the terms of a CFA are of no relevance to the issues in the proceedings. They are therefore on that ground not required to be disclosed.'

[79] This court, too, is being asked to consider the question of privilege in the absence of a claim specifying the grounds relied on. As in *Hodgson*'s case, it is undesirable for us to express a view on privilege when the matter has not been fully argued. Indeed, as we see it, given the procedure in *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185, [1985] 1 WLR 689, it is not necessary for us to express a view on privilege. As we have explained above, we consider that the

costs judge has ample powers which he should normally exercise to put the receiving party to her election as to whether to produce a copy of the CFA to the paying party.

**[80]** We conclude, therefore, that if, in costs proceedings, a party seeks to rely on the CFA, as a matter of fairness she should ordinarily be put to her election under the procedure in *Pamplin's* case. (This procedure applies whether or not the document is privileged. It is no answer to an exercise of the discretion to contend that the document is privileged.) This is not simply because of the fact of reliance but because of the centrality of the CFA in an assessment of costs in which a CFA is relied upon. If the party does not wish to produce the CFA, she can theoretically undertake to prove the terms of the agreement in some other way. However, we doubt whether costs judges will in general be prepared to accept merely oral evidence of the existence of such an agreement and its terms. On the other hand, the court has a discretion in putting a party to his election to allow parts of it to be redacted if, for instance, those parts contain material which there is a good case for saying should not be revealed to the other party even for the purposes of the assessment only, and which it would not be unfair to the paying party to withhold. For instance, they may relate to legal advice on matters which have not been resolved by the claims in respect of whose disposal the success fee is claimed (for example, claims in separate proceedings), or further proceedings between the same parties may be anticipated. Moreover, there may be exceptional cases in which the costs judge is prepared to say that no purpose would be served by disclosure of the CFA. However, we have been unable to think of any circumstances in which this might arise, but the possibility exists.

**[81]** The appellants in the present cases also seek disclosure of the attendance notes prepared by the receiving parties' solicitors showing compliance with reg 4 of the CFA regulations. We do not consider that these should ordinarily be disclosed. We consider that the costs judge should not require these to be disclosed unless there is a genuine issue as to whether there was compliance with reg 4. The measure of explanation given to the client is largely a matter of fact and we consider that it is, therefore, appropriate that the paying party should have to rebut the presumption arising from the fact that the receiving party's solicitor, an officer of the court, has signed the certificate of accuracy.

**[82]** Although the procedure envisages that the costs judge will put a party to her election as to the disclosure of the CFA, now that it is clear from our judgment in this case that this is to be the general practice, we hope that receiving parties will disclose the CFA without more ado. It would obviously lead to further costs and delay if receiving parties were to take an unreasonable view on this issue.

**[83]** Reliance was also placed on art 6 of the convention, the argument being that the paying party was effectively deprived of equality of arms or access to court by denial of access to the CFA and attendance notes. The argument will not now ordinarily arise in relation to the CFA itself. In relation to the attendance notes, the court will, unless it orders disclosure, be proceeding on the basis of a presumption to which the solicitors' certificate of accuracy gives rise. It will not be proceeding on the basis that there is no evidence of compliance with reg 4. However, the presumption is not irrebuttable. The party seeking to challenge compliance with reg 4 can raise a genuine issue about this, in which case the costs officer must consider whether in the exercise of his discretion the attendance notes should be disclosed. Once that threshold is reached, the paying party's right of access to court is fully protected (see *Pamplin's* case). In our judgment, under

convention jurisprudence, the question what evidence the national court considers necessary to support a claim is a question for national law. The paying parties would have to show that they did not receive a fair trial under the procedures established by the national court. We are not satisfied that this would occur in the type of case with which we are at present concerned. Convention jurisprudence does not, moreover, proscribe a process which filters out fanciful claims (*Z v UK* (2001) 10 BHRC 384).

**[84]** In *South Coast Shipping Co Ltd v Havant BC* [2002] 3 All ER 779, Pumfrey J considered the question whether if the costs judge has been shown documents that the paying party had not been allowed to see, there is a breach of art 6 of the convention. Pumfrey J concluded that if the costs judge had seen the documents and required the receiving party to elect between giving secondary evidence of the retainer and waiving the privilege, there was no incompatibility with the convention. Pumfrey J continued (at 793–794 (para 30)):

> 'This is not intended to suggest the costs judge may potentially put the receiving party to its election in respect of every document relied on, regardless of its degree of relevance. I would expect that in the great majority of cases the paying party would be content to agree that the costs judge alone should see the privileged documents. Only where it is necessary and proportionate should the receiving party be put to his election. The redaction and production of privileged documents, or the adducing of further evidence, will lead to additional delay and increased costs.'

We agree.

**[85]** Since the hearing we have read the judgment of District Judge Harrison in *McCreery v Massey Plastic Fabrications Ltd* (21 March 2003, unreported). We note that the district judge has given permission to appeal, but as the appeal is not before us it is not appropriate for us to comment in detail on the judgment. We note, however, that the district judge has advocated changes in the practice regarding disclosure of CFAs and risk assessments which go beyond the practice we have laid down in this judgment.

**[86]** It was also argued on these appeals that by authorising his solicitor to seek reimbursement by the paying party, the receiving party has effectively waived privilege in the documents lodged with the court. This submission was based on *Al Fayed v Commissioner of Police of the Metropolis* [2002] EWCA Civ 780, (2002) Times, 17 June. In this context, we see no reason to depart from the principles as respects privilege established in *Goldman v Hesper* [1988] 3 All ER 97, [1988] 1 WLR 1238 (see [56], above).

**[87]** It follows that in *Worth v McKenna* the order of Judge Marshall-Evans must be set aside. In *Pratt v Bull* para 2(a) of the order of Judge Cotterill must be set aside and paras 2 and 3 of the order of Deputy District Judge Roach restored.

4. SATISFYING THE CONDITIONS IN SECTION 58

**[88]** All of these cases raise (or in the disclosure cases may raise) the issue of failure to comply with any of the applicable conditions in s 58(3) and (4), including the requirements prescribed by the new regulations. This primarily involves a question of construing s 58(1) of the 1990 Act. This subsection, it will be recalled, provides:

> 'A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its

> being a conditional fee agreement; but ... any other conditional fee agreement shall be unenforceable.'

The whole of s 58 was substituted (and s 58A added) by s 27(1) of the 1999 Act. Its predecessor, enacted in 1990, had simply provided in s 58(3):

> 'Subject to subsection (6), a conditional fee agreement which relates to specified proceedings shall not be unenforceable by reason only of its being a conditional fee agreement.'

The only provision specifically making a CFA unenforceable was that in sub-s (6) dealing with CFAs which contained a success fee greater than the permitted maximum for the proceedings in question.

**[89]** The new s 58(1) was clearly intended to leave it to Parliament to decide what further inroads might be made into the principle that contingency or conditional fee agreements are unenforceable: see *Awwad v Geraghty & Co (a firm)* [2000] 1 All ER 608, [2001] QB 570 (see [14], above). It also reflected Parliament's assessment of the state of public policy in this area: see *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2002] EWCA Civ 932 at [61], [2002] 4 All ER 97 at [61], [2002] 3 WLR 1104. The question for us is whether it was also intended to render unenforceable a CFA which did not comply in every particular with the requirements of the section and of regulations made under powers contained in the section.

**[90]** Mr Drabble QC, for the Law Society, took the lead in arguing this issue, with the support of counsel for all the receiving parties. He argued that the statutory regulation has two distinct aims. The first is to ensure that CFAs do not have an unacceptable tendency to corrupt public justice—that is to place the legal representative in an intolerable conflict between his own self-interest and his duty both to his client and to the court. The second is to protect the client—to ensure so far as possible that she understands what she is letting herself in for and is able to make an informed choice amongst the funding options available to her.

**[91]** Thus, he argued, the conditions provided for in the section itself were designed to avoid any tendency to corrupt public justice: the agreement must be in writing (see s 58(3)(a)), must relate to the right sort of proceedings for any sort of CFA (see s 58(3)(b)) or for a CFA with a success fee (see s 58(4)(a)), must state the percentage of any success fee (see s 58(4)(b)), and that percentage must not exceed the prescribed limits (see s 58(4)(c)). The requirements which have in fact been prescribed by the new regulations (for the purpose of s 58(3)(c)), on the other hand, are there to protect the client rather than the wider public interest, although Mr Drabble accepted that requirements might be prescribed which had a wider purpose.

**[92]** His first submission was that 'unenforceable' means only unenforceable in proceedings between solicitor and client, so that it is not open to the paying party to take the point. A great deal of the written and oral submissions to us concerned this point, and in particular the distinction between an unenforceable and an illegal contract. It faces the immediate difficulty that in *Dimond v Lovell* [2000] 2 All ER 897, [2002] 1 AC 384 the defendant was able to resist paying the claimant's car hire charges on the ground that the hire agreement was an unenforceable consumer credit agreement between the claimant and the hirer. It is difficult to see any difference in principle between this situation and that.

**[93]** In any event, as we have already said at [52], above, even if correct, this argument would be of no help to the receiving parties because of the indemnity

principle. Again, a great deal of the argument before us was directed at qualifying the application of that principle in these cases. Ultimately, however, it became clear that a CFA is a contentious business agreement to which s 60(3) of the 1974 Act (see [23], above) applies. If the solicitor cannot enforce the agreement against his client, then the amounts provided for in the agreement are not payable by the client at all (as discussed at [113]–[116], below, the position as to the ATE premium and disbursements is different). In the present state of the law, therefore, they cannot be recovered from the other side.

**[94]** It was also argued that this construction of s 58(1) would undermine the policy on access to justice and the statutory objective contained in s 17(1) of the 1990 Act (see [17], above). However, this subsection contains not one purpose but two, increasing access to justice and maintaining a proper and efficient system of justice. These two objectives have to be balanced. It cannot be the case that Parliament was entirely unconcerned with the interests of the other party to the litigation. The replacement s 58, together with s 58A, was enacted at the same time as paying parties were made liable for both the success fee and the ATE insurance premium. These are significant additional liabilities. There are also the concerns referred to in the House of Lords in *Callery v Gray (Nos 1 and 2)* [2002] 3 All ER 417, [2002] 1 WLR 2000 (see [49], above). The requirement that the CFA be in writing and the statutory cap on the success fee, for example, also provide some protection for paying parties.

**[95]** Accordingly, we reject Mr Drabble's first submission.

**[96]** Mr Drabble's third submission was that the prescribed requirements should themselves be construed in a realistic way, on the basis that the maker of the delegated legislation should not be taken to have intended that it should be construed in so rigid a fashion as to render the whole CFA unenforceable, and thus the whole of the solicitor's fees irrecoverable, because of a minor breach. More precisely, this submission is that what at first sight might appear to be a breach is not a breach at all because the CFA regulations when properly construed do not require anything different.

**[97]** He acknowledged that this approach has its disadvantages. The main disadvantage is that it might tempt a court in costs proceedings, where the client herself makes no complaint and has suffered no detriment, to interpret the requirements in such a way as to dilute the protection given; but in other proceedings, where the client had indeed suffered detriment and wished to raise a legitimate complaint against her legal representative, the court would not wish to do this. Mr McLaren showed us that a client may still be at significant risk under a CFA, for example if she refuses a Pt 36 offer, or the costs recovered from the paying party do not meet everything in the solicitor's bill, or she has had to pay interest on a loan to fund the ATE premium, or she fails to recover the whole premium. Not all solicitors will be prepared to forgo these charges, especially in higher value cases than those with which we are concerned. The need for consumer protection, though reduced under the new scheme, is still real.

**[98]** An example of this difficulty might be the issue under reg 2(1)(d) of the CFA regulations raised in *Tichband v Hurdman* and *Hollins v Russell* (see [118]–[130], below): from a consumer protection perspective it is more important for a client to be told that there is *no* cap on the amount in costs for which they might become personally liable than that there is such a cap. The research by Yarrow and Abrams (see [25], [27], above) indicated that clients were confused between conditional fees on the United Kingdom model and contingency fees on the American model. They might well assume that the solicitor became entitled

to a percentage of the damages recovered rather than an extra percentage of his normal charges. In construing that requirement, it might be said, we should not be tempted to conclude that it is unnecessary to make clear the absence of a cap simply in order to save the CFA.

**[99]** Another disadvantage of this approach is that it deals only with those points which have so far been raised. Experience has shown and is continuing to show that there is no end to the arguments of paying parties. It is a fair assumption that once one head of the Hydra has been slain two more will pop up in its place. Even if in due course it turns out to be unfounded, much time and effort may have been devoted to dealing with it by costs judges up and down the country to the detriment of the efficient administration of justice which was one of the objectives of the 1990 Act.

**[100]** Hence Mr Drabble's preferred approach was his second submission. The words 'satisfies all of the conditions applicable to it' in s 58(1) should be construed in a realistic way to reflect the purposes of the legislation. These were to increase access to legal services by making new types of funding arrangements possible, while protecting both the public interest and the interests of clients. Parliament will not have intended to render unenforceable CFAs which fulfilled the first objective without detriment to the second. Hence an agreement which satisfies all the conditions of the primary legislation and substantially if not literally conforms to the prescribed requirements should be held to satisfy the conditions applicable to it. Put another way, an agreement should not be held unenforceable for immaterial breaches of the CFA regulations.

**[101]** He drew an analogy with the approach to breaches of procedural rules adopted by this court in *R v Immigration Appeal Tribunal, ex p Jeyeanthan, Ravichandran v Secretary of State for the Home Dept* [1999] 3 All ER 231 at 235, [2000] 1 WLR 354 at 358, where Lord Woolf MR commented on the conventional distinction between directory and mandatory requirements:

> 'The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance.'

He concluded his discussion of examples ([1999] 3 All ER 231 at 236, [2000] 1 WLR 354 at 359):

> 'It must be remembered that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable reservation.'

**[102]** The point is well taken by Mr McLaren that these observations were made in the context of procedural rules which made no express provision for the consequences of breach. By contrast, s 58(1) makes express provision for the consequences of failure to satisfy the applicable conditions. Unlike, for example, the Consumer Credit Act 1974, there is no graduated response to different kinds of breach: it is all or nothing. On behalf of the paying parties both Mr McLaren and Mr Burnett QC (who appeared for the defendants in the *TAG Test Cases*) accepted that the principle that the law does not care about very little things applies here. But they urged us not to elaborate it by reference to concepts of materiality derived from public law.

[103] However, we are not here concerned with the interpretation of 'unenforceable'. That was the subject matter of Mr Drabble's first submission. We are concerned with the meaning of the words 'satisfies all of the conditions ...' Mr Drabble also drew a little support from some words of Lord Woolf MR in *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673 at 680, [1998] 1 WLR 1056 at 1064–1065. Lord Woolf MR was pointing out that a legal adviser acting under a CFA should be no more vulnerable to an order for costs against him personally than any other legal adviser, provided that the CFA was inside the protection provided by s 58 (in its original form):

> 'If the statutory requirements are complied with the CFA will be valid and enforceable by the legal advisers against a client. If it *materially* departs from the legislative requirements it will not be enforceable and will not be a CFA which is protected by [the section].' (My emphasis.)

[104] Of course, too much should not be read into an adverb used in the course of arriving at the conclusion that no pre-emptive order was required to protect the solicitor's position. But the case is an early example of the court's desire to further the parliamentary purpose by respecting rather than suspecting this innovation in funding legal services. The House of Lords has recently reminded us of the principles of purposive construction in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 WLR 692. Lord Bingham of Cornhill said (at [8]):

> 'The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'

[105] We have already considered (in [1]–[40], above) the historical context of this legislation, its declared statutory objective, the extensions to the CFA regime in April 2000, and the purposes of the regime in s 58 and the new regulations. In approaching the meaning of the words 'satisfies all of the conditions ...' we can be confident that Parliament would not have meant to render unenforceable a CFA which adequately meets the requirements which were designed to safeguard the administration of justice, protect the client, and acknowledge the legitimate interests of the other party to the litigation. The other party to the litigation has no legitimate interest in seeking to avoid his proper obligations by seizing on an apparent breach of the requirements which is immaterial in the context of the other two purposes of the statutory regulation.

**[106]** The question whether something is 'satisfied' inevitably raises questions of degree. What is enough to satisfy? There can be different degrees of satisfaction. A court may be satisfied beyond reasonable doubt or on the balance of probabilities but it is still satisfied. Different things can be satisfied in different ways. Hunger is satisfied by enough to eat. Greed may only be satisfied by more than enough. Sufficiency produces satisfaction. Conditions are satisfied when they have been sufficiently met. How sufficiently must depend upon the purpose of the conditions. It is not impossible to imagine conditions which would only be sufficiently met if they were observed in every minute particular: the specifications for precision machinery might be an example. But in general conditions are sufficiently met when there has been substantial compliance with, or in other words no material departure from, what is required.

**[107]** The key question, therefore, is whether the conditions applicable to the CFA by virtue of s 58 of the 1990 Act have been sufficiently complied with in the light of their purposes. Costs judges should accordingly ask themselves the following question: has the particular departure from a regulation pursuant to s 58(3)(c) of the 1990 Act or a requirement in s 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice? If the answer is Yes the conditions have not been satisfied. If the answer is No then the departure is immaterial and (assuming that there is no other reason to conclude otherwise) the conditions have been satisfied.

**[108]** We would not draw any formal distinction between the conditions contained in the section itself and those contained in the CFA regulations. The meaning of 'satisfies' must be the same in each case. However, it is more difficult to envisage questions of degree coming into the question whether the conditions in the section have been sufficiently met. Either the CFA relates to permissible proceedings or it does not. But one example might be that in s 58(4)(b) which requires that a CFA providing for a success fee 'must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased'. Was that condition sufficiently met by an agreement such as that in *Tichband v Hurdman*, which left blank the percentage in the clause where it should have been filled in but stated it clearly in the risk assessment (see [133], below)? The answer to that question is obviously Yes.

**[109]** We would, however, draw from both *R v Immigration Appeal Tribunal, ex p Jeyeanthan, Ravichandran v Secretary of State for the Home Dept* [1999] 3 All ER 231, [2000] 1 WLR 354 and *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2002] 4 All ER 97, [2002] 3 WLR 1104 the principle that sufficiency or materiality will depend upon the circumstances of each case. This is not to encourage paying parties to trawl through the facts of each case in order to try to discover a material breach. Quite the reverse. At the stage when the agreement has been made, acted upon, and success for the client has been achieved, it is most unlikely that any minor shortcoming which the paying party might discover in the agreement or the procedures leading up to its making will amount to a material breach of the requirements or mean that the applicable conditions have not been sufficiently met.

**[110]** We should, for completeness, mention one other argument which was put to us. This drew a distinction between the requirements of reg 4 of the CFA regulations, which relate to what must be done before a CFA is made, and the requirements of regs 2 and 3, which relate to the content of the CFA itself.

Section 58(1) speaks of the 'conditions applicable to it', and 'it' is the CFA. The requirements in reg 4 do not relate to the CFA at all but to what must be done beforehand. Section 58A(3)(a), which enables the Lord Chancellor to prescribe under s 58(3)(c) requirements about the information to be provided before the agreement is made, reinforces rather than undermines the argument. Without it, it is argued, a power to prescribe requirements with which the CFA must comply would not encompass this.

**[111]** We reject this argument for three reasons. First, s 58A(3)(a) clearly characterises such requirements as among those with which the agreement must comply for the purpose of s 58(3)(c). Secondly, the words 'applicable to it' are readily able to encompass steps taken by one of the parties before the agreement is made. Thirdly, reg 2(2) requires a CFA to state that reg 4 has been complied with, thus making compliance part of the obligations under the CFA.

**[112]** The argument is also unattractive on policy grounds. Pre-contract warnings are a common feature of consumer protection legislation. They are likely to be more important than the contract itself in ensuring that, so far as possible, the client understands both what she is letting herself in for and, more importantly, the alternatives available to her. To hold that s 58(1) did not apply to breaches of reg 4 would be to deprive the client of a remedy, which Parliament considered important.

**[113]** Before leaving the subject of compliance, we should mention two other points which were discussed during the hearing and upon which there appeared to be common ground. They are not necessary to our decision but they could be of considerable importance in practice. They relate to the recoverability of the ATE premium and any disbursements which the client has in fact paid 'up front' whether personally or by taking out a loan to do so.

**[114]** Section 29 of the 1999 Act provides:

> 'Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.'

It will be seen, therefore, that ATE insurance premiums are recoverable as costs in any proceedings, irrespective of whether or not there is a CFA between the receiving party and her legal representatives. The client's liability to pay the insurance premium arises from the contract of insurance, not from her contract with the legal representative. It arises whether or not there is a CFA and whether or not the CFA is enforceable. The CFAs which we have seen refer to the possibility of such insurance, but do not make it a term of the contract that such insurance is taken out. It would appear, therefore, that there is no bar to the recovery of the ATE insurance premium as costs whatever may be the bar to the recovery of the lawyers' charges and success fee.

**[115]** Secondly, it is not uncommon for the client to put the solicitor in funds for the purpose of paying disbursements, for example the fees of medical or other experts. The funds may be provided either from the client's own pocket or financed by a loan to the client for which the client is legally responsible irrespective of the fate of the CFA. The solicitor is required to retain this money on clients' account until it is expended in accordance with the client's instructions. If the CFA fails, and the money has not been paid out, the solicitor would be required to pay it back to the client. If the money has been paid out,

then this is money actually paid by the client. Mr McLaren accepted that this should be recoverable by the client as costs. The costs claim is that of the client, not of the solicitor. If the client has actually paid a debt to a third party, properly incurred in the conduct of the litigation, there seems no reason why this should not be recoverable from the paying party, in so far as it is reasonable and proportionate. (If a debt to a third party has been properly incurred, the paying party will not have to reimburse it until it has in fact been paid, but at that point it will become money actually paid by or on behalf of the client and thus recoverable from the paying party.) This is irrespective of whether the solicitor can enforce the CFA for his charges and success fee.

**[116]** These two propositions would go a long way to remove any detriment suffered by the lay client as a result of a CFA being found unenforceable in costs proceedings. The client can recoup her own expenditure on the proceedings from the paying party. The true interests in the cases before us, therefore, are those of the solicitors rather than the clients. That does not in any way invalidate the conclusions to which we have come.

5. PARTICULAR ALLEGATIONS

**[117]** We now turn to the specific allegations of breaches of regulations which have been made in five of these cases: *Hollins v Russell, Tichband v Hurdman, Dunn v Ward, Pratt v Bull* and the *TAG Test Cases*. In these cases we are concerned with elements of regs 2, 3 and 4 of the CFA regulations. The appeal in *Hollins v Russell* is concerned with reg 2(1)(d) alone. In *Tichband v Hurdman* this regulation and reg 3(1)(b) are in issue. In *Pratt v Bull, Dunn v Ward* and the *TAG Test Cases* we are concerned with aspects of reg 4.

(i) *Regulation 2(1)(d)*

**[118]** No difficulty will arise under reg 2(1)(d) for solicitors who use the Law Society's model CFA which came into use in July 2000. It contains the following clear statement: 'If you win your claim, you pay our basic charges, our disbursements and a success fee. The amount of *these* is not based on or limited by the damages.' (My emphasis.)

**[119]** In *Hollins v Russell*, the Law Society's April 2000 model CFA was used. This contains the following provision under the heading 'Paying Us':

> 'If you win your claim, you pay our basic charges, our disbursements and a success fee. The amount of *the success fee* is not based on or limited by reference to the damages.' (My emphasis.)

**[120]** In *Tichband v Hurdman* no reference at all was made to the question whether any element of the amounts payable were limited by reference to the damages recovered. In that case there was also no reference in the CFA to the matters covered by reg 3(1)(b).

**[121]** In the courts below, Judge Holman and Judge Tetlow held that the CFAs did not comply with the CFA regulations in the relevant respects, and that they were unenforceable for that reason.

**[122]** It will be remembered (see [31], above) that reg 2(1)(d) requires a CFA to specify the amounts which are payable in all the circumstances and cases specified or the method to be used to calculate them 'and, in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client'. This is clearly a reference to the sort of cap recommended by the Law Society under the old CFA regime, where success fees could not be

recovered as part of a solicitor's costs from the other side and the suggested cap preserved for the client at least 75% of the damages she recovered.

**[123]** It is apparent that if the risk that a successful client may have to pay some of the costs under the new CFA regime is a real one—and we have described (see [97], above) how Mr McLaren, who appeared for the defendants in these two cases, showed us instances in which this potential risk might be a real one—the absence of a cap would be more disadvantageous to a client in those circumstances than the presence of a cap.

**[124]** Given the potential importance to the client of knowing that there is no limit to the amounts for which she may be held personally liable, and given the continuing concerns about consumer protection which led to the new CFA regulations, we are reluctant to place too much weight on the change from 'whether or not' in the 1995 regulations. 'Whether' is clearly capable of expecting both the answer Yes and the answer No even without the addition of the words 'or not'. It all depends upon the question being asked. If a person is asked whether he is coming to dinner, the questioner clearly expects to be given an answer, whether it is Yes or No. If a person asks whether it is raining, he clearly expects to be told either that it is or that it is not. If a client asks whether the sums she will have to pay will be limited by the amount of the damages she recovers, she clearly expects to be told if they are not.

**[125]** The operative requirement in reg 2(1)(d) is that the CFA must specify the matters listed in reg 2(1)(a)–(d), including 'in particular, whether the amounts are limited by reference to the damages which may be recovered on behalf of the client'. The ordinary meaning of 'specify' is to state explicitly (see, for example *BWE International Ltd v Jones* [2003] EWCA Civ 298 at [27], [2003] All ER (D) 245 (Feb) at [27]). In both *Hollins v Russell* (see [119], above) and *Tichman v Hurdman* (see [120], above), there was a departure from reg 2(1)(d) and we now turn to consider whether, applying the test formulated above, s 58(1) rendered the CFAs in those cases unenforceable.

**[126]** To fulfil precisely the requirements of the CFA regulations, the CFA in *Hollins v Russell* should have said in terms that basic charges and disbursements (as well as the success fee) were not limited by reference to the damages which might be recovered on behalf of the client. However, the extract from the CFA in this case (quoted at [119], above) continues: 'You are entitled to seek recovery of part or all of our disbursements, basic charges ... from your opponent. Please see [Law Society conditions 4 and 6].' Law Society Condition 4, accompanying the CFA, says: 'If you win: You are then liable to pay all our basic charges, our disbursements and our success fee ...' Law Society Condition 4 then explains that these items can be recovered from the client's opponent, unless they are disallowed by the court. It states that in that event 'you pay the difference'. The same is stated to be the position if the opponent is publicly funded and basic charges and disbursements cannot be recovered for that reason.

**[127]** The CFA has to be read as a whole and when it is so read its meaning is that basic charges and disbursements are payable in full and are not limited by reference to damages. This is expressly stated in relation to the success fee and it would clearly have been preferable if it had been so stated in relation to basic charges and disbursements as well, in the part of the agreement set out at [119], above.

**[128]** We thus resolve the question of construction in the receiving party's favour but that is not in itself enough because, as we have said at [107], above, the court must ask: has the particular departure from reg 2(1)(d), either on its own or

in conjunction with any other departure in this case, had a materially adverse effect either upon the protection provided for the client by the requirement in question or the interests of the administration of justice? If the court can be satisfied that the answer to this question is No, the requirements of s 58(1) of the 1990 Act, read in conjunction with s 58(3)(c), are met. In the present case, we consider that the effect of the CFA read as a whole is sufficiently clear and that the failure to specify the position did not affect the protection given to the client or the administration of justice to any material degree. The result would have been different if the CFA was less clear as to its effect, that is if it would not have been reasonably comprehensible to a lay person. Accordingly, we allow the appeal in *Hollins v Russell* and set aside the order made by Judge Tetlow.

**[129]** Although the agreement in *Tichband v Hurdman* does not state in so many words whether the amounts payable under the CFA are limited by reference to the damages which may be recovered on behalf of the claimant, cl 30 of the CFA makes it clear that the amount of the solicitors' base costs is calculated by applying an hourly rate to the number of hours spent. This method of calculating the base costs is obviously not one which is dictated by the amount of the damages recovered, and there is no suggestion in the agreement that the costs are limited by reference to the damages. The agreement is in plain language and perfectly clear about this.

**[130]** We have accordingly concluded that in the context of this particular agreement, too, the position was spelt out with sufficient clarity that the client can have been in no doubt about it. The test we have formulated above is met and accordingly the requirements of s 58(1) are satisfied.

(ii) *Regulation 3(1)(b)*

**[131]** In *Tichband v Hurdman* the motorist's insurers also relied on a point under reg 3(1)(b). Under this regulation the CFA was required to specify how much of the percentage increase (by way of success fee), if any, related to the cost to the legal representative of the postponement of the payment of his fees and expenses. This has to be specified because under the costs rules this part of a success fee cannot be recovered from the paying party (see CPR 44.3B(1)(a)).

**[132]** The point the defendants' insurers sought to take (and on which they succeeded before Judge Holman) is as unattractive as it is unmeritorious. Clauses 32 and 33 of this CFA are headed 'Success Fee' and read:

> '32. The reasons we have set the success fee at the level stated are explained on the Risk Assessment form attached to this agreement. We will not seek to recover from you any of the success fee which we are unable to recover from your opponent.
>
> 33. None of the success fee is attributable to the postponement in paying our fees.'

**[133]** The amount of the percentage uplift on the solicitor's basic charges was omitted from the first page of the CFA. The risk assessment form, however, makes it clear that there is to be a total success fee of 45%, made up of one component of 15% and six components of 5% each. One of the latter represents the cost of postponing payment of the solicitor's costs until the end of the case.

**[134]** Mr McLaren was compelled to admit that as between solicitor and client no court would dream of allowing the solicitor to recover this 5% from his client when he was necessarily unable to recover it from the paying party due to the operation of r 44.3B(1)(a). The language of cl 32 makes this clear. The

reality therefore is that, despite what is said in the risk assessment calculation, none of the recoverable success fee is attributable to the postponement in payment of the solicitor's fees. Taken together, cll 32 and 33 prevail over the risk assessment schedule, and thus on its true construction the CFA in this case complies with the new regulations.

**[135]** For these reasons we also allow the claimant's appeal in *Tichband v Hurdman*. The order of Judge Holman must therefore be set aside.

(iii) *Regulation 4(2)(c)*

**[136]** In *Pratt v Bull, Dunn v Ward* and the *TAG Test Cases* reg 4 is in the spotlight. Under reg 4(2)(c) a client must be informed 'whether the legal representative considers that the client's risk of incurring liability for costs in respect of proceedings to which the agreement relates is insured against under an existing contract of insurance'.

**[137]** In *Pratt v Bull*, the 80-year-old claimant was severely injured when she was struck by the defendant's car when using a pedestrian crossing. Initial instructions were given by relatives while she was in intensive care. The following month, when she had recovered enough to give instructions, a solicitor visited her in hospital and a standard CFA was made. When her solicitors sought to recover their costs, the defendant's solicitors demanded to be provided, not only with the CFA, but also with attendance notes and documents to show that she had been given all the oral and written information required by reg 4. They expressed concern that other methods of funding might not have been properly explored. They seized upon one reply given to their questions as indicating that the possibility of legal expenses insurance under her home insurance policy had not been fully explored. The claimant's solicitor's response was that other funding possibilities had indeed been discussed:

> 'Evidently our client did not think she had cover ... Of course there was consideration of the point but to a reasonable degree where this lady was still lying in her hospital bed recovering from the horrific injuries inflicted by your insured.'

**[138]** For the reasons given earlier (see [81]–[86], above) we do not consider that documents such as these should ordinarily be disclosed, nor should the costs judge require this unless there is a genuine compliance issue. In our view, this is a classic case in which there was no good reason to think that the conditions applicable to this CFA had not been sufficiently satisfied. There are limits to what can reasonably be expected of the interchange between solicitor and client in circumstances such as these. It would be ridiculous to expect a solicitor dealing with a seriously ill old woman in hospital to delay making a CFA while her home insurance policy was found and checked. It is sufficient to satisfy s 58 that he had discussed it with her and formed a view on the funding options.

**[139]** It must be remembered that recovery of the insurance premium is provided for under s 29 of the 1999 Act (see [114], above) and is an entirely separate matter from the enforceability of the CFA. If the premium is unreasonable or if, in all the circumstances, it was not reasonable to enter into the policy, the matter can be raised on assessment in the usual way.

**[140]** For these reasons we do not consider that the defendant's solicitors in *Pratt v Bull* were entitled to disclosure of the documents they were seeking for the reasons they gave. We have dealt with the quite different issue relating to the routine disclosure of the CFA itself in the third section of this judgment.

(iv) *Regulation 4(2)(e)(ii)*

**[141]** In *Dunn v Ward* the CFA ended in these terms, so far as is material:

> 'Other points
> Immediately before you signed this agreement, we verbally explained to you the effect of this agreement and in particular the following: (e)(i) In all the circumstances, on the information currently available to us, we believe that a contract of insurance with Temple Legal Protect Ltd is appropriate. Detailed reasons for this are set out in Schedule 2. (ii) In any event, we believe it is desirable for you to insure your opponent's charges and disbursements in case you lose. (iii) The premium payable for this insurance is payable by you, although in certain circumstances it may be recoverable from your opponent.'

**[142]** District Judge Wallace considered that the word 'whether' in reg 4(2)(e)(ii) meant 'whether or not'. Even if a solicitor had no interest in recommending a particular insurance contract he must expressly state this to the client. For this reason he held that this regulation was not complied with.

**[143]** Judge Barnett allowed the claimant's appeal against this decision. He said that the purpose of this regulation was to ensure that the client knew if the legal representative had an interest in a particular product he recommended. It would be of no consequence to the client if there was no such interest. Parliament must have introduced this requirement in order to ensure that clients were protected, and part of that protection involved them having the information they needed in order to make properly informed decisions. Clients did not need to know facts for this purpose which were wholly irrelevant to the decision to be made. The raison d'être of the CFA regime was to increase and facilitate access to justice, and it could not be right to declare a CFA unenforceable merely because it did not mention some fact which was wholly immaterial.

**[144]** In our judgment Judge Barnett was correct. In this context there is no reason to construe 'whether' as meaning anything other than 'if'. The language of the regulation set out in [34], above mirrored the language of the government's February 2000 paper (*Conditional Fees: Sharing the Risks of Litigation: The Government's Conclusions Following Consultation*, see [29], above). The mischief which this regulation was introduced to remedy was the risk that the client's legal representative might induce the client to enter into insurance arrangements in which he had an interest. If he had no interest, then there was no identified mischief. In our judgment Mr McLaren was embarking on a quite hopeless quest when he sought to establish reasons why it might have been desirable for the legal representative to say in terms that he had no relevant interest when he recommended the insurance contract in question. The answer is that these regulations do not require him to.

(v) *Regulation 4(5)*

**[145]** The defendants' insurers in *Dunn v Ward* also sought to establish a breach of reg 4(5), which requires the legal representative to explain the effect of the CFA in writing to the client before she enters into it, in addition to the oral explanation of its effect required by reg 4(3).

**[146]** The evidence on this issue is slightly surprising, although typical of the muddles that may occur in the course of a busy litigation solicitor's practice. Miss Dunn had a cast-iron claim for damages for the injuries she suffered when

the bus in which she was travelling was involved in a road traffic accident. She contacted her solicitors on 23 May 2001, and in a 48-minute interview she elected to enter into a CFA and received a full oral explanation of the effects of a CFA (so as to satisfy reg 4(3)). It is not clear whether she met her solicitor for this interview, or whether the explanation was given to her on the telephone.

**[147]** It appears that on the same day her solicitors posted her two documents. The first was their standard introductory client care letter, written as if she were a privately paying client. They confirmed that they had taken out an ATE insurance policy on her behalf with Temple Legal Protection Ltd (a matter on which she had instructed them to proceed during her interview that day) but they made no mention of a CFA. At the end of their letter they said: 'Unless otherwise agreed, these terms of business apply to any future instructions you give us.'

**[148]** The other document they sent her was the CFA. This was in two parts, although they were stapled together. The first was headed 'Conditional Fee Agreement', and is based on the Law Society's July 2000 model CFA. The second is headed 'Law Society Conditions' and is identical to the conditions which follow at the end of that model CFA.

**[149]** We were told that this composite document won a 'plain English' award for the clarity of its wording. It is in clear, legible print. It starts:

> 'The agreement is a binding legal agreement between you and your solicitors. Before you sign, please read everything carefully. An explanation of words like "our disbursements", "basic costs", "win" and "lose" is in Condition 3 of the Law Society Conditions which you should also read carefully.'

**[150]** Signposted as she was to the Law Society conditions, Miss Dunn would have been able to read the effect of the CFA expressed in clear terms. If she had then turned back to the part of the CFA which refers to the Law Society conditions she would have read: 'You should read the conditions carefully and ask us about anything you find unclear.'

**[151]** She then signed the agreement. She also signed a statement which read: 'I confirm that my solicitor [has] verbally explained to me the other points set out in paragraphs (a) to (e) above.' This list contains the matters listed in reg 4 which the solicitor's attendance note shows that he explained to Miss Dunn on 23 May.

**[152]** Judge Barnett refused to find that this clear explanation of the effect of the CFA, albeit contained in a document attached to the CFA and forming part of it, contravened the requirements of reg 4(5). He said that there was no reason in principle why an agreement should not be or contain an explanation of its own terms and effect, and that there was nothing in the 1990 Act or the CFA regulations which unambiguously excluded this possibility, or required its exclusion by necessary implication. Having reached that conclusion, he expressed the view that although this arrangement did not breach the regulation, it would be better to have a free-standing document containing the required explanation.

**[153]** All these cases turn on their own facts. The regulatory intention is that the client should not be left in the confusion portrayed by the Yarrow and Abrams research study. If these documents had been in small print and as far removed from winning a prize for plain English as many documents of their type, then it is obvious that reg 4(5) would have been breached. On the facts of the present case, however, we asked Mr McLaren to describe what sort of additional document his clients required to see as explaining the effect of the CFA more

clearly than the Law Society conditions did. We did not receive a very clear answer. No doubt if the solicitors had essayed a short letter summarising part of the effect of the CFA more briefly, Mr McLaren's clients would have complained that this abbreviated explanation did not explain its full effect, and that the regulation had been breached for that reason instead.

**[154]** We therefore agree with the approach adopted by Judge Barnett and also with his preference for a free-standing explanatory letter, which may of course cross-refer to any part of the Law Society conditions which sets out the effect of the CFA with clarity. For these reasons we dismiss the appeal in *Dunn v Ward*.

(vi) *The TAG Test Cases: who is the 'legal representative' in reg 4?*

**[155]** In the *TAG Test Cases* the factual position was very much more complex, although the defendant's appeal eventually fell to be determined on a comparatively straightforward point of law. This is another reg 4 case, and the point of law in issue was whether the reg 4 information was given to the claimants by someone who qualified as 'the legal representative' for the purposes of that regulation.

**[156]** By reg 1(3) the term 'legal representative' is defined to mean 'the person providing the advocacy or litigation services to which the conditional fee agreement relates'.

**[157]** The TAG arrangements are fully described in Master Hurst's masterly judgment. This is now reported under the name of *Sharratt v London Central Bus Co Ltd, The Accident Group Test Cases* [2003] 1 All ER 353. He was concerned with preliminary issues in 19 test cases, all of them small personal injury claims which were settled without the need for legal proceedings for sums varying between £1,000 and £3,500. The claims for costs varied between £3,400 and £4,900. A number of different insurance companies represented the defendants in these cases. Before Master Hurst, Mr Burnett and Mr Williams were instructed by one group of insurers, and Miss Taylor by the other. On the appeal to this court all three counsel appeared for the defendants in all nine cases.

**[158]** For the purposes of this judgment the facts can be summarised much more briefly than was necessary for the purposes of Master Hurst's judgment. In November 1999 The Accident Advice Bureau Ltd launched an insurance-backed CFA in anticipation of the coming into force of the 1999 Act and the abolition of legal aid for personal injury claims. At that time ATE insurance premiums and the percentage uplift on CFAs with success fees were not recoverable.

**[159]** On 1 April 2000 Pt II of the 1999 Act came into force, as did the 2000 order and the CFA regulations. The Accident Advice Bureau Ltd became The Accident Group Ltd (TAG). The TAG scheme grew rapidly. In a report on personal injury litigation in 2001 TAG was described as the market leader with a market share of 15%. Master Hurst was told that cases were being accepted at the rate of 15,000 per month. Users of the scheme were required to use the services of TAG agents and a specified medical agency, and to take out an ATE insurance policy with TAG's nominated insurers.

**[160]** When liability insurers took the point that each CFA was unenforceable for a number of different reasons and each ATE premium irrecoverable, a number of test cases were selected in order to test the viability of the insurers' arguments. In particular they were contending that the information given by the TAG representative to a potential client did not comply with reg 4 of the CFA regulations because, among other things, that representative is not a 'legal

representative' within the meaning of that regulation. Master Hurst was told that there were about 211,000 cases in which this point had arisen, and that if the court were to find that the regulation had not been complied with this would result in a 'windfall' of £1bn or more to the liability insurers. It was also said that it would have a devastating effect on the 700 or more firms of solicitors that are TAG panel members.

[161] The defendants were sceptical about the accuracy of these figures. TAG had not provided data showing how many cases led to successful claims, or how many dropped out of the scheme. The figure of £1bn was calculated in a broad brush way, included the insurance premiums, and made no allowance for reductions on detailed assessment. They also questioned the assumptions that the average costs in the simplest cases would be about £4,000, that all cases would be successful, and that every case was indistinguishable from the test cases on other grounds. However all this may be, there is no doubt that the viability of a very well-used scheme is under challenge in these test cases.

[162] To put the matter quite simply, the 700 panel solicitors whom TAG uses play a carefully defined role in a highly organised structure. They are each bound by the conditions of the agreement they make with TAG, and TAG's operations manual, the terms of which each solicitor is bound to observe, and which is updated from time to time, sets out the framework within which TAG's clients' claims are processed. The solicitors have to use a standardised client care letter and a standardised CFA (with no success fee). What they lose by acting without fee in losing cases and without the consolation of a success fee in the cases which they win is made up, they hope, by the volume of potentially successful cases they hope to receive from TAG every month.

[163] TAG obtain their clients through their presence in shopping centres, through cold calling, or through telephone inquiries in response to advertisements. The client signs some initial documentation, which includes a TAG service agreement and declaration form, and TAG then sends an agent employed by an associated company to complete a questionnaire at the client's home. This will contain sufficient detail to enable solicitors to assess whether the claim has a better than 50% chance of success. A firm called Rowe Cohen vets the viability of all TAG's claims against this criterion and the additional criterion that the damages are likely to exceed £1,500. If the cases pass these two tests, the papers are then sent to a panel solicitor for the first time.

[164] At this stage the panel solicitor's responsibilities are fairly limited. He must consider the papers and apply the same tests. If the tests are not passed, he will reject the case and send the papers back to TAG. If the tests are passed, he will send the client a letter of introduction, and will enclose with that letter a standard client care letter, duly completed, a standard CFA, and a copy of the completed questionnaire.

[165] In the introductory letter he tells the client that a TAG representative will contact her by telephone very soon to arrange an appointment to call and see her on his behalf to ensure that the client understands the nature of their agreement. He has already explained in this short letter that it is a statutory requirement that the client must be provided with certain advice before she signs any documentation. The letter ends with the assurance that if the client has any queries and would like to speak to the solicitor personally, she should not hesitate to contact him on a given telephone number. Mr Charlton QC told us, on instructions, that Mr McCulloch recalled only eight cases in which a client had called him out of the 3,500 cases he had handled for TAG.

**[166]** It is at this point that the procedure becomes controversial. The reg 4 information is not given to the client by the solicitor or by a member of his directly employed staff, or even by somebody whom he engages as an independent contractor for this purpose. It is given by a representative of TAG. This representative will visit the client at his home by appointment. On his visit he will explain the CFA and complete what is called the 'fact find' and oral explanation sheet. A copy of this three-page sheet is contained in the operations manual. It begins with a statement to the effect that the panel solicitor has authorised TAG to obtain certain information from a claimant in relation to the claimant's funding options following an accident on [the relevant date] 'and to orally advise the claimant as detailed below in connection with the Panel Solicitor's CFA'. There follow five questions, designed to elicit information relating to the possible existence of alternative funding arrangements, and then ten fairly full paragraphs of text which set out, among other things, the information required by reg 4. These end with the following: 'We understand that you do not require any further explanation, advice or other information about these matters.'

**[167]** At the end of the sheet the TAG representative will certify that he has given this information to the claimant and that he orally gave advice on behalf of the panel solicitor in relation to his CFA and the legal expenses insurance policy 'as detailed above'. The claimant for his part will sign beneath a statement by which she confirms:

> 'That the above information was provided by me to the TAG representative and that I received the oral explanation in relation to the appointed representative's CFA and the legal expenses insurance policy as detailed above. I am aware that the TAG representative is obtaining the above information and providing me with the above explanation on behalf of the appointed representative.'

**[168]** During this visit the TAG representative will also confirm the contents of the questionnaire and obtain the claimant's signature on a statement of truth, the CFA and the solicitor's client care letter; and on a completed credit agreement which will enable him to obtain a loan to fund the cost of the policy premium and the solicitor's disbursements.

**[169]** These completed documents are then sent back to TAG. On receipt of them TAG will issue a certificate of insurance to the claimant under its delegated authority from the insurers, and send the CFA, client care letter and fact find and oral explanation sheet, all now signed by the client, to the panel solicitor, together with a copy of the certificate of insurance. On receipt of these documents the panel solicitor will then sign the CFA and client care letter and start to act for his client in the usual way. The only reason why this agreement, which lacks a success fee, is caught by the CFA regulations is that the panel solicitor is acting on what is colloquially called a 'no win no fee' basis, and is thus caught by the definition of a CFA in s 58(2)(a) (see [18], above).

**[170]** There were, in retrospect, certain unsatisfactory features about the arrangements for the trial conducted by Master Hurst at the end of October last year. A judgment adverse to TAG by a district judge in early August 2002 had put the continued viability of the TAG scheme in question, and the parties wished to obtain an authoritative ruling from the senior costs judge as soon as possible. On 20 September 2002 Master Hurst made an order directing the trial of two

preliminary issues within the test cases (*Sharratt v London Central Bus Co Ltd, The Accident Group Test Cases* [2003] 1 All ER 353 at 356):

> '(i) Whether under the Accident Group Scheme the reg 4 information is given by a "legal representative" within the meaning of regs 1 and 4 of the Conditional Fee Agreements Regulations 2000. (ii) If the answer is in the negative, what are the consequences of that for the claimants' claims for costs.'

[171] He directed that the trial of these issues should take place on 29 and 30 October. In view of the time pressures the parties were not obliged to exchange statements of case on these issues, and disclosure of documents was also dispensed with. The claimants provided two witness statements and certain other voluntary information about the operation of the TAG scheme (so far as it related to these issues). The defendants for their part filed no evidence, and their case on the preliminary issues only became apparent when they served their skeleton arguments shortly before the hearing.

[172] In those skeleton arguments they made two main points. (1) The reg 4 information could only be given by the individual solicitor who was TAG's 'appointed representative' within the panel solicitor's practice, and he had no authority to delegate this responsibility to anybody. (2) If this was wrong, then he could delegate this responsibility to someone else within his practice who was qualified to conduct litigation services within the meaning of s 28 of the 1990 Act: in other words, to another qualified solicitor, or to a Fellow of the Institute of Legal Executives.

[173] In their skeleton arguments, and more particularly in their oral arguments at the hearing, a second fall-back argument started to emerge, whereby the original solicitor might delegate the responsibility to somebody whom he judged to have appropriate skill and discretion, but this description did not embrace the TAG representatives on account of their lack of training and other perceived inadequacies. Nor did the solicitor have any choice about this. He was obliged to delegate to representatives chosen and trained by TAG. In early October the defendants' solicitors had elicited from TAG's solicitors the information that TAG possessed no documentation relating to the training of their representatives received in connection with their reg 4 duties. Some reference was made in this context to role-play. Mr Charlton understandably objected that the defendants' case was now straying well beyond the simple issues on which his clients had prepared their evidence, and that any dispute about the quality of the TAG representatives' reg 4 performance should await the trial of the second round of issues in the test cases which was due to commence on 24 March 2003.

[174] It is clear that Master Hurst adopted Mr Charlton's submissions on this point in the court below. Although Mr Burnett attempted to open up this ground of challenge again in his skeleton arguments on the appeal, he eventually accepted that it was inappropriate to do so. He had by now abandoned his clients' primary contention before Master Hurst. The basis on which he contested the appeal was that his fall-back contention before the master was correct, alternatively that under no circumstances, given his obligations under the Solicitors' Practice Rules and his code of professional conduct, could these reg 4 duties be delegated by a solicitor to an organisation like TAG or to one of TAG's representatives, however well those duties were performed.

[175] Mr Charlton, for his part, attempted to revive an argument which Master Hurst had rejected quite summarily. Parliament has preserved, by s 27(2)(e) of the 1990 Act, the common law right long enjoyed by unqualified staff working for the litigation department of a solicitor's firm to exercise rights of audience in chambers in the High Court and the county court. Mr Charlton argued that a TAG representative might qualify by this route as a person to whom the panel solicitor might appropriately delegate the reg 4 responsibility.

[176] The trouble with this argument is that the retention of this common law practice is limited to the conferring of a right of audience to someone who (see s 27(2)(e)(i))—

> 'is employed (whether wholly or in part), or is otherwise engaged, to assist in the conduct of litigation and is doing so under instructions given (either generally or in relation to the proceedings) by a qualified litigator ...'

There has never been any question of a TAG representative performing advocacy services of this type. It was never indeed contemplated that he would exercise any such services in relation to any proceedings on behalf of the TAG client (for the statutory definition of 'advocacy services' see s 119 of the 1990 Act).

[177] We return, then to the main points of challenge, on which Master Hurst favoured the claimants' arguments. A solicitor has always been able to delegate part of his functions in appropriate cases. The ground rules were set out by the House of Lords in *Law Society v Waterlow, Law Society v Skinner* (1883) 8 App Cas 407. In that case an issue arose as to whether Waterlows, the law stationers, had fallen foul of a provision of the Attorneys and Solicitors Act 1870 which made it an offence to impersonate a solicitor. The House of Lords decided that they had not. Lord Selborne LC said (at 412): '[Waterlows] have simply executed instructions to do ministerial acts in order to save the real solicitor from the trouble and expense of doing them.'

[178] And Lord Blackburn said (at 415):

> 'A solicitor taking out probate is not bound to do everything in his own person. There are some things which he cannot delegate, he is to give his personal responsibility and obligation to his client to use his own skill and his own judgment in some things which are to be done, and he ought not to delegate them at all. There are some matters as to which though he may delegate them and need not do them in person but may employ a clerk, yet he would be required to see that that clerk had competent knowledge.'

[179] After concluding that Waterlows could be used as a messenger to lodge or retrieve documents in the Probate Registry, he went on to comment (at 416–417) on the tasks which might not be acceptably delegated:

> '[I]t was contended that it might be that a great deal more was done,—that ... this messenger of Messrs. Waterlow was to argue it and to advise upon it, and to discuss it, and to do various things which certainly I think [the solicitor] would not be doing quite his duty to his clients if he delegated to another person to do for him, and as to which certainly, if Messrs. Waterlow did them (I think it is probable that they were too wise), if they incurred all the responsibility of advising on matters of law and things of that sort, they would be doing a very foolish and rash thing. If they did all this it would be a plausible argument to say that in doing things like that, furnishing intelligence and legal advice and so on, which [the solicitor] ought not to

have delegated to them to do, they were acting as solicitors [and were thereby committing the offence alleged].'

**[180]** In *Arbiter Group plc v Gill Jennings & Every (a firm) and RWS Information Inc* [2000] Lloyd's Rep PN 669 at 672 (para 20) this court was concerned with the alleged negligence of a firm of American patent searchers who had been instructed by a firm of English patent agents. Swinton Thomas LJ said:

> 'A professional man in appropriate circumstances is entitled to delegate tasks. Whether he is entitled to delegate a particular task will depend upon the nature of the task. He is entitled to delegate some tasks to others but is not entitled to delegate others. It all depends on the nature of the task involved. If he does delegate he must delegate to a suitably qualified and experienced person.'

**[181]** These principles are now reflected in the modern arrangements governing solicitors' conduct. The modern prohibition on unqualified persons acting as solicitors is to be found in s 20 of the Solicitors' Act 1974. Rule 13 of the Solicitors' Practice Rules now provides, so far as is material:

> '(1) The principals in a practice must ensure that their practice is supervised and managed so as to provide for: (a) compliance with principal solicitors' duties at law and in conduct to exercise proper supervision over their admitted and unadmitted staff ...'

**[182]** Note (b) to this rule relates to 'supervision' and 'management'. It contains the following guidance:

> '(i) "Supervision" refers to the professional overseeing of staff and the professional overseeing of clients' matters ... (iii) Operationally, supervision and management may be delegated within an established framework for reporting and accountability. However, the responsibility under paragraph (1)(a) of the rule ... remains with the principals.'

**[183]** The *Guide to the Professional Conduct of Solicitors* (8th edn, 1999) (the guide) contains (in para 3.07) the rubric: 'A solicitor is responsible for exercising proper supervision over both admitted and unadmitted staff.' This is followed by a note which reads:

> '1. The duty to supervise staff covers not only employees but also independent contractors engaged to carry out work on behalf of the firm, e.g. consultants, locums, solicitors' clerks.'

**[184]** Further guidance on modern practice is evident in Annex 21G to the guide, which is concerned with solicitors' supervision responsibilities over the conduct of unadmitted staff who exercise rights of audience on behalf of their firms under s 27(2)(e) of the 1990 Act. After reciting the effect of para 3.07 of the guide, and of Note 1 that follows it, Annex 21G continues:

> 'Accordingly, as a matter of professional conduct, when instructing an unadmitted person (whether an employee or an independent contractor) to appear in chambers in the High Court or the county court, a solicitor should:
> • be satisfied that the person is responsible and competent to carry out the instructions;

- give the person sufficiently full and clear instructions to enable him or her to carry out those instructions properly;
- afford appropriate supervision.'

[185] We had the benefit of receiving a written submission from the Law Society on this aspect of the TAG appeal. The Law Society drew our attention, as did the parties, to the matters we have set out at [177]–[184], above. Its short written submission also contained the following observations:

'It is the Law Society's view that it is open to solicitors to delegate a wide range of tasks to unqualified persons, whether those persons are employees or independent contractors. This is provided, of course, that the person to whom the task is delegated is competent and responsible and provided that the performance of the individual is adequately supervised. It is the Law Society's view that the decision as to whether an individual is competent must be made by the solicitor concerned based on the nature of the task to be delegated and the qualities of the delegate. Further, the level of supervision required would be for the practitioner to decide in these circumstances. It is also the Law Society's view that the individual's competence must be assessed in the context of the work which that individual is expected to do. Using employees or independent contractors who may be competent to handle only a very limited range of tasks, provided they are competent to handle the tasks which they are asked to undertake, gives rise to no objection at law or breach of the solicitors' conduct rules. If there were any justified complaint about the adequacy of work carried out by an unadmitted person, then under the rules of professional conduct, the Law Society would expect (assuming the person concerned continued to undertake the work) that the supervision arrangements would be amended. The Law Society accepts that, in the context of these appeals, these propositions may be trite and uncontested. Nevertheless the Law Society would wish the court to have them at the forefront of its considerations whatever the outcome of these appeals. The Law Society would be concerned if, by any part of its judgment, the court were to restrict a solicitor's ability to delegate tasks. Provided the rules of professional conduct are complied with, this ability to delegate is essential to the efficient and profitable running of virtually every solicitor's practice. It is also essential to ensuring that the cost to the public of legal services is not unnecessarily increased.'

[186] As we have observed, following Master Hurst's summary rejection of their contention that a solicitor had no authority to delegate his reg 4 responsibilities at all, even to a more experienced solicitor in the same firm, the defendants had jettisoned this argument by the time their notice of appeal was settled. Mr Burnett, however, argued vigorously that the solicitor might only delegate this responsibility to another qualified solicitor (however inexperienced) or to a Fellow of the Institute of Legal Executives who was himself qualified to perform litigation services pursuant to s 28 of the 1990 Act. A legal executive of vast experience of litigation practice would not do, Mr Burnett said, unless he had qualified as a Fellow of the Institute.

[187] There was a paradox at the heart of his clients' submissions. We have seen (at [17], above) how Pt II of the 1990 Act has the purpose of fostering new or better ways of providing litigation services. An outside observer might have

expected liability insurers to approve of practices which tend to drive down the cost of these services (for which they have to pay, when they are used by successful claimants) as opposed to insisting that every regulatory duty, however routine, must be performed by expensive professional people. However, such was their enthusiasm for the potential windfalls that might be achieved by their adherence to the indemnity principle whenever it might work to their financial advantage that they happily turned a blind eye to this paradox.

**[188]** In developing his argument that a solicitor might only delegate his reg 4 responsibilities to another person who was himself qualified to conduct litigation services, Mr Burnett invited us to consider the statutory framework of the new legislative scheme along the following lines. He said that the current approach of the law to CFAs was informed by two concerns, one ancient, one modern. The former was the rule against champerty, and the latter was the need to protect consumers of limited sophistication. In general, the first was the concern of the common law, whilst the latter was the emphasis supplied by statute. The CFA regulations themselves were principally directed at the need to protect consumers, as was observed in *Callery v Gray, Russell v Pal Pak Corrugated Ltd* [2001] 3 All ER 833 at [26], [2001] 1 WLR 2112. They also operated to protect unsuccessful litigants who had to pay the costs of their opponents on CFAs.

**[189]** He said that the need to protect consumers entering CFAs was pressing. Many clients who considered bringing an action for the recovery of damages for personal injury had had no prior contact with the legal system, and were wholly unaware of the different types of funding for litigation, the risks of litigation, or the range of and comparison between available insurance products and funding schemes. Most were likely to be one-off users of personal injury or employment claims services. They would therefore have no previous experience against which to compare the service provided. Many were unaware of the differences in quality and skill between solicitors and other unqualified persons appearing to offer the same service, a point made in the Blackwell Report (see [38], above).

**[190]** In this context CFAs were complex documents, which many lay people have difficulty understanding, and the current CFA regulations significantly enlarged on the degree of consumer protection afforded by their predecessor, partly as a result of the findings in the Yarrow and Abrams study (see [25] and [27], above) as to the level of consumer misconception. There was also a temptation for CFAs to be marketed in excessively simplistic terms—classically 'no win no fee'—which could and did give rise to a misleadingly understated description of the potentially onerous obligations to which consumers were subscribing.

**[191]** Mr Burnett submitted that Parliament's anxiety to protect consumers entering CFAs was amply demonstrated by the serious sanction which it imposed for non-compliance with the regulations, namely the unenforceability of the agreement. The regulations specifically required that the reg 4 information, advice and explanation must be given before a client entered into a CFA which could potentially involve her in incurring liability for costs, and at a point where it was anticipated she would need and require advice on the CFA and any financing or funding options available to her: see *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125.

**[192]** He added that the fair administration of justice also required the protections afforded to consumers by the regulations to be balanced by a measure of protection for paying parties in this type of litigation.

**[193]** He pointed out that as access to justice has been liberalised through the statutory relaxation of the law against champerty and the enlargement of rights

of audience, great concerns have been expressed about the proliferation of unqualified 'claims assessors' involving themselves in litigation: see the Blackwell Report. This court stated in *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2002] 4 All ER 97 at [56] and [59], [2002] 3 WLR 1104:

> 'In its context it is natural to read s 58 as applying to the provision of advocacy and litigation services by those authorised in accordance with the earlier sections to exercise rights of audience or conduct litigation. There is nothing in the section which suggests that it is intended to apply to the provision of services ancillary to the conduct of litigation by the many different categories of person who have, in the past, been accustomed to assist with the conduct of litigation ... [T]he legislative intent was that the provisions of s 58 of the 1990 Act were intended to apply only to those who could be described as "litigators", that is advocates and those conducting the litigation.'

**[194]** Mr Burnett submitted that the integrity and independence of the solicitors' profession was seen as the principal safeguard (not least by the authors of the Blackwell Report) against such practices and the risk of abuse noted by members of the House of Lords in *Callery v Gray (Nos 1 and 2)* [2002] 3 All ER 417, [2002] 1 WLR 2000. It was a bulwark against the public evil of champerty because it holds a higher duty to the court than to its clients, and against the private evil of misselling to consumers because of the strict rules of professional conduct and advice, including the Solicitors' Costs Information and Client Care Code 1999 (which reg 4 closely reflects).

**[195]** In our judgment Mr Burnett protests too much. We must stress that we are only concerned on this issue with the question whether as a matter of principle a solicitor may delegate his reg 4 responsibilities to a wider class of people than those embraced by Mr Burnett's primary argument on the appeal. If it is possible to delegate more widely, then the solicitor will remain professionally responsible for the performance of the person who actually performs the duties. Each situation must be considered on its own facts. Parliament wishes to foster new ways of rendering litigation services, and provided that the performance of the reg 4 duties is appropriately delegated, and the duties are properly performed under appropriate supervision, we cannot see that Parliament's intentions are being thwarted if the solicitor delegates more widely than is allowed for in Mr Burnett's primary argument before us. We would not wish to be prescriptive about the form which that supervision should take, provided that an appropriate system has been set up.

**[196]** We have found it useful in this context to compare the position of a solicitor in relation to delegation with that of a company director. In that context there is a helpful passage in the judgment of Jonathan Parker J in *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 at 489 where he says:

> '(i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors. (ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity

a to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions. (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend of the facts of each particular case, including the director's role in the management of the company.'

b [197] This passage is valuable in that it clearly distinguishes the governing principle set out in (ii) from the question of fact which will need to be answered under (iii) in any particular case.

[198] When we tested the validity of Mr Burnett's submissions we examined the nature of the services which were being performed for the solicitor in the c present case. We did not in this context concern ourselves with the matters set out in reg 4(e) because a particular feature of the TAG scheme is that the client has already agreed with TAG that she will purchase TAG's preferred insurance scheme before the solicitor appears on the scene, even if TAG does not actually procure the insurers to issue cover until after the credit agreement has been d signed. This is the effect of the declaration signed by the claimant when she enters the TAG scheme. In it she agrees to pay the premium for the insurance policy on the basis that TAG will not seek to enforce this liability in the event that evidence of insurance is not issued on the sole grounds of liability and quantum. What this all means in practice will have to be worked out at a later hearing, but at the level of generality with which we are concerned to determine the e preliminary issues before us on this appeal, we consider it to be better to concentrate on the aspects of the reg 4 duties which do not relate to advice about the policy.

[199] These duties oblige the panel solicitor to ensure that his client receives proper oral explanation of the following matters: (a) the circumstances in which f he may be liable to pay the panel solicitor's costs in accordance with the CFA; (b) the circumstances in which he may seek assessment of the fees and expenses of the panel solicitor, and the procedure for doing so; (c) whether he considers that the client's risk of incurring liability for costs in respect of the proceedings to which the CFA relates is insured against under an existing contract of insurance; (d) whether other methods of financing those costs are available and, if so, how g they apply to the client and the proceedings in question. The client must also receive an explanation of the effect of the CFA both orally and in writing.

[200] We can see no reason why these duties cannot be performed by someone on the solicitor's behalf who does not happen to be a qualified solicitor or a Fellow of the Institute of Legal Executives. The relevant advice is very h clearly set out in the oral explanation sheet, and the fact find part of that sheet, discussed with the client in her own home (where she can readily look for documents relating to her household insurance or her trade union membership), will enable the client to deal with the matters raised in (c) and (d), above. The first four questions, which relate to other possible methods of funding the j litigation, are simple questions followed by 'Y/N'. The client will circle Y or N as appropriate, and these answers will reach the panel solicitor in due course.

[201] Mr Burnett argued eloquently that the procedure adopted by TAG's representatives on behalf of the panel solicitor did not admit of the kind of dialogue to be expected when a qualified solicitor discusses matters of this kind with a client. Although TAG bridled at his suggestion that their representatives read the oral explanation 'parrot-fashion'—and whether they did or not is a

matter for the later hearing—Mr Burnett was on stronger ground when he observed that reg 4(1) contains not only a duty to inform but also a duty to provide such further explanation, advice or other information about the matters listed in the regulation as the client may reasonably require. In this context he reminded us that Master Hurst had shared his client's surprise at the final item of the oral explanation sheet in which (as quoted at [166], above) it is said that the client does not require any further explanation, advice or other information about these matters. We, too, find it difficult to reconcile this with the solicitor's introductory letter which invites the client to telephone if she has any queries.

**[202]** Mr Charlton, however, told Master Hurst on instructions that in practice the TAG representative will deal with any matters which the client may raise, and we share the master's view that the explanation of what happens in practice is best left for the later hearing.

**[203]** In our judgment, the issues raised by Mr Burnett should not drive us to the conclusion that the person who actually gives the reg 4 advice must inevitably be someone who is himself qualified to conduct litigation services. Parliament has not made this requirement, and in the context of the liberalising effect of Pt II of the 1990 Act it would be wrong for us to do so.

**[204]** The question then arises, if a wider degree of delegation is legally possible, can a solicitor lawfully delegate his responsibility to an organisation like TAG, and can TAG sub-delegate it to one of their representatives?

**[205]** The way in which Mr Burnett advanced his fall-back argument was to the effect that if a solicitor could delegate his reg 4 duties more widely, he could only do so in favour of someone with appropriate skill or discretion, and that this description could not embrace TAG or its representatives. In this context he relied on certain passages in *Bowstead & Reynolds on Agency* (17th edn, 2001) pp 40, 137:

> '2-017 An agent may be appointed for the purpose of executing a deed, or doing any other act on behalf of the principal, which the principal might himself execute, make or do; except for the purpose of executing a right, privilege or power conferred, or of performing a duty imposed, on the principal personally, the exercise or performance of which requires discretion or special personal skill, or for the purpose of doing an act which the principal is required, by or pursuant to any statute or other relevant provision, to do in person.
>
> Comment
>
> 2-018 The authorities cited for the proposition contained in this Article indicate that it is a general rule of common law which will apply unless displaced ...
>
> When agent may delegate authority
>
> 5-001 (1) An agent may not delegate his authority in whole or in part except with the express or implied authority of the principal ... (3) The above principles are inapplicable where the act done or to be done is purely ministerial and does not involve confidence or discretion.'

**[206]** Because the TAG staff who perform the reg 4 duties do not have the professional obligations upon which Mr Burnett laid such emphasis, he said that a vital filter was stripped out of the TAG scheme. Being employees of TAG (or associated enterprises) they could not be expected to give impartial advice (as must solicitors—see the Solicitors' Introduction and Referral Code 1990). Their task (in all probability supported by a remuneration package which has large

commission and other incentive elements) was to maximise their own TAG revenue—a business-driven model with different values from those to be expected of an officer of the court.

**[207]** Mr Burnett argued that the use of TAG representatives in this way, in place of solicitors and legal executives or people directly employed by a solicitor's firm, is to undermine the protective statutory regime. He said that it raised a serious issue of public policy, given the scale on which TAG itself says its scheme operates: the statutory requirements were being side-stepped at a rate of 15,000 cases per month.

**[208]** Master Hurst's approach to this final question was to start with the proposition that a 'legal representative' might be an individual or a firm or even a prescribed membership organisation (see reg 4(4), and s 30 of the 1999 Act). His reasons are set out in *Sharratt v London Central Bus Co Ltd, The Accident Group Test Cases* [2003] 1 All ER 353 at [54]–[60] and we need not repeat them here. He then concluded (at [75]) that delegation within a solicitor's firm must be permissible. If the task is delegated to someone incompetent within the firm, the firm will suffer the consequences when it is found that the requirements of the CFA regulations have not been complied with.

**[209]** He showed that he understood clearly the criticisms made by the defendant insurers. Paragraphs [76]–[77] and [82]–[83] of his judgment show how well he understood them. Since he had found that the legal representative might be an individual, a firm or a recognised body, it followed that there could be delegation within the firm or recognised body. He concluded, however, that given his finding that there could be delegation within the firm or recognised body, it followed that there could be delegation to a duly authorised agent.

**[210]** Although questions might arise as to whether the agent was competent to carry out the required task, or indeed whether the task had actually been carried out with the necessary competence, these were questions of quality which were not within the scope of his present judgment. It was the legal representative who would bear the consequences if his appointed agent did not carry out the task correctly, as would be the case in relation to internal delegation to an incompetent member of staff. 'Incompetence by the delegate does not invalidate the delegation' (at [84]).

**[211]** At the end of this part of his judgment, he said (at [88]):

> 'Can it be, [Mr Burnett] asked, that Parliament intended, when it enacted that CFAs which failed to comply with delegated legislation would be unenforceable, and when it had approved delegated legislation imposing mandatory requirements to give information and provide such explanation, advice or information as the client may require, that a TAG representative or someone similar would give the information required by reg 4 by using the wording set out in the fact find and oral explanation sheet? The answer to that question is that there is nothing in the general law of delegation and agency or in the 2000 regulations which prevents delegation of the reg 4 task to a properly appointed agent. The essential question is one of quality, ie was there sufficient explanation given by or on behalf of the legal representative? If the answer to that question is Yes: was that information given by a duly appointed agent? If the answer to the essential question is No, it is immaterial who gave the explanation.'

**[212]** Like Master Hurst we can only answer this question on this preliminary issue at a high level of generality. As we have observed, solicitors are now free to

delegate some of their functions, where it is appropriate to do so, to unadmitted staff and to independent contractors, provided that they comply with their responsibilities for supervision which appear in the Solicitors' Practice Rules and the *Guide to the Professional Conduct of Solicitors*. If they use independent contractors, they may use individuals, or they may use a reputable firm or company which will itself furnish staff who will perform the necessary functions. We were told that this often occurs when solicitors use inquiry agents to visit witnesses and prepare witness statements for them in the course of litigation.

**[213]** These practices have their convenient aspects, so far as client care is concerned. In the TAG cases there was evidence that solicitors and their staff usually work conventional office hours. The client, particularly if she is at work, prefers to deal with matters like the processing of a small accident claim at home in the evenings, and this is where the TAG scheme comes into its own. Although in the conventional way in which solicitors' business is conducted, the solicitor will have a personal interview with the client in his office (for which he will charge out at the appropriate hourly rate) Mr McCulloch described the practical difficulties he encountered when determining how to implement the new regulations.

**[214]** He said that when they were first introduced he held the view that in order to ensure that the client was fully informed of the nature of the agreement and had the ability to ask questions, there had to be some kind of personal conversational contact. Whilst it might have been possible to provide this advice by telephone he had concluded that it was virtually impossible to do this effectively without delaying progress. Clients were frequently not available during his normal office hours, and his practice, in common with many others, could not afford to provide a night-time or weekend service. It was simply beyond their resources.

**[215]** We have concluded that on this appeal Master Hurst directed himself correctly on the relevant law. So far as his application of the law to the facts is concerned, we can only interfere with this decision of a judge who has immense practical experience of the market in which solicitors now operate, and a keen understanding (which is apparent from his judgment) of the need to maintain appropriate professional standards, if we are of the opinion that his decision was wrong (CPR 52.11(3)(a)). We are quite unable to do so. Master Hurst showed that he understood the subject matter of these preliminary issues and their legislative background. He directed himself correctly on the law. He appreciated the strength of the opposing arguments, and he summarised them accurately in his judgment. And he reached a conclusion which was rationally argued and logically defensible.

**[216]** Whether when he descends to the detail of how the TAG scheme operates in practice during the later hearing, when the relevant issues have been defined with greater precision and when there is fuller evidence before him, both in the form of witness statements (which may be tested in cross-examination) and documents, than was available at the first trial, he finds breaches of reg 4 in one or more of the test cases will have to await the outcome of the later hearing. For the purposes of the first trial, and of this appeal, it is sufficient if we make it clear that it will be in theory permissible for a solicitors' firm to delegate the performance of its reg 4 duties to an organisation like TAG, and for TAG to sub-delegate to its representatives, provided that in so doing the solicitor is not abandoning the supervisory responsibilities required of him by Practice

Rule 13.07 and the Guide to Professional Conduct para 3.07. Whether the TAG scheme can and does provide properly for this is a matter for the fact-finding trial.

**[217]** Part II of the 1990 Act is concerned with the search for new or better ways for providing litigation services. A national organisation like TAG may be able to achieve economies of scale and standards of client service which simply are not available to an ordinary solicitors' firm. Quality control, however, is all important, and if a solicitor abjures his duty to maintain supervisory responsibility, through an established framework for reporting and accountability, over the TAG representatives when they visit his client's home on his behalf, it is likely that it would be found that it was not he who gave the information he was required by reg 4 to give, and that the regulation has therefore been broken.

**[218]** For these reasons we will dismiss this appeal.

6. CONCLUSIONS: THE RIGHT APPROACH

**[219]** We believe it will be helpful if we set out in one place the broad effect of this judgment.

**[220]** So far as matters of procedure are concerned, we consider that it should become normal practice for a CFA to be disclosed for the purpose of costs proceedings in which a success fee is claimed. If the CFA contains confidential information relating to other proceedings, it may be suitably redacted before disclosure takes place. Attendance notes and other correspondence should not ordinarily be disclosed, but the judge conducting the assessment may require the disclosure of material of this kind if a genuine issue is raised. A genuine issue is one in which there is a real chance that the CFA is unenforceable as a result of failure to satisfy the applicable conditions.

**[221]** When we turn to matters of law, we have explained that a CFA will only be unenforceable if in the circumstances of the particular case the conditions applicable to it by virtue of s 58 have not been sufficiently complied with in the light of their statutory purposes (see [105]–[110], above). Costs judges should ask themselves the following question: has the particular departure from a regulation or requirement in s 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?

**[222]** Thus the judge conducting the assessment should first consider the position as between solicitor and client. If the judge had done so in *Tichband v Hurdman*, for instance, he would immediately have seen that the client could not possibly have avoided his liability under the CFA by relying on the discrepancy between cl 33 and the risk assessment (see [131]–[134], above). If the court considers that as between solicitor and client the client would have just cause for complaint because some requirement introduced for his protection was not satisfied, or that the CFA otherwise offends public policy (for example, through a breach of s 58(3)(b), a provision with which we are not concerned on these appeals), then the CFA will be unenforceable, and the indemnity principle will operate in favour of the paying party.

**[223]** Even then, however, the client should be able to recover the disbursements which she has already financed, whether personally or through a loan, and any ATE premium (see [113]–[116], above).

**[224]** The court should be watchful when it considers allegations that there have been breaches of the CFA regulations. The parliamentary purpose is to enhance access to justice, not to impede it, and to create better ways of delivering

litigation services, not worse ones. These purposes will be thwarted if those who render good service to their clients under CFAs are at risk of going unremunerated at the culmination of the bitter trench warfare which has been such an unhappy feature of the recent litigation scene.

**[225]** In *Burstein v Times Newspapers Ltd* [2002] EWCA Civ 1739 at [29], [2003] 1 Costs LR 111 at [29] Latham LJ ended the judgment of the court with these words:

> 'The deputy costs judge is to be commended for ensuring that the detailed assessment did not become an excuse for further expensive litigation at the behest of a disappointed but persistent litigant. Satellite litigation about costs has become a growth industry, and one that is a blot on the civil justice system. Costs judges should be astute to prevent such proceedings from being protracted by allegations that are without substance.'

**[226]** In future district judges and costs judges must be equally astute to prevent satellite litigation about costs from being protracted by allegations about breaches of the CFA regulations where the breaches do not matter. They should remember that the law does not care about very little things, and that they should only declare a CFA unenforceable if the breach does matter and if the client could have relied on it successfully against his solicitor.

7. RESULTS OF THE INDIVIDUAL APPEALS

**[227]** We allow the defendants' appeals in the two disclosure cases, *Worth v McKenna* and *Pratt v Bull*. We allow the claimants' appeals in *Hollins v Russell* and *Tichband v Hurdman*. We dismiss the defendant's appeal in *Dunn v Ward*. We also dismiss the defendants' appeal in the *TAG Test Cases*.

**[228]** We consider that in *Worth v McKenna* the fair order to make is that if the receiving party so requests within five days of the order on this appeal the detailed assessment be reheard by the district judge in accordance with the principles set out in this judgment. In *Pratt v Bull* we remit the matter to the district judge to set a new timetable for the future conduct of the assessment proceedings. In *Hollins v Russell* the order of Judge Tetlow is set aside and the order of District Judge Simpson restored. In *Tichband v Hurdman* we remit the matter to a district judge to conduct a detailed assessment in accordance with the principles set out in this judgment.

*TAG Test Cases and Ward appeals dismissed. Hollins, Tichband, Bull and McKenna appeals allowed.*

Kate O'Hanlon Barrister.

# Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and another

[2003] EWHC 1866 (Ch)

CHANCERY DIVISION

PARK J

12, 13, 14, 15 MAY, 18 JULY 2003

*Mistake – Mistake of law – Money paid under mistake of law – Restitution – Limitation of action – Claimant company United Kingdom subsidiary of German parent – Claimant unable to utilise group income election to avoid paying advance corporation tax on dividends paid to parent as election only available if both subsidiary and parent resident in United Kingdom – European Court of Justice finding that such treatment contrary to Community law – Claimant commencing action for restitution – Whether action time-barred – Whether payments of advance corporation tax made under mistake of law – Whether English law recognising claim in restitution to recover taxes paid under mistake of law – Limitation Act 1980, s 32(1)(c).*

The claimant company was the United Kingdom subsidiary of a German company. Advance corporation tax was payable on the dividends it paid to its German parent because, at the relevant time, s 247(1)[a] of the Income and Corporation Taxes Act 1988 provided that a group income election, which enabled dividends to be paid without the paying subsidiary having to pay advance corporation tax to the Revenue, could only be made if the subsidiary and its parent were both resident in the United Kingdom. In July 1995, the claimant became aware that s 247 was being challenged by another company and that the basis of the challenge was that the provision was unlawful because it contravened the EC Treaty. By a judgment given on 8 March 2001, the Court of Justice of the European Communities held that the denial of the right of election to holding companies established in member states other than the United Kingdom and their United Kingdom subsidiaries was contrary to Community law. The court further held that, in respect of payments of advance corporation tax which had already been made, Community law conferred a right of compensation or restitution. The claimant had later been able to set off the advance corporation tax it had paid against its liability to mainstream corporation tax, but the effect of having had to pay the advance corporation tax was that it had suffered a disadvantage of timing. On 13 October 2000, the claimant commenced an action against the Revenue seeking compensation or restitution in respect of that timing disadvantage. The Revenue considered that the claim was time-barred under ss 2 or 5 of the Limitation Act 1980 in respect of three payments of advance corporation tax made in October 1993, February 1995 and January 1996 as they had been paid more than six years before the action was commenced. The claimant submitted that its action in respect of those three payments of advance corporation tax was not time-barred because it had made the payments under a mistake of law, it did not discover the mistake until the decision of the European Court of Justice was given on 8 March 2001

a Section 247, so far as material, is set out at [2], below

and that the limitation period in respect of its action for compensation or restitution accordingly began to run from the date of that discovery, pursuant to s 32(1)(c)[b] of the 1980 Act which provided that where an action was for relief from the consequences of a mistake, the limitation period did not begin to run until the claimant had discovered his mistake or could with reasonable diligence have discovered it. The Revenue contended that a cause of action for the restitution of tax payments made under a mistake of law did not exist.

**Held** – (1) English law recognised a claim in restitution to recover money paid under a mistake of law. It made no difference that the money was mistakenly paid in taxes (see [15], [17], [18], below); *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 applied, dicta of Lord Goff of Chieveley at 537–538 considered.

(2) At the times of the first two advance corporation tax payments, the claimant did not know that it was entitled to make a group income election despite the express provision in s 247 that it was not. If it had known the true state of the law, the elections would have been made, and the dividends would have been paid under them as group income, not attracting liability on the claimant's part to pay advance corporation tax. Therefore, the advance corporation tax which the claimant in fact paid was paid under a mistake of law: if the mistake had not existed the advance corporation tax would not have been paid. It could not be said that the claimant had discovered that the first two payments had been made under a mistake of law when, in July 1995, it had found out about the challenge to the United Kingdom provision relating to group income elections, nor that it had known that the third payment in January 1996 was made under a mistake of law. Accordingly, the claimant did not discover the mistake until the decision of the European Court of Justice was given on 8 March 2001 and a limitation defence under the 1980 Act therefore did not apply. The limitation period only started to run against the claimant on the release of the Court of Justice's decision, by which time it had already commenced its claim for relief. The claim accordingly succeeded (see [25], [26], [29]–[32], [42] below).

**Notes**

For postponement of limitation period for relief from consequences of mistake, see 28 Halsbury's Laws (4th edn, reissue) para 1129.

Advance corporation tax was abolished by s 31 of the Finance Act 1998 with effect from 6 April 1999.

For the Limitation Act 1980, s 32(1)(c), see 24 Halsbury's Statutes (4th edn) (1998 reissue) 733.

**Cases referred to in judgment**

*Eagerpath Ltd v Edwards (Inspector of Taxes)* [2001] STC 26, CA.

*Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, [1992] 2 AC 1, [1991] 2 WLR 372, HL.

*Hoechst UK Ltd v IRC* [2003] EWHC 1002 (Ch), [2003] All ER (D) 198 (Apr).

*Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349, [1998] 3 WLR 1095, HL.

b Section 32, so far as material, is set out at [8], below

*Metallgesellschaft Ltd v IRC, Hoechst AG v IRC* Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620, ECJ.
*Pirelli Cable Holding NV v IRC* [2003] EWHC 32 (Ch), [2003] STC 250.
*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) SA 202, SA SC.
*Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70, [1992] 3 WLR 366, HL.

**Cases referred to in skeleton arguments**

*Air Canada v British Columbia* (1989) 59 DLR (4th) 161, Can SC.
*Alliance and Leicester plc v Pellys* [1999] All ER (D) 765 (Jul).
*Amministrazione delle Finanze dello Stato v SpA San Giorgio* Case 199/82 [1983] ECR 3595, ECJ.
*Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1979] 3 All ER 522, [1980] QB 677, [1980] 2 WLR 218.
*Biggs v Somerset CC* [1996] 2 All ER 734, CA.
*Cooke v Gill* (1873) LR 8 CP 107.
*EC Commission v France* Case C-270/83 [1986] ECR 273, ECJ.
*Factortame Ltd v Secretary of State for Transport (No 2)* Case C-213/89 [1991] 1 All ER 70, [1991] 1 AC 603, [1990] 3 WLR 818, [1990] ECR I-2433, ECJ and HL.
*First Roodhill Leasing Ltd v Gillingham Operating Co Ltd* [2001] All ER (D) 65 (Jul).
*Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357, ECJ.
*Haahr Petroleum Ltd v Abenra Havn* Case C-90/94 [1997] ECR I-4085, ECJ.
*Letang v Cooper* [1964] 2 All ER 929, [1965] 1 QB 232, [1964] 3 WLR 573, CA.
*Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512, [1991] 2 AC 548, [1991] 3 WLR 10, HL.
*Marks and Spencer plc v Customs and Excise Comrs* Case C-62/00 [2002] STC 1036, [2003] QB 866, [2003] 2 WLR 665, ECJ.
*Nurdin & Peacock plc v D B Ramsden & Co Ltd* [1999] 1 WLR 1249, [1999] 1 All ER 941.
*Palmisani v Instituto Nazionale della Previdenza Social (INPS)* Case C-261/95 [1997] ECR I-4025, ECJ.
*Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, CA.
*Phillips-Higgins v Harper* [1954] 1 All ER 116, [1954] 1 QB 411, [1954] 2 WLR 117; *affd* [1954] 2 All ER 51, [1954] 2 WLR 782, CA.
*President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773, [1985] AC 104, [1984] 3 WLR 10, HL.
*R v Secretary of State for Transport, ex p Factortame Ltd (No 7)* [2001] 1 WLR 942.
*Savings and Investment Bank Ltd v Fincken* [2001] EWCA Civ 1639, [2001] All ER (D) 70 (Nov), CA.
*Shields v E Coomes (Holdings) Ltd* [1979] 1 All ER 456, [1978] 1 WLR 1408, CA.
*Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 4 All ER 10, [1994] 1 WLR 1409, CA.
*Westdeutsche Landesbank Girozentrale v Islington London BC* [1994] 4 All ER 890, [1994] 1 WLR 938, CA; *rvsd* [1996] AC 669, [1996] 2 All ER 961, [1996] 2 WLR 802, HL.

**Claim**

Deutsche Morgan Grenfell Group plc (DMG) claimed compensation or restitution from the defendants, the Inland Revenue and the Attorney General, in respect of payments of advance corporation tax on the ground that those payments were made pursuant to a provision of United Kingdom law which, in

March 2001, had been declared to be contrary to Community law by the Court of Justice of the European Communities. The facts are set out in the judgment.

*Laurence Rabinowitz QC* and *Francis Fitzpatrick* (instructed by *Slaughter & May*) for DMG.

*Ian Glick QC* and *Bruce Carr* (instructed by the *Solicitor of Inland Revenue*) for the Revenue.

*Cur adv vult*

18 July. The following judgment was delivered.

**PARK J.**

[1] ABBREVIATIONS, DRAMATIS PERSONAE, GLOSSARY, ETC

| | |
|---|---|
| ACT | Advance corporation tax. |
| CJEC | The Court of Justice of the European Communities. |
| DBAG | Deutsche Bank AG, a German company and the parent company, direct or indirect, of DBI and DMG. |
| DBI | DB Investments (GB) Ltd. |
| DMG | Deutsche Morgan Grenfell Group plc, the claimant company. |
| ICTA | The Income and Corporation Taxes Act 1988 in its form before amendments which took effect in 1999. |
| *Kleinwort Benson* | The House of Lords decision in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349. |
| *Metallgesellschaft/Hoechst* | The combined cases in the CJEC of *Metallgesellschaft Ltd v IRC, Hoechst AG v IRC* Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620. The judgment of the CJEC was delivered on 8 March 2001. |
| MCT | Mainstream corporation tax, as to which see [6], below. |
| *Pirelli* case, the | *Pirelli Cable Holding NV v IRC* [2003] EWHC 32 (Ch), [2003] STC 250. |

OVERVIEW

[2] At the times relevant for this case United Kingdom tax law provided that, where subsidiary companies paid dividends to their parents, 'group income' elections could be made which enabled the dividends to be paid without the paying subsidiary having to pay ACT to the United Kingdom Revenue. Until the decision of the CJEC in *Metallgesellschaft/Hoechst* such elections could be made only between United Kingdom resident companies: s 247(1) of ICTA included the words 'both being bodies corporate resident in the United Kingdom'. However, in *Metallgesellschaft/Hoechst* the CJEC held that it was contrary to art 52 of the EC Treaty (now art 43 EC) for United Kingdom law to deny the right to make group income elections where the parent company was resident in a member state other than the United Kingdom. The CJEC also held that, as respects payments of ACT which had already been made in the past, Community law conferred a right of compensation or restitution which the aggrieved companies were entitled to pursue in the United Kingdom courts.

[3] Many United Kingdom subsidiaries of member state parents, including DMG, a subsidiary of a German parent, commenced actions seeking compensation or restitution accordingly. The actions are now all organised within a group litigation order (as to which see CPR 19.11–19.15), and a series of test cases is being heard to determine various questions of principle to which they, or some of them, give rise. The first such case was the *Pirelli* case, which concerned an issue which arose where the parent company was resident in a member state which had a particular kind of double taxation agreement with the United Kingdom. The second such case is this one, in which the test claimant is DMG.

[4] The special feature of this case, and of others within the group litigation order for which this is the test case, is that questions of limitation of actions arise: some of the payments of ACT which DMG made to the United Kingdom Revenue were made more than six years before DMG commenced its action claiming compensation or restitution. The Revenue say that DMG's claims in respect of those ACT payments are barred by the normal six years' time limit laid down by s 2 of the Limitation Act 1980. DMG argues that it can circumvent this effect of the 1980 Act by a combination of two principles of law: first, that English law recognises an action for restitution of money paid under a mistake of law (see the decision of the House of Lords in the *Kleinwort Benson* case); second, that under s 32(1)(c) of the 1980 Act, the limitation period where an action is brought for relief from the consequences of a mistake begins to run only when the claimant discovered the mistake or could with reasonable diligence have discovered it.

DMG has pleaded its case in ways which include a claim for restitution on the ground that it made the payments of ACT under a mistake of law. It says that it did not discover the mistake until the decision of the CJEC in *Metallgesellschaft/Hoechst*. That decision was given on 8 March 2001, by which date DMG had already commenced its action. Alternatively, DMG says that the earliest time at which it could be said to have discovered its mistake was when the Advocate General delivered his opinion in *Metallgesellschaft/Hoechst*. That was on 12 September 2000, well within six years before DMG commenced its action. DMG argues that therefore it is not time-barred from recovering the relief which it claims, notwithstanding that the ACT payments (or some of them) were made more than six years before the action was commenced.

[5] It seems to me that three principal questions arise. (i) Does a claim for restitution of a payment made under a mistake of law apply in the case of a payment of tax to a Revenue authority? In my view the answer is, Yes. (ii) Did DMG make the relevant payments of ACT under a mistake of law so as to be entitled to claim restitution in accordance with the principles laid down by the House of Lords in *Kleinwort Benson*? In my view the answer is again, Yes. (iii) Under s 32(1)(c) of the 1980 Act, when did the limitation period begin to run? Did it begin to run only at the time of the CJEC's decision in *Metallgesellschaft/Hoechst* (or possibly at the time of the Advocate General's opinion)? Or did it begin to run at the earlier time in mid-1995 when DMG first learned that the Hoechst group of companies was arguing that the rule that only United Kingdom resident companies could make group income elections was contrary to Community law? In my opinion the period began to run only at the time of the CJEC's decision. It follows that DMG's claims succeed.

THE RELEVANT UNITED KINGDOM TAX LAW

[6] At the times with which this case is concerned the general rule of United Kingdom tax law was that, if a company resident in the United Kingdom paid a dividend, it had to pay ACT to the Revenue (see ICTA, s 14). The rate of ACT varied over the years. At the times with which the present case is concerned it was normally 25% of the dividend. In the usual case the amount so paid could be set off against the company's normal liability to pay corporation tax on its profits, sometimes referred to as mainstream corporation tax or (as in this judgment) MCT. Where the ACT was so set off the payment of it did not cause the company to suffer an absolute loss of the money, because the set-off reduced on a pound for pound basis a later payment of MCT which the company would otherwise have had to make anyway. However, it did have the effect that the company had to pay some of its corporation tax bill early, so the ACT meant that the company suffered a timing disadvantage and the United Kingdom Revenue received a corresponding timing advantage. (There could be cases where a subsidiary had paid ACT and could not set it off against MCT. In such cases the ACT payment did represent an absolute loss of the money and not just a timing disadvantage. However, in the case of DMG all the relevant ACT payments were eventually set off against MCT, so that the disadvantage for which DMG seeks relief is a timing disadvantage only.)

[7] There was an exception to the rule that a company which paid a dividend had to pay ACT. If it was a subsidiary of a United Kingdom holding company the two companies could jointly make a group income election under s 247 of ICTA. The effect was that the subsidiary did not have to pay the ACT after all. It did still have to pay its full MCT when the due date came round, but the group income election removed the timing disadvantage. However, if the dividend-paying company was a subsidiary of a non-United Kingdom holding company the two companies could not make a group income election, so the subsidiary had to pay ACT and suffer the timing disadvantage, in circumstances where a subsidiary of a United Kingdom holding company, if it and its parent had made a group income election, did not. That was the feature of United Kingdom law which, in *Metallgesellschaft/Hoechst*, the CJEC held to have been contrary to EC law and also to entitle the companies which had suffered from it to claim compensation or restitution. Where, as in this case and as in the cases of the Metallgesellschaft and the Hoechst groups, the ACT had been set

off against MCT, the compensation or restitution would be an amount calculated by reference to interest over the period from the payment of the ACT until it was set off against MCT.

THE LIMITATION ACT 1980

[8] Sections 2 and 5 of this Act provide that an action founded on tort (see s 2) or on simple contract (see s 5) may not be brought after the expiration of six years from the date when the cause of action accrued. The parties agree that a claim for compensation or restitution of the nature which the CJEC said in *Metallgesellschaft/Hoechst* should be available would almost certainly be a claim in tort or contract and subject to a six years' time limit. An important issue is: when does the six years' period start to run. The parties also agree that, if ss 2 or 5 applies and the period runs only from the date when the cause of action accrued, some of DMG's causes of action accrued more than six years before it brought its action and would therefore be time-barred. However s 32 opens the possibility that, if one of the detailed circumstances described in the section exists, the limitation period, though it is still six years, may commence to run at a date later than the date when the cause of action accrued. So far as relevant the section provides as follows:

> **'Postponement of limitation period in case of fraud, concealment or mistake**
>
> (1) ... where in the case of any action for which a period of limitation is prescribed by this Act, either—(a) ... or (b) ... or (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the ... mistake ... or could with reasonable diligence have discovered it.'

THE FACTS

[9] At the times when the ACT payments relevant to this case were made the group structure was a little more complicated than a parent company with a 100% direct subsidiary, but nothing turns on the extra complications. The German holding company was DBAG. It was not the simple 100% owner of DMG. Instead it owned 14% of the shares in DMG directly. It owned all of the shares in DBI, an interposed United Kingdom holding company, and DBI owned the other 86% of the shares in DMG. I mention for completeness that in November 1997 the structure was simplified and DBI, the 100% direct subsidiary of DBAG, became the 100% (as opposed to merely the 86%) direct owner of DMG. However, the dividends and the associated ACT payments which are relevant to this case were paid before November 1997, so it is the earlier structure which is in point.

[10] According to the terms of ICTA, s 247, group income elections could not have been made between DMG and DBAG or between DBI and DBAG, because DBAG was not a company resident in the United Kingdom. A group income election could have been made between DMG and DBI (because both companies were resident in the United Kingdom), but no such election was made. The reason was that, although an election would have enabled dividends to flow from DMG to DBI without ACT, onward dividends from DBI to DBAG would have had to be paid subject to a liability on the part of DBI to pay ACT: or at least that was how the matter appeared on the terms of the domestic United Kingdom legislation. In the circumstances DMG paid

ACT by reference to all its dividends—the 86% of them paid to DBI as well as the 14% of them paid to DBAG—and DBI did not pay ACT when it paid onward dividends to DBAG. DBI did not have to pay ACT on those onward dividends because of the rules about franked investment income in ICTA, ss 238 and 241.

[11] DMG has pleaded in this case, and the Revenue admit, that, if s 247 had permitted group income elections to be made between a United Kingdom subsidiary and a parent company in another member state, elections would have been made between DMG and DBI, between DMG and DBAG, and between DBI and DBAG. The corollary is that, because s 247 appeared clearly not to permit group income elections to which a parent company in another member state was a party, the companies did not attempt to make group income elections. There is no doubt that, if they had attempted to make them, the Revenue would have rejected the elections and pointed to the clear terms of the United Kingdom statute in justification of the rejection.

[12] Over the years several dividends flowed through from DMG to DBAG, either directly as to 14% of them or through DBI as to 86% of them. In the case of all of them DMG paid ACT. As respects some of the ACT payments no issue arises in the present case (because no limitation arguments arise), but as respects three dividends and associated ACT payments there are limitation issues in dispute which I must decide. Before I give the dates of the dividends and ACT payments it is useful to record that DMG issued its claim form, commencing the present action, on 13 October 2000, served its particulars of claim on 9 February 2001, and amended the particulars so as to give specific details of the ACT payments which this case is about on other dates. One amendment, giving particulars of an ACT payment made in 1993, was made on 16 August 2001. Another amendment, giving particulars of two ACT payments made in 1995 and 1996 was made on a date which must be taken to have been 19 August 2002. The periods which ran for six years up to those dates began on 14 October 1994, 10 February 1995, 17 August 1995, and 20 August 1996.

[13] The three ACT payments which are relevant for this judgment were made on 14 October 1993, 15 February 1995, and 14 January 1996. At a later point I shall go into more detail on these matters, but it will be apparent from the dates which I have just given that a limitation issue certainly arises as respects the ACT paid on 14 October 1993, and at least might arise also as respects the ACT paid on 15 February 1995 and on 14 January 1996. If the s 2 limitation period (as opposed to the s 32 limitation period) started to run on the date of payment of the ACT, six years from the payment of the ACT on 14 October 1993 had expired before DMG had even issued its claim form. The position is more complicated as regards the two subsequent payments of ACT (on 15 February 1995 and 14 January 1996), because it gets involved with questions of whether what mattered was the service of the particulars of claim or rather the making of the amendments to the particulars of claim. I will explain about that in a later section of this judgment.

DOES ENGLISH LAW RECOGNISE A CLAIM IN RESTITUTION TO RECOVER TAXES PAID UNDER A MISTAKE OF LAW?

[14] This question subdivides into two questions. The first is whether English law recognises a claim in restitution to recover money paid under a

mistake of law. If the answer to the first question is, Yes, the second question arises: does it make any difference if the money paid was paid to a Revenue authority in discharge of what was, or at least was thought to be, a liability for taxes?

**[15]** The answer to the first question is now clear, as a result of the decision of the House of Lords in *Kleinwort Benson*. English law does recognise a claim in restitution to recover money paid under a mistake of law. The *Kleinwort Benson* case is so celebrated that it would be excessive for me to describe it in any detail. It is sufficient to say that a bank (Kleinwort Benson) had made payments to a local authority (Lincoln in the particular case dealt with by their Lordships) under swap agreements which the bank thought, in common with virtually everybody who had a view on the point at the time, were legally enforceable. An intervening decision of the House of Lords (*Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, [1992] 2 AC 1) showed that the bank and virtually everybody else were mistaken about the law: the swap agreements were not legally enforceable after all. Kleinwort Benson sued to recover the payments which it had made. It had limitation problems, but it sought to overcome them by relying on a right to recover payments made under a mistake of law and also by relying on s 32 of the 1980 Act.

**[16]** The majority in the House of Lords (Lord Goff of Chieveley, Lord Hoffmann and Lord Hope of Craighead) held that Kleinwort Benson was entitled to succeed. Under English law money paid under a mistake of law was recoverable; earlier cases to the contrary were overruled. And s 32(1)(c) did operate to postpone the start of the six years' limitation period until the time when the mistake of law was discovered or discoverable with reasonable diligence. The majority also took the view that Kleinwort Benson had indeed made the payments to Lincoln under a mistake. That was one respect in which the minority differed. Lord Browne-Wilkinson and Lord Lloyd of Berwick considered that, because the bank had made the payments in accordance with what it and everyone else had believed to be the law at the time, it had not made them under a mistake. The contrary view of the majority on that issue is summarised in the following passage from the speech of Lord Goff ([1998] 4 All ER 513 at 536, [1999] 2 AC 349 at 379):

> 'To me, it is plain that the money was indeed paid over under a mistake, the mistake being a mistake of law. The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it. Plainly, therefore, he paid the money under a mistake of law, and accordingly, subject to any applicable defences, he is entitled to recover it.'

That passage does conclude with a suggestion that there might be applicable defences, but Lord Goff went on to consider whether there indeed were any, and concluded that there were not, at least so far as the instant case was concerned. He did think it possible that there ought to be some defences, but he did not consider that the House of Lords could introduce them as a matter of case law.

**[17]** I will consider later how the foregoing aspects of the House of Lords' decision in *Kleinwort Benson* apply to the facts of the present case. For the

moment I wish to address the second question which I identified in [14], above: does it make any difference if the money was paid to a Revenue authority in discharge of what was, or at least was thought to be, a liability for taxes? In principle it is hard to see why that should make any difference, but the question must be considered with some care because of three paragraphs in Lord Goff's speech ([1998] 4 All ER 513 at 537–538, [1999] 2 AC 349 [1999] 2 AC 349 at 381–382 in a speech which extends in [1998] 4 All ER 513 from 523–544 and in [1999] 2 AC 349 from 365 to 389). I believe that I ought to quote them in full:

> 'At this point it is, in my opinion, appropriate to draw a distinction between, on the one hand, payments of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions. The former category of cases was considered by your Lordships' House in *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70, in which it was held that at common law taxes exacted ultra vires were recoverable as of right, without the need to invoke a mistake of law by the payer. Moreover reference was made, in the course of the hearing, to the various statutory provisions (usefully summarised in the Law Commission's Consultation Paper (Law Com no 120) at pp 74–84) which regulate the repayment of overpaid tax. For present purposes it is of interest that, in the case of some taxes (including income and corporation tax), no relief is given "in respect of an error or mistake as to the basis on which the liability ... ought to have been computed where the return was in fact made on the basis of or in accordance with the practice generally prevailing at the time when the return was made": see the proviso to s 33(2) of the Taxes Management Act 1970.
>
> Two observations may be made about the present situation. (I of course have it in mind that this is the subject of proposals for legislative reform contained in the Law Commission's Report *Restitution: mistakes of law and ultra vires public authority receipts and payments* (Law Com no 227) (1994), but your Lordships are concerned with the law as it stands at present.) The first observation is that, in our law of restitution, we now find two separate and distinct regimes in respect of the repayment of money paid under a mistake of law. These are (1) cases concerned with repayment of taxes and other similar charges which, when exacted ultra vires, are recoverable as of right at common law on the principle in the *Woolwich* case, and otherwise are the subject of statutory regimes regulating recovery; and (2) other cases, which may broadly be described as concerned with repayment of money paid under private transactions, and which are governed by the common law. The second observation is that, in cases concerned with overpaid taxes, a case can be made in favour of a principle that payments made in accordance with a prevailing practice, or indeed under a settled understanding of the law, should be irrecoverable. If such a situation should arise with regard to overpayment of tax, it is possible that a large number of taxpayers may be affected; there is an element of public interest which may militate against repayment of tax paid in such circumstances; and, since ex hypothesi all citizens will have been treated alike, exclusion of recovery on public policy grounds may be more readily justifiable.

> In the present case, however, we are concerned with payments made under private law transactions. It so happens that a significant number of payments were in fact made under interest rate swap agreements with local authorities before it was appreciated that they were void; but the number is by no means as great as might conceivably occur in the case of taxes overpaid in accordance with a prevailing practice, or under a settled understanding of the law. Moreover the element of public interest is lacking. In cases such as these I find it difficult to understand why the payer should not be entitled to recover the money paid by him under a mistake of law, even if everybody concerned thought at the time that interest rate swap agreements with local authorities were valid.'

**[18]** Is Lord Goff saying in those paragraphs that the cause of action for restitution of money paid under a mistake of law, the existence of which he, Lord Hoffmann and Lord Hope are affirming, does not apply to money mistakenly paid in taxes? In my judgment the answer is that he is not. In support of my view I make the following points. (i) There is certainly no principle that, for public policy reasons or for other reasons, there can never be restitutionary claims for recovery of taxes wrongly paid. See *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70, recognising the existence of a restitutionary claim in respect of tax paid under protest in response to what turned out to have been an unlawful statutory demand. (ii) If Lord Goff intended to say that, although money paid under a mistake of law was generally recoverable, money paid in taxes under a mistake of tax law was not, he would not have said it at the point in his speech where the three paragraphs which I have quoted appear. The general structure of the speech was to begin with an analysis of whether a cause of action for restitution of payments made under a mistake of law existed at all, and then, having concluded that it did, to go on to consider whether there were any defences to such a cause of action which might apply in particular cases. If His Lordship wished to say that a cause of action for payments of taxes made under a mistake of law did not exist he would surely have dealt with the point in the first part of his speech. However, the paragraphs which I have quoted appear in the second part of the speech, and in particular in a section where Lord Goff is considering whether the House of Lords should introduce a 'settled law defence' along the lines of a proposal which had been made by the Law Commission. The Commission had considered that legislation would be necessary to create a settled law defence, and in a draft Bill had included a provision expressed as follows (Law Com no 227 p 196 (cl 3(1))):

> 'An act done in accordance with a settled view of the law shall not be regarded as founding a mistake claim by reason only that a subsequent decision of a court or tribunal departs from that view.'

(iii) In the context I do not believe that Lord Goff was saying that there could never be a restitutionary claim for tax paid by mistake. Rather he was observing that, although there could be such a claim, the courts might at some future time have to consider whether there was also a settled law defence. In the *Kleinwort Benson* case itself he went on to decide that (at common law, and leaving out of account possible future legislative changes) there was no such defence where the mistaken payments had been made under private law. He did not wish to be understood as deciding the same

thing where the payments were tax payments. However, he was not deciding that there was a settled law defence in the case of tax payments. He was leaving the matter open. (iv) In the present case the submission put to me by Mr Glick QC on behalf of the Revenue was that a cause of action for the restitution of tax payments made under a mistake of law did not exist at all. He expressly said that, if I considered that the cause of action did exist, he did not invite me to decide at High Court level that a settled law defence might be available. He reserved the right to advance such an argument in a higher court, and I gave permission for an amendment to the Revenue's defence which would lay the basis for such an argument if the Revenue wish to advance it hereafter. (v) In the earlier part of Lord Goff's speech, where he discussed whether there should be a cause of action in restitution for money paid under a mistake of law, he reviewed a number of authorities in other jurisdictions which had held that such a cause of action did exist. Among them was the South African case of *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) SA 202. That was a tax case in which a restitutionary claim for the recovery of tax paid under a mistake of law succeeded. The impression which I glean from the speech is that Lord Goff approved of the *Willis Faber* decision and saw no objection to a similar result forming part of United Kingdom law. (vi) In none of the other speeches in the House of Lords, either of the majority or of the minority, is there any suggestion that there could be a difference between payments of tax made under a mistake of law and payments of different kinds made under a mistake of law.

**[19]** There is one last point to make on this aspect of the case. I ought to mention the judgment of Brooke LJ in *Eagerpath Ltd v Edwards (Inspector of Taxes)* [2001] STC 26. The case was about a technical issue of tax appeal machinery involving an 'error or mistake claim' under s 33 of the Taxes Management Act 1970. However, there are some observations of Brooke LJ which assume that a result of the *Kleinwort Benson* decision in the House of Lords is that a taxpayer who has paid too much tax because of a mistake of law has a cause of action at common law entitling him to recover the overpayment. However, the observations were clearly obiter. I am informed that the issue of whether the *Kleinwort Benson* decision extended to tax payments had not been raised in argument. I think it is unlikely that Brooke LJ considered the three paragraphs from Lord Goff's speech which I have quoted. In the circumstances I do not attach much weight to his observations, but they are at least a tentative opinion of a Court of Appeal judge that tax payments made by mistake can be recovered.

DID DMG MAKE ITS PAYMENTS OF ACT UNDER A MISTAKE OF LAW?

**[20]** In my opinion the answer is, Yes. However, the question is not entirely straightforward. In my view it is more complicated than the equivalent question which arose in the *Kleinwort Benson* case, and it requires careful analysis. In that case Lord Goff said, in a passage which I have already quoted (see [16], above):

> 'The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it.'

In this case it cannot be put as simply as that. There are two different reasons why that is so.

[21] The first reason is this. The relevant United Kingdom tax provisions did not take the simple form of providing that, if a subsidiary paid a dividend to another company which was in the same group, it did not have to pay ACT. They provided: (1) that if the companies were in a group relationship, they could make a group income election; (2) that if there was a group income election in force at the time of payment of a dividend, ACT was not payable (unless the companies specifically gave notice to the contrary as regards a particular dividend); (3) that a group income election did not take effect for three months or, if earlier, until the inspector notified the companies that he accepted it; and (4) that an election would be of no effect if, in those three months, the inspector notified the companies concerned that he was not satisfied that it was validly made. See generally ICTA, ss 247(2), (3), 248(2). On the last point, if the inspector gave notice that he was not satisfied that an election was validly made the companies could appeal, but unless and until the appeal was determined in the companies' favour, there was no group income election in force. It followed that as a matter of law ACT was properly payable in respect of dividends paid in the meantime, and even a successful appeal against the refusal of a group income election would not change that position. The dividends paid while the appeal was pending continued to give rise to ACT liabilities, and the success of the appeal would only be relevant to future dividends paid after the appeal decision. See as to this observations of the CJEC in para 104 of its judgment in *Metallgesellschaft/Hoechst*.

[22] The point which emerges from the foregoing is that, on a close analysis, the mistake of law which DMG made was not that it paid ACT which was not payable: the ACT was as a matter of law payable when DMG paid it, and the decision of the CJEC in *Metallgesellschaft/Hoechst* does not mean that it was not payable. Rather the mistake of law which DMG made was that it did not realise that it and DBI could have made group income elections with DBAG, which would have had the effect of preventing the ACT from being payable.

[23] The second reason why this case is not exactly the same as one covered by the passage from Lord Goff's speech in *Kleinwort Benson* is this. His Lordship describes a situation where: 'The payer believed, when he paid the money, that he was bound in law to pay it.' In the present case it is not as clear cut as that, at least as regards the last of the three ACT payments to which the case relates. The special feature which affects this case is that Hoechst commenced its action against the Revenue in April 1995, and DMG, through its Head of Taxation Mr Thomason, knew about it at the latest by early July 1995. I will consider the implications of this in subsequent paragraphs, but I record now that Mr Glick on behalf of the Revenue seeks to make much of it. In the simplest form his argument is that, if DMG paid ACT at a time when it knew that the United Kingdom statute law was being challenged as contrary to Community law, it cannot say that it paid the ACT under a mistake. The argument is more complicated as regards the first and second ACT payments, both of which were paid before Hoechst commenced its challenge. However, it will be recalled that under s 32(1) of the 1980 Act the limitation period begins to run when the claimant discovers his mistake (or could with reasonable diligence have discovered it). Mr Glick argues that, even if DMG was suffering from a mistake when it made the first two ACT

payments, it discovered its mistake by July 1995 when its Head of Taxation learned of the argument which Hoechst was putting forward.

**[24]** In my view, however, DMG did pay the ACT, including the third amount of ACT paid on 14 January 1996, under a mistake of law. I do not accept Mr Glick's submissions about the effect of DMG's knowing of Hoechst's argument from mid-1995 onwards. In this respect I do not think that my reasoning precisely follows the arguments of counsel. To some extent the arguments explored the question of what degree of doubt there had to be about a proposition before the person concerned can be said to be suffering from a mistake or not. As my reasons, explained in the ensuing paragraphs, will show, I do not see the issue in quite that way.

**[25]** At the times of the first and second dividends and of the two ACT payments to which they gave rise DMG knew nothing about the argument that, by virtue of EC law, it and DBI were entitled to make group income elections with DBAG despite the express provision in ICTA, s 247 that they were not. Because of the CJEC decision in *Metallgesellschaft/Hoechst* DMG knows now that the true state of the law then was that the companies were entitled to make group income elections; the Revenue knows that now as well; indeed we all do. But we did not know that then. If the true state of the law had been known at the time the companies would have made elections and DMG's dividends would have been paid under them as group income, not attracting a liability on DMG's part to pay ACT. At this stage in the analysis it must be assumed that, if the true state of the law had been understood, both DMG and the Revenue would have understood it. In other words we know now that DMG, DBI and DBAG were mistaken in thinking that DMG and DBI could not make group income elections with DBAG; if they had not been mistaken in that respect they would have made elections; if they had made elections all of the DMG dividends which in fact attracted ACT would not have attracted ACT. Therefore the ACT which DMG in fact paid was paid under a mistake of law: if the mistake had not existed the ACT would not have been paid. It is, however, important to appreciate that the mistake was not directly a mistake about whether there was a liability to pay ACT. It was directly a mistake about whether group income elections could be made. The liabilities to pay ACT arose as secondary consequences of that primary mistake.

**[26]** I move on now to consider whether it makes any difference that by July 1995 DMG knew that Hoechst was challenging the provision in s 247 that, for a group income election to be possible, both companies had to be resident in the United Kingdom, and that the basis of the challenge was that the provision was unlawful because it contravened articles of the EC Treaty. I will deal first with the third ACT payment of just under £3·5m, which was paid by DMG on 14 January 1996. The payment related to two dividends, both paid on 17 July 1995: one paid direct to DBAG on its 14% shareholding, and the other paid to DBI on its 86% shareholding. The evidence shows that the DBAG group, including DMG, knew about the Hoechst argument before 17 July 1995, but made no attempt to get group income elections in place. So in the context of the third ACT payment the question is whether, given that DMG knew about the argument, DMG can still say that it paid the ACT under a mistake. In relation to the first and second payments the detailed facts are different: the ACT payments were made in October 1993 and February 1995 in respect of dividends paid in July 1993 and July 1994: at none of those times

did DMG know about the Hoechst argument. For those ACT payments the question is: if DMG made the payments under a mistake of law (which in my opinion it did), did it discover the mistake in 1995 when it discovered about Hoechst's argument?

[27] Before I move on I wish to record the evidence which Mr Thomason (the Head of Taxation at DMG) gave about his state of mind when he learned of the Hoechst argument. In his witness statement he said this:

> 'At all times prior to the determination of the European Court in the Hoechst case, I believed that the United Kingdom statute denying the ability to make a group income election was the law and I was bound to act in accordance with this law ... It did not occur to me that I could ignore the law as it stood for the simple reason that the law is the law. Just because another taxpayer challenged the law that did not mean that I could or should ignore it.'

Mr Thomason was cross-examined, but I do not believe that the foregoing passage was challenged or affected by his answers on other points. He added the general point (obvious but plainly relevant) that it was not clear in 1995 what would be the outcome of the Hoechst case (or, as it turned out, of the *Metallgesellschaft/Hoechst* conjoined cases). He also said that there were more arguments being advanced by Hoechst in 1995 than the one which eventually succeeded in the CJEC. For example, relief was being claimed by Hoechst AG, the German parent company, as well as by the United Kingdom subsidiary which had paid the dividends and the associated ACT. In addition arguments were being advanced in reliance, not on the EC Treaty, but on the non-discrimination article in the double taxation agreement between the United Kingdom and Germany.

[28] I now proceed with my own analysis of the position. It is obvious that, when DMG learned of the argument which Hoechst was advancing, it had come to know something—to discover something—which it had not known before. That is true, but DMG did not come to know, or to discover, that it and DBI could make group income elections with DBAG after all. All that it discovered was that another company was arguing that it could make a group income election with its German parent company in comparable circumstances, and that the Revenue were disputing the argument. I examine the position as matters actually stood before DMG paid the dividend which it was planning to pay and did pay in July 1995. If at that time DMG and DBI had submitted group income elections with DBAG, it is in my opinion certain that the inspector would have rejected the elections within the three-month period which was available to him under s 248(2). Short of DMG abandoning the intention to pay dividends altogether (which I assume would have been unacceptable to the group as a whole) DMG would have had to pay the ACT. Further, such ACT would have been correctly paid even if DMG had appealed against the rejection of the elections and a later decision (like the actual decision in *Metallgesellschaft/Hoechst*) showed that the inspector ought to have accepted them. (See as to this [21] and [22], above.)

[29] Concentrating for the moment on the first and second ACT payments (the payments associated with the dividends which DMG paid in July 1993 and July 1994), I repeat that the mistake which DMG made at those times was that it did not realise that it and DBI could have made valid group income elections

with DBAG. In 1995, when DMG learned of the case which Hoechst had begun against the United Kingdom Revenue, it did not discover that it (DMG) and DBI could have made group income elections with DBAG after all. All that it discovered was that there was a possible argument that they could have done that. So it did discover something, but not something which made any difference to the matters which are critical in this case. Suppose that back in 1993, when DMG was planning to pay the first of the dividends, it had already known what it actually discovered in 1995: that there was an argument that group income elections could be made with parent companies in member states other than the United Kingdom, but that the Revenue did not agree with the argument. Would DMG, DBI and DBAG have submitted group income elections then? I do not think that they would. Still less do I think that, if they had submitted elections then, DMG would not have been liable to pay ACT when it paid the dividends. I have no doubt that the Revenue would have rejected the elections, and that DMG would have been liable to pay the ACT and would have paid it.

**[30]** Accordingly, my conclusions in relation to the first two ACT payments are: (1) that DMG did pay them under a mistake of law; (2) that, unless a limitation defence applies, DMG is entitled to claim restitution on the basis of a mistake of law; (3) that DMG did not discover its mistake in 1995 when it learned about the argument which Hoechst was advancing; (4) that therefore the limitation period applicable to DMG's mistake of law claim did not begin to run in or about July 1995; and (5) that no limitation defence applies. In my opinion DMG did not discover its mistake until the decision of the CJEC in *Metallgesellschaft/Hoechst* was released on 8 March 2001. DMG had already commenced its action claiming relief before then: it did so shortly after the Advocate General's opinion was delivered. That opinion was in favour of the claimants, and thus it foreshadowed the later decision of the CJEC itself. It might be arguable that DMG discovered its mistake at the time of the Advocate General's decision. I would not take that view myself: it was not inevitable that the CJEC would take the same view as the Advocate General. But the point does not matter, because, even if the limitation period started to run at the time of the Advocate General's opinion, DMG commenced its action only a month and a day later (12 September 2000 and 13 October 2000).

**[31]** As regards the third ACT payment—the one made on 14 January 1996—DMG knew about the Hoechst argument when it paid the ACT, and it had also known about the argument when it and DBI made no attempt to make group income elections before it paid the dividends on 17 July 1995. Notwithstanding that, I accept that DMG paid the ACT under a mistake of law, and is in principle entitled to restitution for the timing disadvantage which it thereby suffered. The limitation period would only start to run against DMG on the release of the CJEC decision, by which time it had already commenced its claim for relief.

**[32]** The result is that in my judgment DMG's claims succeed and that none of them is statute-barred. I will, however, briefly indicate what I believe the position would have been if I am wrong and if, once DMG knew of the Hoechst argument in 1995, it was no longer suffering from a relevant mistake.

WHAT IF (CONTRARY TO MY VIEW) DMG WAS NO LONGER MISTAKEN ONCE IT

LEARNED OF THE ARGUMENT BEING ADVANCED BY THE HOECHST GROUP?

[33] I will deal first with the first two ACT payments, which were made before DMG knew about the Hoechst argument. On the hypothesis which I am now assuming, DMG was under a mistake when it made the payments but discovered its mistake on a date between April 1995 (when the Hoechst action was commenced) and mid-July 1995 (by which time there is no doubt that DMG knew about the Hoechst case). So the limitation period started to run on a date in that period. I do not know exactly which date, but for illustration purposes in the discussion which follows I will assume that it was 1 July 1995. For DMG's claim for restitution to escape being statute-barred it would have had to have been commenced before 1 July 2001. DMG's claim form was issued on 13 October 2000, and the particulars of claim were served on 9 February 2001. On the face of it both were within time, whether the relevant date is taken to be that of the claim form or that of the particulars of claim.

[34] However, there is a complication which arises from the detailed contents of DMG's pleadings. The question is whether the claim form and the particulars of claim as they were originally expressed always claimed relief in respect of the ACT payments made in October 1993 and February 1995, or whether claims in respect of those particular ACT payments were new claims added by amendments made on 16 August 2001 (as respects the October 1993 ACT payment) and on 19 August 2002 (as respects the February 1995 ACT payment). If they were new claims added to the particulars of claim by the amendments, and if (contrary to my view) the limitation period had started running on or about 1 July 1995, the claims would be time-barred by the 1980 Act. In my opinion, however, the original particulars of claim, on their proper interpretation, already claimed relief in respect of the ACT payments made in October 1993 and in February 1995.

[35] This is a fine point on the small print wording of the particulars of claim, and I will not go into it at length. The critical point is that the particulars claimed relief in respect of all payments of ACT made by reference to 'the dividends'. 'The dividends' was a defined term: it meant the dividends which DMG had paid from time to time to DBI and DBAG, thus (as it seems to me) covering all dividends, including those which had led to the payments of ACT in October 1993 and February 1995 (the first and second payments which are in issue in this case). The original particulars of claim did say that the payments of ACT 'include but are not limited to' certain payments set out in a schedule. The payments so set out did not include the payments made in October 1993 and February 1995: those payments were only added to the schedule by the amendments made more than six years after 1 July 1995. However, in my view the original particulars of claim claimed relief in respect of all payments of ACT which had been made by DMG in respect of all dividends paid by it to DBI and DBAG. The claim was not limited to the payments specified in the schedule.

[36] In this respect the original particulars of claim were different from those which I considered in the recent case of *Hoechst UK Ltd v IRC* [2003] EWHC 1002 (Ch), [2003] All ER (D) 198 (Apr). The particulars of claim in that case (as I interpreted them) only claimed relief in respect of the specific ACT payments which were identified in a schedule, so that when the schedule was amended to add further payments the amendment had the effect of adding new claims in respect of additional causes of action. In the present case, in contrast, I consider that the amendments did not add new claims, but rather gave further details of claims which had already been made within the causes of action which had

already been pleaded. Therefore, even if, contrary to my view, the six years limitation period started to run in July 1995 as respects the first two payments of ACT which are in issue, I still consider that DMG's claims for relief in respect of those two payments were brought within the period and are not statute-barred.

**[37]** I turn to the third ACT payment, the one of about £3·5m which was made on 14 January 1996. The result is the same as respects that payment, but the precise route by which the result is reached is different. When the payment was made, and also at the earlier time when the dividend which gave rise to it was paid (on 17 July 1995), DMG already knew about the argument which Hoechst was advancing. In my view, for the reasons which I have explained earlier, that did not change the position that DMG paid the ACT under a mistake of law. However, Mr Glick has submitted that it did, and that DMG did not pay the January 1996 ACT under a mistake. Let me suppose that he is right. Three specific consequences would follow. (1) DMG's claim for restitution, in so far as it rests on the *Kleinwort Benson* principle that money paid under a mistake of law is recoverable, would fail. (2) However, DMG would have a good claim for compensation or restitution based on the different ground that it had paid the money pursuant to an unlawful taxation measure (as in *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70). (3) The limitation period for that cause of action began to run immediately on payment of the ACT, on 14 January 1996. Therefore DMG would need to commence its action before 14 January 2002.

**[38]** As I have already recorded the claim form was issued on 13 October 2000 and the particulars of claim were served on 9 February 2001, both comfortably within the six years period. Therefore DMG's claim in respect of the last of the three ACT payments would have been in time anyway, as long as the claim as pleaded in the original particulars did claim relief in respect of that ACT payment. In my judgment it did, for the same reasons as those which I explained in [35], above. The particulars claimed relief in respect of all ACT payments made by DMG, not only in respect of those associated with the dividends which were scheduled to the pleading. When the schedule was amended, effectively on 19 August 2002 and thus too late to be within the six years' limitation period which ended on 13 January 2002, the amendment did not plead a new cause of action, but rather gave further factual details of a cause or causes of action which had already been pleaded in the original particulars served on 9 February 2001. Therefore, even if DMG, by reason of knowing about Hoechst's argument, did not make its January 1996 ACT payment under a mistake, it still brought its claim for relief in respect of that payment within the time permitted by the 1980 Act.

**[39]** There is one other detailed matter to be mentioned in connection with limitation. In my judgment in *Hoechst UK Ltd v IRC* [2003] All ER (D) 198 (Apr) I suggested the possibility that, in claims like those of Hoechst and of DMG in this case, the limitation period may not have expired all at once on the sixth anniversary of the date when a payment of ACT was made, but progressively over the period from that sixth anniversary date until the later sixth anniversary of the date when the ACT was set off against MCT. The theory behind the suggestion is that the relief is calculated on the basis of notional interest over that period, and thus may be regarded as accruing from day to day. It seems to me to be at least arguable that the limitation period

would also run from day to day and would expire from day to day six years later.

**[40]** In the oral argument in this case I drew attention to the possible argument. Counsel had not considered it in preparation for the hearing, so it was agreed that they would not address it in their oral arguments, but might supply me with written submissions on it after the hearing. They did that. Mr Rabinowitz QC and Mr Fitzpatrick on behalf of DMG supported the argument. Mr Glick QC and Mr Carr on behalf of the Revenue said that it was wrong. In the event the question does not arise on the view which I take of this case, so, while I am grateful to counsel for their careful written submissions upon it, I hope that they will forgive me if I do not express a view on it. It is better to leave the point to be decided in a future case where it does matter.

CONCLUSION

**[41]** In the result I conclude that DMG's claims, in so far as they are formulated as claims for restitution in respect of money paid under a mistake of law, succeed in principle, and that they are not time-barred by the 1980 Act. I wish only to add that this is not a result which I reach with much enthusiasm. When Parliament first enacted the predecessor of s 32(1)(c) of the 1980 Act (postponing the running of the limitation period in claims based on mistake until the mistake is discovered), it did not have in mind claims for recovery of money based on a mistake of law, particularly a mistake which was shared by almost everyone else at the time. This was one consideration which influenced the dissenting minority in *Kleinwort Benson*. Lord Browne-Wilkinson said (1998] 4 All ER 513 at 523, [1999] 2 AC 349 at 364):

> 'On every occasion in which a higher court changed the law by judicial decision, all those who had made payments on the basis that the old law was correct (however long ago such payments were made) would have six years in which to bring a claim to recover money paid under a mistake of law.'

The three Law Lords in the majority clearly felt that the limitation consequences of their decision would be unacceptable in the long term and would have to be changed. Thus Lord Goff said (1998] 4 All ER 513 at 544, [1999] 2 AC 349 at 389):

> 'I recognise that the effect of s 32(1)(c) is that the cause of action in a case such as the present may be extended for an indefinite period of time. ... [T]he recognition of the right at common law to recover money on the ground that it was paid under a mistake of law may call for legislative reform to provide for some time limit to the right of recovery in such cases. The Law Commission may think it desirable, as a result of the decision in the present case, to give consideration to this question indeed they may think it wise to do so as a matter of some urgency.'

The Law Commission considered the matter in its major report on *Limitation of Actions* (9 July 2001) (Law Com no 270) pp 22 (para 2.49), 32 (para 2.90), 119–120 (paras 4.76–4.79). However, no legislation consequent upon that report has yet been enacted.

**[42]** In the circumstances I believe that I am bound by the decision of the majority in the House of Lords in *Kleinwort Benson* to hold that a cause of action for recovery of money paid under a mistake of law does exist, and that where

such an action is commenced s 32(1)(c) of the 1980 Act applies with the effect that the limitation period does not begin to run until the mistake is discovered. For the detailed reasons which I have given in this judgment, I consider that DMG did make the three payments of ACT under a mistake of law; that DMG is therefore entitled to restitution; that it makes no difference that the payments were tax payments; and that DMG's claims for restitution are not time-barred by the 1980 Act. For those reasons I will give judgment in favour of DMG. *a* *b*

*Order accordingly.*

Celia Fox Barrister.

# Amendment to the Consolidated Criminal Practice Direction (Appeals against sentence—the provision of notice to the prosecution)

COURT OF APPEAL, CRIMINAL DIVISION
LORD WOOLF CJ
10 OCTOBER 2003

*Practice – Criminal proceedings – Consolidation of existing practice directions, practice statements and practice notes – Amendment – Appeals against sentence – Provision of notice to the prosecution.*

**LORD WOOLF CJ** gave the following direction.

This practice direction amends the consolidated criminal practice direction handed down by Lord Woolf CJ on 8 July ([2002] 3 All ER 904).

An additional section, set out below, is added to Pt II of the consolidated practice direction.

A new approach is to be taken to the numbering of the consolidated practice direction to enable this additional section, and future amendments, to be incorporated without altering the number of later sections. In future, sections will be identified by reference to the part of the consolidated practice direction in which they fall and the number of the section. The new section is added as section II.1 with the rest of the sections in Pt II remaining as section II.13, II.14 etc.

A revised table of contents for the consolidated criminal practice direction is attached as Appendix A.

II.1 APPEALS AGAINST SENTENCE—THE PROVISION OF NOTICE TO THE PROSECUTION

II.1.1 The Registrar of Criminal Appeals will notify the relevant prosecution authority in the event that: (a) leave to appeal against sentence is granted by the single judge; or (b) the single judge or the Registrar refers an application for leave to appeal against sentence to the full court for determination; or (c) the Registrar becomes aware that counsel for the applicant will be appearing at a renewed application for leave to appeal against sentence.

II.1.2 The prosecution will have seven days from the grant of leave by the single judge or the referral by the Registrar to notify the Registrar if they wish to be represented at the hearing OR to request sight of the grounds of appeal and/or any comments made by the single judge when granting leave or referring the case to the full court. Upon such a request, the prosecution will have a further seven days from receipt to notify the Registrar if they wish to be represented at the hearing.

II.1.3 Occasionally, for example, where the single judge fixes a hearing date at short notice, the Registrar may have to foreshorten the period specified in II.1.2, above.

II.1.4 In relation to (c) in para II.1.1, the prosecution will have 72 hours or, if the case is listed, 48 hours, to notify the Registrar that they wish to be represented at the hearing. Should the prosecution require sight of the grounds of appeal and

the single judge's comments, such a request should be made as expeditiously as possible.

II.1.5 If the prosecution wishes to be represented at any hearing, the notification should include details of counsel instructed, a time estimate and an indication whether a skeleton argument will be lodged no later than 14 days before the hearing (or such shorter period as may be necessary). If a skeleton argument is to be lodged, it must be served on the court and the applicant/appellant.

II.1.6 An application by the prosecution to remove a case from the list for counsel's convenience, or to allow further preparation time, will rarely be granted.

II.1.7 There may be occasions when the Court of Appeal Criminal Division will grant leave to appeal to an unrepresented applicant and proceed forthwith with the appeal in the absence of the appellant and counsel. In those circumstances there will be no opportunity to notify the prosecution.

II.1.8 As a court of review, the Court of Appeal Criminal Division would expect the prosecution to have raised any specific matters of relevance with the sentencing judge in the first instance.

II.1.9 When the prosecution attend a hearing as a result of this practice direction, the prosecution should not volunteer assistance in relation to any unrepresented applicant.

II.1.10 This direction will come into force as from 10 November 2003.

II.1.11 The prosecution are already invited to appear and respond, as a matter of course, in appeals against confiscation orders and where the court is considering issuing sentencing guidelines. This practice will continue without change.

II.1.12 This practice direction replaces the existing protocol whereby the prosecution were responsible for lodging a letter of interest with the Registrar of Criminal Appeals via the Crown Court.

Sanchia Pereira Barrister.

*APPENDIX A*

CONSOLIDATED CRIMINAL PRACTICE DIRECTION—REVISED TABLE OF CONTENTS


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# Inland Revenue Commissioners v Laird Group plc

[2003] UKHL 54

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD MILLETT, LORD RODGER OF EARLSFERRY AND LORD WALKER OF GESTINGTHORPE

23 JULY, 16 OCTOBER 2003

*Income tax – Tax advantage – Transaction in securities – Distribution of profits of company – Abnormal amount by way of dividend – Whether payment of dividend transaction in securities – Income and Corporation Taxes Act 1988, ss 703(1), 709(2).*

In June 1990 the appellant company acquired the entire issued share capital of S Ltd. Six months later the company declared and paid a dividend of £3·484m to its shareholders (the L plc dividend). Shortly afterwards S Ltd paid an interim dividend of £3m to the company (the S Ltd dividend). Because no group election was in force when the S Ltd dividend was paid, advance corporation tax amounting to £1m was payable in respect of the S Ltd dividend. S Ltd accounted to the Revenue for the advance corporation tax and set it against its mainstream corporation tax for the current and past years, thereby obtaining repayment of £1m of mainstream corporation tax. The dividend paid by S Ltd was received by the company as franked investment income and the advance corporation tax paid on the S Ltd dividend was set off against the advance corporation tax payable on the L plc dividend with the result that the company paid £1m less by way of advance corporation tax in respect of the L plc dividend than it would have done if it had not received the S Ltd dividend. In 1993 the Revenue issued a notice under s 703[a] of the Income and Corporation Taxes Act 1988 cancelling the tax advantage obtained by the company on the ground that it had been obtained in consequence of 'transactions in securities', which as defined in s 709(2)[b] included transactions relating to securities, namely, the payments of the S Ltd and L plc dividends. Following service of the s 703 notice, the company was assessed to advance corporation tax in the sum of £1m. The Special Commissioners dismissed the company's appeal against the notice. The company subsequently gave notice to the Special Commissioners requiring the appeal to be reheard by the tribunal constituted under s 706 of the 1988 Act. The tribunal allowed the company's appeal and discharged the assessment. They considered that there was no binding authority to the effect that the declaration and payment of a

a Section 703, so far as material, provides: '(1) Where—(a) in any such circumstances as are mentioned in section 704, and (b) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions. (2) For the purposes of this Chapter a tax advantage obtained or obtainable by a person shall be deemed to be obtained or obtainable by him in consequence of a transaction in securities or of the combined effect of two or more such transactions, if it is obtained or obtainable in consequence of the combined effect of the transaction or transactions and the liquidation of a company.'

b Section 709, so far as material, is set out at [17], below

dividend constituted a transaction in securities and that the expression 'transactions in securities' was aimed at the creation or transfer of securities or at the variation or extinguishment of rights attaching to securities, such that a substantially new security was created, and not to the mere giving effect to existing rights such as the giving effect to dividend rights following the declaration of a dividend. The Revenue appealed by way of case stated to the High Court which upheld the tribunal's decision and dismissed the Revenue's appeal. The Court of Appeal allowed the Revenue's further appeal and reinstated the assessment. The company appealed to the House of Lords. The issue for determination was whether the payment of the S Ltd dividend was a transaction relating to securities within the meaning of s 703(1) and 709(2) of the 1988 Act.

**Held** – The payment of a dividend which was the distribution of part of the undistributed profits of a company to its shareholders was not a transaction relating to securities because neither the shares themselves nor the rights attached to them were affected by a payment which merely gave effect to the shareholders' rights. Although shareholders had no right to any dividend until, if final, it was declared, or if interim, it was paid, the shareholders owned the company and they entrusted the management of its undertaking to the directors. To enable the directors to carry out their functions, shareholders gave them a discretion to decide how much of the company's funds should be retained to pay creditors and carry on the business and how much could safely be returned to shareholders by way of dividend. By declaring a dividend, the directors effectively released funds due to the shareholders from their power to retain them in the business. The distribution of the undistributed profits of a company to the shareholders entitled thereto therefore merely gave effect to the rights attached to the shares. The claimant's appeal would therefore be allowed (see [1], [2], [37], [38], [41], [42], [44]–[46], below); *IRC v Joiner* [1975] 3 All ER 1050, *Greenberg v IRC, Tunnicliffe v IRC* [1971] 3 All ER 136 and *IRC v Parker* [1966] 1 All ER 399 considered.

**Notes**

For transactions in securities, see 23(2) *Halsbury's Laws* (4th edn reissue) para 1569, n 2.

For the Income and Corporation Taxes Act 1988, ss 703(1), 709(2), see 44 *Halsbury's Statutes* (4th edn) (2002 reissue) 1067, 1076.

**Cases referred to in opinions**

*Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279.

*Greenberg v IRC, Tunnicliffe v IRC* [1971] 3 All ER 136, [1972] AC 109, [1971] 3 WLR 386, HL.

*IRC v Crossman, IRC v Mann* [1936] 1 All ER 762, [1937] AC 26, HL.

*IRC v Joiner* [1975] 3 All ER 1050, [1975] 1 WLR 1701, HL; *affg on different grounds* [1975] 1 All ER 755, [1975] 1 WLR 273, CA; *affg* [1973] 2 All ER 379, [1973] 1 WLR 690.

*IRC v Parker* [1966] 1 All ER 399, [1966] AC 141, [1966] 2 WLR 486, HL.

*Sheppard and anor (Trustees of the Woodlands Trust) v IRC (No 2)* [1993] STC 240.

*Short v Treasury Comrs* [1947] 2 All ER 298, [1948] 1 KB 116, CA; *affd* [1948] 2 All ER 509, [1948] AC 534, HL.

**Cases referred to in list of authorities**

*Farrell v Alexander* [1976] 2 All ER 721, [1977] AC 59, [1976] 3 WLR 145, HL.

*Maunsell v Olins* [1975] 1 All ER 16, [1975] AC 373, [1974] 3 WLR 835, HL.

*Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

*R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.

*Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390.

**Appeal**

Laird Group plc (Laird) appealed with permission of the Court of Appeal (Sir Andrew Morritt V-C, Mummery and Longmore LJJ) from their decision on 30 April 2002 ([2002] EWCA Civ 576, [2002] STC 722) allowing the Revenue's appeal from a decision of Lightman J on 28 February 2001 ([2001] STC 689) dismissing its appeal from a decision of the tribunal constituted under s 706 of the Income and Corporation Taxes Act 1988 (Chairman: Stephen Oliver QC) on 24 January 2000 ([2000] STC (SCD) 75) allowing Laird's appeal from a decision of the Special Commissioners (Mr THK Everett and Mr PW de Voil) on 8 February 1999 ([1999] STC (SCD) 86) affirming the validity of a notice issued by the Revenue under s 703 of the Income and Corporation Taxes Act 1988 and an assessment to tax on Laird in the sum of £1m. The facts are set out in the opinion of Lord Millett.

*Andrew Thornhill QC* and *James Henderson* (instructed by *Ashurst Morris Crisp*) for Laird.

*Michael Furness QC* and *David Ewart* (instructed by the *Solicitor of Inland Revenue*) for the Crown.

Their Lordships took time for consideration.

16 October. The following opinions were delivered.

**LORD NICHOLLS OF BIRKENHEAD.**

[1] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Millett. For the reasons he gives, with which I agree, I would allow this appeal and make the order he proposes.

**LORD HOFFMANN.**

[2] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Millett. For the reasons he has given, I too would allow this appeal.

**LORD MILLETT.**

[3] My Lords, the question for decision in this appeal is whether the payment of a dividend in respect of shares is 'a transaction in securities' or 'a transaction relating to securities' within the meaning of s 703 of the Income and Corporation Taxes Act 1988. The tribunal established under s 706 of the 1988 Act (the tribunal) ([2000] STC (SCD) 75) and Lightman J ([2001] STC 689) held that it is not. The Special Commissioners ([1999] STC (SCD) 86) and the Court of Appeal ([2002] EWCA Civ 576, [2002] STC 722) held that it is.

THE FACTS

[4] The facts are remarkably simple for a case concerned with tax avoidance. In June 1990 the taxpayer, the Laird Group plc (Laird), acquired the entire share capital of Stanton Rubber and Plastics Ltd (Stanton). Six months later Laird declared and paid a dividend of £3,848,000 to its shareholders (the Laird dividend). Shortly afterwards Stanton paid an interim dividend of £3,000,000 to Laird (the Stanton dividend).

THE TAX CONSEQUENCES

[5] Companies pay mainstream corporation tax on their profits. In turn their shareholders are generally liable to income tax under Sch F on dividends and other distributions which they receive in respect of their shares. At all material times the United Kingdom operated a partial imputation system under which shareholders could use part of the corporation tax for which the company was liable to offset their own liability to income tax on dividends and other distributions which they received from the company. In order to ensure that the credit taken by the shareholders represented tax which the company had actually paid, a company resident in the United Kingdom and paying a dividend to its shareholders was required to pay advance corporation tax in respect of the dividend. The company could set off the amount of advance corporation tax which it paid against its liability to mainstream corporation tax on its profits in the current year or past years. It could also carry any unused balance of advance corporation tax forward and set it off against its liability to mainstream corporation tax in future years.

[6] This system penalised companies such as Laird which paid substantial dividends to their shareholders but which earned most of their profits overseas through subsidiaries resident and taxable abroad. They had to pay advance corporation tax in respect of the dividends but were liable to relatively little mainstream corporation tax on their overseas profits because these would already have borne tax abroad. This gave rise to unusable advance corporation tax which fell to be written off against profits.

[7] Stanton had accumulated substantial profits on which mainstream corporation tax had been paid. On its acquisition by Laird, Laird and Stanton became members of the same group of companies. Stanton could have elected to pay dividends to Laird under a group election. Had it done so, it would not have been required to account to the Revenue for advance corporation tax in respect of the Stanton dividend. Laird, on the other hand, would have had to pay advance corporation tax on the Laird dividend, but would have insufficient mainstream corporation tax against which the payment could be set off.

[8] Stanton therefore did not make a group election. Instead it paid advance corporation tax of £1m on the Stanton dividend and set this sum off against mainstream corporation tax on its profits for the current and past years. Payment of the Stanton dividend thus gave rise to a reduction or repayment of £1m of Stanton's mainstream corporation tax. Laird, for its part, received the Stanton dividend as franked investment income, that is to say a dividend on which advance corporation tax had been paid, and this could be set against Laird's liability to pay advance corporation tax on the Laird dividend. As a result Laird paid £1m less by way of advance corporation tax in respect of the Laird dividend than it would have done if it had not received the Stanton dividend.

THE PROCEEDINGS

[9] In 1993 the Board of Inland Revenue issued a notice under s 703(3) of the 1988 Act to counteract the tax advantage which Laird had obtained by arranging to receive payment of the Stanton dividend. Section 703 enables the Board to take action to counteract a tax advantage which has been obtained in prescribed circumstances in consequence of a transaction in securities or of the combined effect of two or more such transactions. The taxpayer can repel the Board's attack by showing that the transaction or transactions in question were carried out for bona fide commercial reasons or in the ordinary course of making or managing investments and that none of them had as their main object or one of their main objects the obtaining of a tax advantage.

[10] The Board alleged that the payments of the Stanton and Laird dividends were transactions in securities which were not carried out for bona fide commercial reasons or in the course of making or managing investments and had as one of their main objects the obtaining of a tax advantage within the meaning of s 703(1) of the 1988 Act. Following service of the s 703 notice Laird was assessed to advance corporation tax in a sum of £1m.

[11] The Special Commissioners dismissed Laird's appeal against the s 703 notice and upheld the assessment. They held that each of the dividends was a transaction in securities. Laird asked for the case to be reheard by the tribunal, which held that the declaration and payment of a dividend do not constitute transactions in securities within the meaning of s 703 of the 1988 Act and discharged the assessment. The Revenue appealed by way of case stated to the High Court, where Lightman J upheld the tribunal's decision and dismissed the Revenue's appeal. The Court of Appeal allowed the Revenue's further appeal and reinstated the assessment. Laird now appeals to your Lordships' House.

THE LEGISLATION

[12] The narrow issue arising on the appeal is whether the Stanton dividend (which was the dividend which gave rise to the tax advantage which Laird obtained) was 'a transaction in securities' within the meaning of s 703 of the 1988 Act. This section forms part of a group of sections (ss 703–710) which were first enacted by s 28 of the Finance Act 1960. These provisions have been amended from time to time in a number of respects which, with one exception, are not material, and were consolidated by the Income and Corporation Taxes Act 1970 and again by the 1988 Act. The critical definition of 'transaction in securities' which is now to be found in s 709(2) of the 1988 Act, however, has not changed over the years. For ease of exposition, I shall refer to the predecessor sections by reference to their counterparts in the 1988 Act.

[13] It is not necessary to set out the lengthy and complicated statutory provisions at length. They can be found in the reports of the decisions below. Shortly stated, they enable the Revenue to counteract a tax advantage where (i) there is a transaction in securities (or two or more such transactions); (ii) the transaction or transactions have occurred in one or more of the five sets of circumstances mentioned in s 704; and (iii) in consequence of the transaction or the combined effect of two or more such transactions the taxpayer has obtained or is in a position to obtain a tax advantage.

[14] These are three separate and independent requirements. The Revenue do not suggest that it is sufficient that the taxpayer has obtained a tax advantage in one of the circumstances described in s 704; he must also be shown to have obtained the tax advantage in question in consequence of one or more

transactions in securities. This appears plainly from the structure of the section, from the fact that it is a defence for the taxpayer to show that the transaction or transactions were entered into for bona fide commercial reasons even if the circumstances described in s 704 are present, and from the way in which the courts have stated the issues: see, for example, *IRC v Joiner* [1975] 3 All ER 1050 at 1054–1055, [1975] 1 WLR 1701 at 1705 per Lord Wilberforce.

**[15]** It is common ground that conditions (ii) and (iii) above, are satisfied. The circumstances described in para A of s 704 occurred because 'in connection with the distribution of profits of a company' (Stanton) 'the person in question' (Laird) received an abnormal amount by way of dividend and the amount so received was taken into account for the purpose of the application of franked investment income in calculating Laird's liability to pay advance corporation tax.

**[16]** It is also common ground (i) that the Stanton dividend was of an abnormal amount; (ii) that Laird gained a tax advantage in consequence of the receipt of the Stanton dividend in that the receipt reduced or discharged its liability to pay advance corporation tax; and (iii) that the payment of the Stanton dividend had as one of its main objects the obtaining of a tax advantage. The remaining requirement, on which issue is joined, is whether the payment of the Stanton dividend constituted a transaction in securities. Laird concedes that the acquisition of the share capital of Stanton was such a transaction. But the tribunal found that it was carried out for bona fide commercial reasons and did not have as its main object, or one of its main objects, the obtaining of a tax advantage; and this finding has not been challenged by the Revenue.

**[17]** The expression 'transaction in securities' is defined in s 709(2) of the 1988 Act as follows:

> '"transaction in securities" includes transactions, of whatever description, relating to securities, and in particular—(i) the purchase, sale or exchange of securities; (ii) the issuing or securing the issue of, or applying or subscribing for, new securities; (iii) the altering, or securing the alteration of, the rights attached to securities ...'

The question is whether the payment of a dividend is 'a transaction relating to' the shares in respect of which it is paid.

**[18]** I need set out only one further provision which has a bearing on the present issue, viz s 703(2) of the 1988 Act. This was first introduced by the Finance Act 1962 and is in the following terms:

> 'For the purposes of this Chapter a tax advantage obtained or obtainable by a person shall be deemed to be obtained or obtainable by him in consequence of a transaction in securities or of the combined effect of two or more such transactions, if it is obtained or obtainable in consequence of the combined effect of the transaction or transactions and the liquidation of a company.'

This assumes that, whatever else 'a transaction in securities' may mean, it does not include the liquidation of a company, for if it did the subsection would be pointless: see *Joiner*'s case [1975] 3 All ER 1050 at 1057, [1975] 1 WLR 1701 at 1708 per Viscount Dilhorne and [1975] 3 All ER 1050 at 1060, [1975] 1 WLR 1701 at 1712 per Lord Diplock. Section 703(2) is directed at the perceived lacuna which would otherwise arise where the tax advantage was obtained, not in consequence of two or more transactions in securities, but in consequence of a transaction in

securities and a liquidation and would not have been obtained but for the liquidation.

THE AUTHORITIES

**[19]** The relevant statutory provisions have been considered by your Lordships' House on three occasions: in *IRC v Parker* [1966] 1 All ER 399, [1966] AC 141; *Greenberg v IRC, Tunnicliffe v IRC* [1971] 3 All ER 136, [1972] AC 109; and *Joiner*'s case [1975] 3 All ER 1050, [1975] 1 WLR 1701. In none of them did the present question fall for decision.

**[20]** In *Parker's* case a company capitalised a sum standing to the credit of its profit and loss account and applied it in issuing redeemable debentures to its members in proportion to the amounts paid up on their shares. The company subsequently redeemed the debentures at par. The difficulty arose because the debentures were issued in 1953, long before the enactment of the Finance Act 1960, while notice of redemption was not given until 1961. The Finance Act was not retrospective. The question was whether the redemption and cancellation of the debentures by themselves constituted transactions in securities. The House unanimously held that they did.

**[21]** In *Greenberg*'s case a company created a new class of preferred shares which it issued credited as fully paid to its two shareholders. They sold the shares to a purchaser on terms that the price was to be paid by instalments. Under arrangements made between the parties the company paid dividends on the shares which were paid into the purchaser's bank account. Corresponding sums were then paid out of the bank account to the shareholders in payment of the purchase price for the shares. By this means the shareholders converted dividends, which would have been taxable in their hands, into instalments of the purchase price for their shares, which were not. The problem was again one of timing. The arrangements were made before the enactment of the Finance Act 1960, but the payments were made after it. The Revenue did not contend that the declaration and payment of a dividend by itself was a transaction in securities. Its contentions were more modest. It did not focus its attention on the dividends. It claimed that the payment of the instalments of the purchase price, or the completion of the sale by such payment, was such a transaction. All members of the Committee accepted the Revenue's contention that the contract of sale, which was clearly a transaction in securities, was not carried out until the instalments of the purchase price were paid. Four members of the Committee (Lord Reid, Lord Morris of Borth-y-Gest, Lord Guest and Lord Simon of Glaisdale) also agreed that the payments of the instalments of the purchase price were themselves transactions in securities in consequence of which a tax advantage had been obtained. Lord Simon thought that the payments of the dividends were the transactions in securities in consequence of which the tax advantage was obtained. Lord Reid agreed with him but did not rest his conclusion on this ground. Lord Guest was equivocal on this point; while Lord Wilberforce expressly reserved his position.

**[22]** In *Joiner*'s case the taxpayers entered into a shareholders' agreement which varied the rights attached to their shares in important respects before putting the company into liquidation. The variations were all necessary steps in order to achieve the taxpayers' objective, which was to receive the undistributed profits of the company as surplus assets in the liquidation (and therefore free of surtax) while keeping the business itself in existence. The Court of Appeal ([1975] 1 All ER 755, [1975] 1 WLR 273) held that the liquidation by itself was a

transaction in securities. Before your Lordships' House, however, the Revenue did not contend that a straightforward liquidation without any variation of the rights attached to the shares was a transaction in securities, and the House did not hold that it did. All members of the Committee rested their decision on the ground given by Goulding J at first instance ([1973] 2 All ER 379, [1973] 1 WLR 690), that the variation of rights constituted a transaction in securities and that accordingly the tax advantage was obtained in consequence of the combined effect of a transaction in securities and the liquidation of a company.

**[23]** Both *Parker*'s case and *Greenberg*'s case contain dicta on the question whether the payment of a dividend is a transaction in securities. Opinion was divided in *Greenberg*'s case on the question whether *Parker*'s case compelled the conclusion that a dividend is a transaction in securities. Lord Simon thought that it did ([1971] 3 All ER 136 at 161, [1972] AC 109 at 151) while Lord Wilberforce went out of his way to say that it did not (see [1971] 3 All ER 136 at 157, [1972] AC 109 at 146). *Greenberg*'s case itself has often been assumed to be authority for the proposition that it is: see, for example, *Sheppard and anor (Trustees of the Woodlands Trust) v IRC (No 2)* [1993] STC 240 at 255. I respectfully prefer Lord Wilberforce's conclusion. As I have already observed, the point did not arise for decision in any of the cases. Moreover, the dicta in *Parker*'s case and *Greenberg*'s case must be treated with caution, for both cases were decided on the Finance Act 1960 as it stood before the introduction of what has become s 703(2).

**[24]** But the three cases in your Lordships' House contain many valuable and authoritative insights which help to tease out the statutory definition of 'transaction in securities' in s 709(2). Lord Reid's speech in *Greenberg*'s case makes it clear that the expression may include a unilateral transaction, such as the redemption or cancellation of a debenture or payment of a dividend. In *Parker*'s case [1966] 1 All ER 399 at 406, [1966] AC 141 at 164–165, Lord Hodson said of the words 'transactions, of whatever description, relating to securities' that 'there could hardly be a wider net connecting transactions and securities'.

**[25]** In *Joiner*'s case [1975] 3 All ER 1050 at 1055, [1975] 1 WLR 1701 at 1705–1706, Lord Wilberforce summarised the effect of the earlier decisions in two propositions. First:

> 'On the enactment of the original s 28 of the Finance Act 1960 it was possible to contend, and it was contended, that this section (and its associated sections) was directed against a particular type of tax avoidance known generally under such descriptions as dividend-stripping, asset-stripping and bond-washing, and that the sections and particular expressions used in them, amongst others "transactions in securities", should be interpreted in the light of this supposed purpose. But this line of argument became unmaintainable after the decisions of this House in *Inland Revenue Comrs v Parker* and *Greenberg v Inland Revenue Comrs*.'

Despite this the taxpayer was at some pains to resurrect the argument before us. With all due respect, that horse has been dead for nearly 30 years.

**[26]** Secondly:

> '... we must continue to give "transaction in securities" and "transactions relating to securities" the widest meaning: we can neither confine these expressions to the instances given in [s 709(2)], nor can we deduce from that enumeration any limitation on their scope.'

'TRANSACTIONS IN SECURITIES'

[27] My Lords, with all respect to those who have argued otherwise in the past, I do not think that there is any room for doubt that, as a matter of ordinary language, the creation, issue, sale, purchase, exchange, redemption and extinguishment of shares or debentures are all 'transaction[s] in securities'. In each case the securities themselves are the subject matter of the transaction. But there is also no doubt that the connection between the transaction and the securities may be looser than this. The transaction need not be a 'transaction *in* securities'; it may be a 'transaction ... *relating to* securities'. One example of such a transaction appears in s 709(2)(iii): 'the altering, or securing the alteration of, the rights attached to securities'. It is not possible to use this example to deduce the nature of the necessary relationship between the transaction and the securities; but some relationship there must be.

'TRANSACTION ... RELATING TO SECURITIES'

[28] I think that there are two indications of the kind of relationship that Parliament had in mind. One is the width of the word 'securities'. The other is in s 703(2), which shows that Parliament did not regard the liquidation of a company in itself as a transaction relating to its shares.

[29] The word 'securities' includes not only stocks and shares of every description, including preference shares, but also debentures and unsecured loan notes. It would not be a normal use of language to describe the payment of a fixed dividend in respect of preference shares as a transaction relating to securities; and I would at least pause before attaching such a description to the payment of interest on a debt merely because it was secured by a debenture or unsecured loan note. Neither the debt nor the rights attached to it, which include the right to receive interest payable in respect of it, is affected by the payment in any way. The debt merely provides the measure of the amount to be received by way of interest. The same applies to fixed dividends payable in respect of preference shares.

[30] Before the introduction of s 703(2), therefore, the question whether the payment of a dividend on ordinary shares was a transaction relating to securities was a question of some nicety which was never finally resolved. But that section and the assumption which it makes that the liquidation of a company is not such a transaction cast further light on the kind of relationship between the transaction and the security which Parliament had in mind.

[31] It can hardly be said that the liquidation of a company does not affect its shares or the rights of the shareholders at all. Any transfer of shares made after the commencement of the winding up is void unless made to or with the sanction of the liquidator (see s 88 of the Insolvency Act 1986). The company's property is realised and applied in satisfaction of the companies' liabilities and subject thereto is distributable among the shareholders according to their rights and interests in the company (see s 107 of the 1986 Act). After the creditors have been paid in full and the amounts credited as paid up on the share capital have been repaid, the balance in the liquidator's hands represents the undistributed profits of the company. If there is nothing due in respect of any preference shares, these belong to the ordinary shareholders and are distributable to them in proportion to the amounts credited as paid up on their shares. The company is then dissolved.

[32] It is not difficult to see why the effect of the liquidation in making the shares non-transferable should not be regarded as a transaction relating to the

shares. It is because it is only the right to transfer legal title to the shares which is affected; shareholders remain free to deal with the beneficial interest in their shares. The purpose of making the legal title to the shares non-transferable is merely to freeze the company's register of members at the date of the winding-up so that the liquidator can safely deal with the shareholders whose names appear on the register at that date. Taxation is normally concerned with beneficial interests.

**[33]** It is also tolerably clear why the dissolution of the company at the end of the process is not regarded as a transaction in securities. The shares themselves are not extinguished by payment of the amounts due to the shareholders (which may and often does take place by instalments), though since they merely represent a proportionate share of the company they necessarily cease to exist when the company itself does. But the shareholders remain contributories, and if for example further assets are discovered they may petition to have the company restored to the register so that they may share in the proceeds.

**[34]** Accordingly the critical questions are: (i) why is the payment of the undistributed profits of the company to the shareholders in the course of a liquidation not a transaction relating to their shares? and (ii) what if any is the difference between the payment of the undistributed profits to the shareholders in the course of a liquidation and their distribution to shareholders by way of dividend while the company is a going concern? In both cases the payment to each shareholder is made in respect of his shares.

**[35]** The juridical nature of a share is not easy to describe. It is not a share in the company's undertaking, for the company owns its property beneficially and not in trust for its members: '[s]hareholders are not, in the eye of the law, part owners of the undertaking' (see *Short v Treasury Comrs* [1947] 2 All ER 298 at 301, [1948] 1 KB 116 at 122 (Court of Appeal)). It is classified as a chose in action, but this merely tells us that it is a species of intangible personal property. It is customary to describe it as 'a bundle of rights and liabilities', and this is probably the nearest that one can get to its character, provided that it is appreciated that it is more than a bundle of contractual rights. The most widely quoted definition of a share is that of Farwell J in *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279 at 288 which was approved by your Lordships' House in *IRC v Crossman, IRC v Mann* [1936] 1 All ER 762, [1937] AC 26. It was usefully and in my respectful opinion accurately summarised by Lord Russell of Killowen in his speech (dissenting on the facts) in that case ([1936] 1 All ER 762 at 787, [1937] AC 26 at 66):

> 'It is the interest of a person in the company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company.'

These rights, however, are not purely personal rights. They confer proprietary rights in the company though not in its property. The company is at one and the same time a juridical person with rights and duties of its own, and a *res* owned by its shareholders: see *Gower's Principles of Modern Company Law* (6th edn, 1997) p 301.

**[36]** The rights of the shareholders in a company are set out in its articles of association. In the case of ordinary shareholders they are normally those described by Lord Wilberforce in *IRC v Joiner* [1975] 3 All ER 1050 at 1056, [1975] 1 WLR 1701 at 1706–1707: 'rights to receive dividends, if declared, rights to vote, rights in a liquidation to receive a share of surplus assets after discharge of liabilities.'

[37] Once realised the assets of a company in liquidation are a distributable fund in the hands of the liquidator, who no longer needs funds with which to carry on its undertaking. After the creditors have been paid and the amounts credited as paid up on the shares have been repaid, the balance is distributable to the ordinary shareholders because it belongs to them, subject only to the liquidator's discretion to retain sufficient funds in his hands to enable him to complete the winding up. The distribution of the undistributed profits of a company in liquidation to its shareholders is not a transaction relating to securities because neither the shares themselves nor the rights attached to them are affected by a payment which merely gives effect to the shareholders' rights; they receive only what is already theirs. Distributions are made to shareholders in respect of the shares, but the shares of the individual shareholder are nothing more than the measure of the proportion of the total which is due to him.

[38] In my opinion the position is not materially different if part of the undistributed profits is paid to the shareholders by way of dividend while the company is a going concern. The Court of Appeal ([2002] STC 722) seized on the fact that until a dividend, if final, is declared or, if interim, is paid, the shareholders have no right to it. Accordingly, the Court of Appeal concluded, the declaration and payment do not merely give effect to pre-existing rights.

[39] This proposition merits further examination. If correct, it has the advantage of distinguishing the payment of ordinary dividends from the payment of interest on a debenture or loan note, and the disadvantage of leaving the payment of a preference dividend to depend upon the particular wording of the articles of association in question.

[40] The right to receive a dividend does not arise until the conditions laid down in the company's articles of association are satisfied. Any requirement that a dividend must be declared by the directors before the shareholders are entitled to receive it must be found in the company's articles of association: there is nothing in the Companies Acts save an obligation not to pay dividends out of capital. Constraints on the shareholders' rights to receive dividends contained in the articles are self-imposed.

[41] In the early days articles of association commonly left the declaration of dividends to the company in general meeting, that is to say to the shareholders themselves. Gradually, however, it became the general practice to require the dividend to be declared by the directors. The change was a response to the increasing separation of ownership and management. The shareholders own the company, but they entrust the management of its undertaking to the directors. To enable the directors to carry out their functions, shareholders give them a discretion to decide how much of the company's funds should be retained to pay creditors and carry on the business and how much can safely be returned to shareholders by way of dividend. By declaring a dividend, the directors effectively release funds due to the shareholders from their power to retain them in the business.

[42] Whether the company is in liquidation or continuing to carry on business as a going concern, therefore, the distribution of the undistributed profits of a company to the shareholders entitled thereto merely gives effect to the rights attached to the shares. The funds are released, in the one case from the liquidator's discretion to retain them for the purpose of the winding up, and in the other from the directors' discretion to retain them for the purposes of the undertaking. Given that the former is not 'a transaction relating to securities',

neither in my opinion is the latter. The relationship between the payment and the shares in respect of which it is paid is the same in both cases. *a*

**[43]** I have reached this conclusion without reference to Hansard; but I am comforted by the fact that it is supported by the explanation given to Parliament by the Attorney General, Sir Reginald Manningham-Buller QC (later Viscount Dilhorne), when introducing what was to become s 28 of the Finance Act 1960 (see 624 HC Official Report (5th series) col 511). This makes it unnecessary to *b* consider whether it would have been proper to resort to Hansard had the meaning of the expression 'transaction ... relating to securities' been incapable of resolution without doing so.

CONCLUSION

**[44]** I would allow the appeal with costs here and below, set aside the decision *c* of the Court of Appeal and the Board's notice under s 703, and discharge the assessment.

**LORD RODGER OF EARLSFERRY.**

**[45]** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Millett. For the reasons he gives in his speech I *d* would allow this appeal.

**LORD WALKER OF GESTINGTHORPE.**

**[46]** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Millett. For the reasons he gives in his speech I *e* would allow this appeal.

*Appeal allowed.*

Celia Fox Barrister.

# R v Gill and another

## [2003] EWCA Crim 2256

COURT OF APPEAL, CRIMINAL DIVISION

CLARKE LJ, ASTILL J AND JUDGE PETER BEAUMONT QC (THE COMMON SERJEANT)

15, 31 JULY 2003

*Evidence – Admissibility – 'Hansard' interview – Revenue suspecting that appellants failing to disclose details of assets – Revenue putting questions to appellants at 'Hansard' interview – Appellants answering untruthfully – Whether appellants' answers admissible at subsequent trial for cheating the public revenue – Whether caution should have been given before interview – Whether admission of answers evidence having such an adverse effect on fairness of proceedings that court ought not to admit it – Police and Criminal Evidence Act 1984, ss 67(9), 78, Code of Practice C, para 10.1.*

The appellants ran a business together in partnership. The Revenue considered that the appellants had failed to disclose the existence of various bank and building society accounts in the United Kingdom and abroad thus concealing the extent of their financial assets and evading payment of tax that would otherwise have been payable. When investigating cases of tax fraud it was the Revenue's practice, as set out in a statement given by the Chancellor of the Exchequer to Parliament in October 1990, to accept a money settlement instead of instituting criminal proceedings in respect of the fraud and, in deciding whether to accept such a settlement, to be influenced by the fact that the taxpayer being investigated had made a full confession and had co-operated with the Revenue. However, the Revenue reserved the right to institute criminal proceedings even if the taxpayer had confessed and had given full facilities for investigation of the facts. (The interview where this practice was explained to the person being investigated was known as a 'Hansard' interview.) In March 1995, officers from the Revenue's Special Compliance Office (SCO), which was charged with investigating serious fraud, carried out a Hansard interview with the appellants. The appellants were subsequently charged with cheating the public revenue. At the appellants' trial in March 2002, the Revenue sought to rely on answers given by the appellants at their Hansard interview as evidence of their untruthful dishonesty. The appellants submitted that Code C of the Police and Criminal Evidence Act 1984 (PACE), as the SCO officers were persons 'charged with the duty of investigating offences or charging offenders' applied to the interview and that para 10.1[a] of that code, which provided, inter alia, that a person whom there were grounds to suspect of an offence must be cautioned before any questions about it were put to him for the purpose of obtaining evidence which might be given to a court in a prosecution, had not been complied with. Accordingly, they claimed, their answers should be excluded by the trial judge under s 78[b] of PACE

a Paragraph 10.1, so far as material, is set out at [31], below

b Section 78, so far as material, provides '(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

on the ground that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. The trial judge dismissed that submission holding that, having regard to the history and practice of Hansard interviews, they were part of a civil procedure to collect tax and not part of a criminal investigation. The appellants were convicted. They appealed to the Court of Appeal contending, inter alia, that under s 67(9)[c] of PACE, persons charged with the duty of investigating offences or charging offenders were to follow the relevant Code of Practice.

**Held** – (1) The SCO officers were charged with investigating serious fraud. Since serious fraud inevitably involved the commission of an offence or offences, it followed that the officers were charged with the duty of investigating offences when they conducted the Hansard interview. Further, since the Revenue expressly reserved the right to prosecute for fraud, one of the purposes of asking the questions must have been the obtaining of evidence which might be given to a court in a prosecution, even if the Revenue's main aim was to arrive at a monetary settlement. For those reasons, Code C applied to the Hansard interview and the appellants should, accordingly, have been cautioned and the interview recorded on tape (see [37]–[40], below).

(2) The admission of the statements made in the Hansard interview did not have such an adverse effect on the fairness of the proceedings that the court ought not to have admitted it. The breach of Code C was significant, but it was not caused by any bad faith and could not fairly be regarded as involving a flagrant disregard of the code's provisions. The principal purpose of the caution under para 10.1 was to ensure that interviewees did not make admissions unless they wished to do so and were aware of the consequences. It was not to prevent them from telling lies. That was not to say that lies told by a person at an interview to which Code C applied would always be admissible where there was a breach of the code. Each case depended on its own facts. However, in the instant case, there was no unfairness in admitting the statements as lies, provided that they were otherwise admissible and an appropriate direction had been given (as it had by the trial judge). Accordingly, the appeal would be dismissed (see [44], [46], [48], [57], below); *R v Allen (No 2)* [2001] 4 All ER 768 considered.

**Notes**

For cheating the public revenue and for cautions, see 11(1) *Halsburys's Laws* (4th edn reissue) para 578 and Supp to 11(1) *Halsbury's Laws*, para 734, respectively.

For the Police and Criminal Evidence Act 1984, s 67(9), see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 874.

For the Police and Criminal Evidence Act 1984, s 78, see 17 *Halsbury's Statutes* (4th edn) (1999 reissue) 236.

**Cases referred to in judgment**

*Allen v UK* App No 76574/01 (10 September 2002, unreported), ECt HR.

*Han v Customs and Excise Comrs* [2001] EWCA Civ 1040, [2001] 4 All ER 687, [2001] 1 WLR 2253.

*Henderson v Henderson* [1965] 1 All ER 179, [1967] P 77, [1965] 2 WLR 218.

*Ibrahim v R* [1914] AC 599, [1914–14] All ER Rep 874, PC.

*R v Absolam* (1989) 88 Cr App Rep 332, CA.

c Section 67, so far as material, is set out at [29], below

*R v Allen* [1995] Crim LR 643, CA.
*R v Allen (No 2)* [2001] UKHL 45, [2001] 4 All ER 768, [2002] 1 AC 509, [2001] 3 WLR 843.
*R v Barker* [1941] 3 All ER 33, [1941] 2 KB 381, CCA.
*R v Delaney* (1989) 88 Cr App Rep 338, CA.
*R v Graham* [1994] Crim LR 212, CA.
*R v Grannell* (1989) 90 Cr App R 149, CA.
*R v Lucas* [1981] 2 All ER 1008, [1981] QB 720, [1981] 3 WLR 120, CA.
*R v Okafor* [1994] 3 All ER 741, CA.
*R v Quinn* [1995] 1 Cr App R 480, CA.
*Saunders v UK* (1997) 2 BHRC 358, ECt HR.

**Appeals against conviction**

The appellants, Sewa Singh Gill and Paramjit Singh Gill appealed, with permission granted by Sachs J on 5 September 2002, against their convictions in the Crown Court at Snaresbrook on 15 March 2002 on six and three counts, respectively, of cheating the public revenue, after a trial before Judge Bing and a jury. The facts are set out in the judgment of the court.

*Philip Sapsford QC* (instructed by *Stringer Saul*) for the appellants.
*Anthony Abell* and *Valerie Charbit* (instructed by the *Solicitor of Inland Revenue*) for the Crown.

*Cur adv vult*

31 July 2003. The following judgment of the court was delivered.

**CLARKE LJ.**

INTRODUCTION

[1] This is the judgment of the court. The appellants are brothers. Sewa Singh is now aged 52 and Paramjit Singh is now 40. On 15 March 2002 in the Crown Court at Snaresbrook before Judge Bing and a jury, after a lengthy trial, Sewa Gill was convicted of six counts of cheating the Inland Revenue (the Revenue), namely counts 2, 3, 4, 6, 8 and 10, and Paramjit Gill was convicted of three counts of cheating the Revenue, namely counts 7, 9 and 11. Sewa Gill was acquitted of counts 1 and 5 and found not guilty by direction of count 12 and Paramjit Gill was acquitted of count 13. All those counts also alleged cheating the Revenue. On 15 May 2002, Sewa Gill was sentenced to three years' imprisonment on each count concurrent and Paramjit Gill was sentenced to 20 months' imprisonment on each count concurrent.

[2] The appellants appeal against conviction pursuant to leave granted by the single judge, Sachs J, who granted leave on one ground only. They renew their applications for leave to appeal on the remaining three grounds. Paramjit Gill's application for leave to appeal against sentence was refused by Sachs J and has not been renewed.

[3] The ground upon which leave was granted relates to the use made at the trial of answers given by the appellants at an interview which took place on 8 March 1995. It was a type of interview which is sometimes known as a 'Hansard interview'. The other three grounds in respect of which leave to appeal is sought allege misdirection by the judge in respect of the law of domicile and the legal concept of cheat and a failure by the judge to give clear directions as to

the issues which the jury had to decide in relation to each count on the indictment. Mr Sapsford QC made detailed oral submissions in relation to the Hansard interview and domicile but otherwise relied upon the written materials before the court. Before considering each of the grounds relied upon we summarise the underlying facts and issues at the trial.

THE UNDERLYING FACTS AND ISSUES

[4] This is taken from the Criminal Appeal Office summary. The appellants were brothers and ran a business in partnership, sharing the profits equally. The business dealt in clothing manufacture and investment in property for rent. Its profits for the years 1983–1993 were said to have been between £13,648 and £61,229. However, the prosecution case was that in tax returns and other documents submitted to the Revenue during the period 1984–1995 the appellants failed to disclose the existence of various bank and building society accounts in the United Kingdom and bank accounts in Switzerland and Jersey, thus concealing the extent of their financial assets and evading payment of the tax that would have been payable. The prosecution case may be shortly summarised in this way.

[5] The Gills were a close family and some of the accounts in which assets were held were in the names of both one or other of the appellants and another family member. The lengths to which they went to conceal these accounts, for example in creating false documentation, and the lies they told both when interviewed and at the trial of their former solicitor Ivor Gerber (at which they gave evidence for the Crown) showed an intent to defraud.

[6] The prosecution maintained that the money in the case was generated in the United Kingdom by the appellants' commercial activities and so was taxable here, wherever they were domiciled and whether or not it was kept offshore. It did not accept that any of the money came from India. In particular, it did not accept that it could realistically have been generated by the farm about which a good deal of evidence was given. However it was not accepted that the appellants retained Indian domicile. They lived and worked in the United Kingdom and never claimed that they were not domiciled in the United Kingdom in their dealings with the Revenue in connection with this case. The purpose of doing so would have been in order to establish a claim that they were not liable for tax payable here on that basis.

[7] The defence accepted that the bank and building society accounts in question had not been disclosed but denied any intent to defraud. The appellants were not domiciled in the United Kingdom but retained their domicile of origin, which was India. They always had a clear and settled intention to return to India, where they had been born. Not being domiciled in the United Kingdom, they were under no obligation to disclose the offshore accounts, the money in which came from India (especially from their mother's farm in the Punjab). They were able to provide good explanations for the failure to disclose the accounts in this country. They produced financial records and accounts which they said showed that the business was not capable of generating the sort of money attributed to it and a schedule of rental income which showed that it had all been declared. They admitted lying, but only in order to protect their elderly mother from investigation by the Indian authorities, a consideration which lasted until her death in 2001.

[8] The appellants' family were Sikhs from the Punjab. Their grandparents lived in the United Kingdom and their parents came here when Sewa Gill was

quite young. Their father, Naranjan Singh Gill, then returned to India and acquired a farm in the Punjab, while their mother, Surjit Kaur Gill, brought up the appellants and their sister Balbir. Balbir worked as a dental assistant, then in 1976 married a Mr Ghuman and went to Canada, but returned to England following her divorce. Naranjan Gill came back to England in 1981 but the farm remained in the family. In the early 1980s Sewa Gill, who had previously worked as a diesel fitter, set up in business as a clothing manufacturer. He originally did so under the name of Smaks of London, although the name was changed to Club Tropicana in 1986. He banked at the National Westminster Bank in Barking. Paramjit Gill (also referred to as Bob) was not involved in setting up the business but joined it as Sewa Gill's partner at an early stage. He dealt with the bookkeeping and the receipt of money.

[9] The Revenue first made inquiries as a result of tax returns submitted by Sewa Gill at the end of 1984 because they showed an unexplained injection of capital into the business. Further investigations followed tax returns submitted in March 1994. The accounts specified in the indictment were: accounts in the joint names of the two appellants at the Woolwich Building Society, the Bank of Ireland in Ilford, the Royal Bank of Scotland AG in Zurich, Handelsbank (a subsidiary of the NatWest) in Zurich and the Bank of Ireland in Jersey; an account at the Royal Bank of Scotland AG in Zurich in the name of Firola, a Luxembourg registered company (the documentation for which was signed by the appellants); an account at the Bank of Ireland in Jersey in the joint names of Sewa Gill and his mother; and two National Savings Bank accounts, one in the joint names of Paramjit Gill and his sister, and one in his sole name.

[10] Counts 2, 6 and 7 concerned tax returns submitted in 1984 and 1994, on which interest earned from certain bank and building society accounts was not declared. Counts 3, 4, 10 and 11 concerned statements of assets and liabilities delivered to the inspector of taxes in 1985 and 1995, on which details of certain bank and building society accounts were not disclosed. Counts 8 and 9 concerned statements of bank and building society accounts delivered to the inspector of taxes in 1995, on which details of certain bank and building society accounts were not disclosed.

[11] The loss to the Revenue (according to evidence in the related confiscation proceedings) was stated to be £511,177·35 in the case of Sewa Gill and £23,457·21 in the case of Paramjit Gill. We understand that confiscation orders made in those proceedings are the subject of applications for leave to appeal but they are not relevant to the issues in this appeal. With that introduction we turn to consider the points raised in the appeal.

## HANSARD INTERVIEW

[12] So far as we are aware, a Hansard interview is unique to investigations carried out by the Revenue. As already stated, a Hansard interview took place on 8 March 1995. Present were both the appellants and three representatives of the Revenue, namely Mr Cole, Mr Fellows and Mr Cooper, all of whom worked for the Special Compliance Office (SCO), which is the Revenue's investigation branch charged with investigating serious fraud. Mr Cole and Mr Fellows were investigators and Mr Cooper was an accountant. Although the interview was not recorded on tape, Mr Cole made notes.

[13] The relevance of the interview in this appeal is that in the course of it the appellants made a number of statements which the prosecution (which was of course the Revenue) sought to rely upon at the trial. It is important to note that

it did not rely upon what was said as evidence of truth which amounted to a confession or an admission or a statement against interest. It relied upon the statements as lies which supported the conclusion that the appellants dishonestly failed to disclose accounts which they knew would expose them to liability for United Kingdom tax. We will return to the relevance of that reliance below.

**[14]** The appellants submitted that what they had said in the interview ought to have been excluded (as we understand it) under s 78 of the Police and Criminal Evidence Act 1984. Counsel then appearing for them submitted that Code C of the Codes of Practice issued under the 1984 Act applied and that, since it was common ground that the provisions of Code C had not been followed, the judge should exclude the evidence on the ground that the admission of the evidence would (in the words of s 78) have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

**[15]** That submission logically gave rise to two separate questions. The first was whether Code C applied and the second was whether, if so, the evidence upon which the prosecution sought to rely should be excluded under s 78. Although the judge did not expressly advert to Code C, he treated the question as being whether a caution should have been administered and thus may, we think, be taken as having considered the question whether Code C applied. In any event he held that, having regard to the history and practice of Hansard interviews, they were part of a civil procedure to collect tax and not part of a criminal investigation. In reaching that conclusion he considered the important decision of the House of Lords in *R v Allen (No 2)* [2001] UKHL 45, [2001] 4 All ER 768, [2002] 1 AC 509. Mr Sapsford, who appears for both appellants on this appeal but did not appear at the trial, submits that the judge was wrong so to hold. Mr Abell submits that the judge was correct but that, in any event, we should hold that the evidence was properly admitted because it was probative and would not have such an adverse effect on the fairness of the proceedings that it would or should have been excluded under s 78. We will consider those points in turn in the context of the Hansard interview and its history.

*The Hansard interview and its history*

**[16]** Before considering the application or otherwise of Code C, it is appropriate to refer briefly to the nature of a Hansard interview, set in its historical context. It is a somewhat curious expression. At the time of the interview in this case on 8 March 1995 the interview was conducted in accordance with the practice set out in a reply to a parliamentary question given by the Chancellor of the Exchequer (Mr John Major) on 18 October 1990 (see 177 HC Official Report (6th series) written answers col 882). In the communication subsequently prepared by the SCO the Chancellor was stated to have given 'the following answer regarding tax fraud':

> 'The practice of the Board of Inland Revenue in cases of tax fraud is as follows: 1. The Board may accept a money settlement instead of instituting criminal proceedings in respect of fraud alleged to have been committed by a taxpayer. 2. They can give no undertaking that they will accept a money settlement and refrain from instituting criminal proceedings even if the case is one in which the taxpayer had made a full confession and has given full facilities for investigation of the facts. They reserve to themselves full discretion in all cases as to the course they pursue. 3. But in considering whether to accept a money settlement or to institute criminal proceedings,

a it is their practice to be influenced by the fact that the taxpayer has made a full confession and has given full facilities for investigation into his affairs and from examination of such books, papers, documents or information as the Board may consider necessary. The above statement of practice should be regarded as replacing the one given by the then Chancellor of the Exchequer on 5 October 1944.'

b **[17]** As we understand it, the SCO followed the ordinary practice in this case. It asked the appellants to agree to an interview and asked them a number of questions. It also asked them to answer a set of standard questions as follows:

'1. In regard to any business with which you have been concerned either
c as a director, partner or sole proprietor, (a) Have any transactions, receipts or expenses been omitted from or incorrectly recorded in the books thereof? (b) Are the accounts sent to the Inland Revenue correct and complete to the best of your knowledge and belief? (c) Are all taxation returns correct and complete to the best of your knowledge and belief? 2. Are all your personal taxation returns correct and complete to the best of your knowledge and
d belief? 3. Are you prepared to allow an examination of all business books, business and private bank statements and other business and private records in order that the Revenue may be satisfied that your answers to the first two questions are correct?'

**[18]** As can be seen from the Chancellor's statement in October 1990, it
e replaced an earlier statement made to Parliament on 5 October 1944. That statement had in turn replaced the first of the statements, which had been made on 19 July 1923. The 1990 statement was in some respects significantly different from the earlier ones. In 1923 the then Financial Secretary to the Treasury (Sir William Joynson-Hicks) said that where a taxpayer voluntarily disclosed 'the
f fact of his past frauds and their full extent' the Revenue would not institute criminal proceedings but would accept a pecuniary settlement. Even in a case where the taxpayer had previously furnished 'false and fraudulent particulars', if he subsequently made a 'voluntary or quasi-voluntary disclosure', the Revenue would not refuse to accept a pecuniary settlement, although his previous fraudulent replies would be regarded as relevant to determining the amount of
g the financial penalty.

**[19]** In 1942 the Court of Criminal Appeal decided the case of *R v Barker* [1941] 3 All ER 33, [1941] 2 KB 381, where the facts were shortly these. The Revenue read a statement to the above effect reflecting the 1923 statement, whereafter the appellant produced two ledgers which had been fraudulently prepared in order
h to induce the Revenue to believe that the irregularities amounted to only £7,000. This court held that the statement by the Revenue, which reflected the statement in Parliament, was partly a promise or an inducement and that it was not admissible on a charge of conspiring to cheat the Revenue by producing false statements of account. It held, as Tucker J put it ([1941] 2 KB 381 at 385), that—

j 'those documents stand on precisely the same footing as an oral or written confession which is brought into existence as the result of such a promise, inducement or threat.' (See also [1941] 3 All ER 33 at 37.)

**[20]** The government of the day soon took steps to change the law as so stated and on 5 May 1942 the then Financial Secretary to the Treasury (Sir Kingsley Wood) told the House of Commons that, in the light of the decision in *R v Barker*,

the 1923 statement was withdrawn. The reason he gave was that, whereas cases had occurred in which taxpayers, having promised full disclosure, deliberately withheld essential information, and until then criminal proceedings had been taken against the taxpayer, the decision in *R v Barker* made it practically impossible to institute proceedings where a taxpayer, purporting to act on the basis of the 1923 statement, deliberately held back information and only made partial disclosure.

**[21]** The statement of practice in 1942 was in some respects similar to the 1923 statement but included a statement to the effect that, if any taxpayer furnished information in relation to any fraud, he must clearly understand that such information would be available, if necessary, to deal with the situation in which a taxpayer undertook to make a full disclosure but deliberately held back information with the intention of deceiving the Revenue as to his true liability. The statement added that it was for that reason that a new section was to be added to the Finance Bill.

**[22]** That section, originally enacted as s 34 of the Finance Act 1942, subsequently became s 105 of the Taxes and Management Act 1970, which Lord Hutton said in *R v Allen (No 2)* [2001] 4 All ER 768 at [32], [2002] 1 AC 509 (with which the other members of the House of Lords agreed) reversed the effect of the decision in *R v Barker*. Section 105, as amended by various provisions of the Finance Act 1989, provides:

> '(1) Statements made or documents produced by or on behalf of a person shall not be inadmissible in any such proceedings as are mentioned in subsection (2) below by reason only that it has been drawn to his attention that—(a) pecuniary settlements may be accepted instead of a penalty being determined, or proceedings being instituted, in relation to any tax, (b) though no undertaking can be given as to whether or not the Board will accept such a settlement in the case of any particular person, it is the practice of the Board to be influenced by the fact that a person has made a full confession of any fraudulent conduct to which he had been a party and has given full facilities for investigation, and that he was or may have been induced thereby to make the statements or produce the documents.
>
> (2) The proceedings mentioned in subsection (1) above are—(a) any criminal proceedings against the person in question for any form of fraudulent conduct in connection with or in relation to tax, and (b) any proceedings against him for the recovery of any tax due from him, and (c) any proceedings for a penalty or on appeal against the determination of a penalty.'

**[23]** In *R v Allen (No 2)*, count 11 of the indictment, which alleged cheating the Revenue, asserted that, in a schedule of assets provided by the appellant to the Revenue during the course of a Hansard investigation and pursuant to a notice issued under s 20(1) of the 1970 Act, he omitted to list his beneficial interest in shares issued by offshore companies. In the House of Lords it was argued on behalf of the appellant that the schedule was inadmissible. Reliance was placed upon the privilege against self-incrimination and in that connection upon art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), upon ss 7(1)(b) and 22(4) of the 1998 Act and upon *Saunders v UK* (1997) 2 BHRC 358. Reliance was also placed upon the decision in *R v Barker* [1941] 3 All ER 33 at 37, [1941] 2 KB 381 at 385 in support of the submission that the statements in the schedule

stood (as it was put by Tucker J) on precisely the same footing as an oral or written confession which is brought into existence as the result of such a promise, inducement or threat.

**[24]** The House of Lords held that it was not necessary to consider the alleged breach of art 6 because the 1998 Act did not have retrospective effect. However, the House of Lords considered and rejected the above submissions. It did so by reference to the principle that, when the courts have excluded a confession because it was involuntary having been obtained by an inducement, they have done so on the ground that it was unsafe to rely on the confession as being true. See the speech of Lord Hutton in *R v Allen (No 2)* [2001] 4 All ER 768 at [34], where he quoted a well-known statement to that effect by Lord Sumner in *Ibrahim v R* [1914] AC 599 at 610–611, [1914–14] All ER Rep 874 at 878.

**[25]** The essential reasons for the decision on this point in *R v Allen (No 2)* can be seen from Lord Hutton's speech (at [35]):

> 'However, in *R v Barker* and in this case the respective accused did not give information contained in the documents and the schedule, respectively, which the Crown claimed was true, both accused gave false information and were prosecuted for giving that false information. To the extent that there was an inducement contained in the Hansard statement, the inducement was to give true and accurate information to the Revenue, but the accused in both cases did not respond to that inducement and instead of giving true and accurate information gave false information. Therefore, in my opinion, the appellant's argument in this case that he was induced by the hope of non-institution of criminal proceedings held out by the Revenue to provide the schedule and that its provision was, therefore, involuntary is invalid. If, in response to the Hansard statement, the appellant had given true and accurate information which disclosed that he had earlier cheated the Revenue and had then been prosecuted for that earlier dishonesty, he would have had a strong argument that the criminal proceedings were unfair and an even stronger argument that the Crown should not rely on evidence of his admission, but that is the reverse of what actually occurred.'

It can be seen from that paragraph that the House of Lords rejected the suggestion that a response to a s 20 notice in the context of the Hansard procedure under the 1990 statement is inadmissible as being akin to a confession which is brought into existence as the result of a promise, inducement or threat. Importantly, however, a distinction was drawn between that situation and one where the appellant had given true information that he had cheated the Revenue and then been prosecuted. In that event Lord Hutton thought that he would have a strong argument that the Crown should not be permitted to rely upon the evidence of his admission. It is not perhaps absolutely clear whether that was under ss 76 or 78 of the 1984 Act or, indeed, at common law.

**[26]** On 10 September 2002, which was of course after the trial in the instant case, the European Court of Human Rights rejected an application in the case of *Allen v UK* App No 76574/01 (10 September 2002, unreported) as being inadmissible. Both the self-incrimination point and the inducement point were advanced on behalf of the applicant. The court's reasons included the following:

> 'The court notes that in this case the applicant does not complain that the information about his assets which he gave the Inland Revenue was used against him in the sense that it incriminated him in the commission of an

offence due to acts or omissions in which he had been involved prior to that moment. His situation may therefore be distinguished from that of the applicant in *Saunders v UK* ((1997) 2 BHRC 358) ... The applicant was charged with and convicted of the offence of making a false declaration of his assets to the Inland Revenue. In other words, he lied, or perjured himself through giving inaccurate information about his assets. This was not an example of forced self-incrimination about an offence which he had previously committed; it was the offence itself. It may be that the applicant lied in order to prevent the Inland Revenue uncovering conduct which might possibly be criminal and lead to a prosecution. However, the privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation by the revenue authorities.'

**[27]** The court then noted that there was a distinction between the penalty of £300 for refusing to make a declaration of assets and the penalty of up to two years' imprisonment for refusing to answer questions in *Saunders'* case and added:

'Nor does the court consider that any improper inducement was brought to bear through the use of the so-called "Hansard Warning" which informed the applicant of the practice of the Inland Revenue of taking into account the co-operation of the taxpayer in deciding whether to bring any prosecution for fraud. There is no indication that the applicant was misled as to the effect of the warning, accepting that it could not be interpreted as any kind of guarantee of freedom from prosecution. Consequently, the court does not find that the facts of this case disclose any infringement of the right to silence or privilege against self-incrimination or that there has been any unfairness contrary to art 6(1) of the convention.'

**[28]** It should be noted that in *R v Allen (No 2)* the House was not considering whether evidence should be excluded under s 78 of the 1984 Act. Nor was there any consideration of the question whether Code C applied or whether the Revenue should have administered a caution before asking any questions or submitting a questionnaire. We return to that possible distinction below.

*The 1984 Act and Code C*

**[29]** Section 66(1)(b) of the 1984 Act provides for the issue of codes of practice in connection with 'the detention, treatment, questioning and identification of persons by police officers'. The relevant code in this regard is Code C. Section 67(9) provides:

'Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of such a code.'

**[30]** In *R v Okafor* [1994] 3 All ER 741 it was held that Code C applied to customs officers as it does to police officers. Here it is correctly conceded that in appropriate circumstances the code applies to SCO officers, but Mr Abell submits that the code did not apply to the officers who attended the Hansard interview of 8 March 1995 because the time when it would apply had not yet arrived.

**[31]** He submits that Mr Cole and Mr Fellows were not yet 'charged with the duty of investigating offences or charging offenders' within the meaning of s 67(9) of the 1984 Act. He also relies upon the express terms of the edition of Code C

which was in force at the time of the interview. In particular he relies upon para C: 10.1, which was in these terms:

> 'A person whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions if it is his answers to previous questions that provide grounds for suspicion) are put to him for the purpose of obtaining evidence which may be given to a court in a prosecution. He therefore need not be cautioned if questions are put for other purposes, for example, to establish his identity or his ownership of any vehicle or the need to search him in the exercise of powers of stop and search.'

Mr Abell submits that the officers were not putting questions at the Hansard interview 'for the purpose of obtaining evidence which may be given to a court in a prosecution'.

[32] We note in passing that in the edition of Code C which came into effect on 10 April 1995, which was just over a month after the interview in this case, para 10.1 had been amended to read as follows:

> 'A person whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions if it is his answers to previous questions which provide the grounds for suspicion) are put to him regarding his involvement or suspected involvement in that offence if his answers or his silence (ie failure or refusal to answer a question or to answer satisfactorily) may be given in evidence to a court in a prosecution. He therefore need not be cautioned if questions are put for other purposes, for example, solely to establish his identity or his ownership of any vehicle or to obtain information in accordance with any relevant statutory requirement (see paragraph 10.5C) or in furtherance of the proper and effective conduct of a search, (for example to determine the need to search in the exercise of powers of stop and search or to seek co-operation while carrying out a search) or to seek verification of a written record in accordance with paragraph 11.13.'

We accept Mr Abell's submission that the question in this case must be judged by reference to the earlier edition of the code.

[33] Mr Abell concedes that the appellants were suspected of serious fraud before the interview and that it was because of that fact that the interview took place. It is plain from the available material that that concession is correctly made. However, he submits that the appellants were properly informed as to the nature of a Hansard interview and that Code C did not apply. In accordance with what we understand was normal practice, the appellants were sent a leaflet explaining the role of the SCO. They were also recommended to consider having professional representation at the meeting. The appellants considered having their accountant present but decided not to.

[34] Although we have not seen the leaflet IR120 which was sent to the appellants, we have seen the equivalent leaflets which are in use now. Code of Practice 8 (COP 8) relates to SCO investigations where serious fraud is not suspected, whereas COP 9 relates to SCO investigations in respect of 'cases of serious fraud'. COP 9 includes the following:

> 'Introduction: This Code of practice tells you how the Special Compliance Office will carry out investigations into cases where serious fraud is

suspected and the investigation is not being conducted with a view to criminal prosecution. Most taxpayers pay what is due and others make genuine mistakes. If we suspect someone is deliberately trying to pay less tax, we will conduct a thorough investigation. We want taxpayers to pay the right amount of tax. This Code of Practice covers cases where we suspect serious fraud and gives you the opportunity to fully disclose any irregularities in your tax affairs. It tells you how we carry out investigations and promises that we will treat you fairly and courteously in accordance with the law and "Our Service Commitment to you" (see inside of back cover). The Board of Inland Revenue has complete discretion to pursue prosecutions in the circumstances it considers appropriate. Where serious tax fraud has been committed the Board may however accept a money settlement instead of pursuing a criminal prosecution. If at any time the Board decides that a criminal investigation is appropriate, this Code of Practice will cease to apply. We will then conduct the investigation under the Police and Criminal Evidence Act 1984 the Criminal Procedure & Investigations Act 1996, and their respective Codes of practice. In Scotland and Northern Ireland we will conduct any criminal investigation under the law applicable in those parts of the United Kingdom ...

General

"We will investigate any situation where we suspect serious tax fraud. This includes the tax affairs of individuals, partnerships and companies. We set high standards for the way we work. This code describes how we give you an opportunity to tell us what, if anything, is wrong with your tax affairs and how you can disclose any irregularities." '

[35] It can be seen from COP 9 that it is now made clear to the taxpayer suspected of fraud that the Revenue is not at that time carrying out a criminal investigation but reserves the right to do so in the future. Although we have not seen the document sent to the appellants, we understand that it drew a similar distinction. Mr Abell submits that such a document underlines his submission that those carrying out a Hansard interview are not 'charged with a duty of investigating offences or charging offenders' within the meaning of s 67(9) of the 1984 Act and that the questions were not put 'for the purpose of obtaining evidence' within the meaning of para 10.1 of Code C in the form then in force.

[36] The judge accepted that submission. He held that the Hansard interview was part of a civil process designed to gather in money and not a criminal investigation. As we read his ruling, he formed the view that, if Parliament had taken the view that a caution was required it would have so provided when it enacted s 105 of the 1970 Act. In short the judge took the view that the Hansard interview was part of a separate well-understood form of proceeding outside the scope of Code C.

[37] While we fully understand the importance of the Revenue being able to recover the tax owed to it and the value of the Hansard procedure in that regard, we are unable to accept the Revenue's submission. The statement of the Chancellor of the Exchequer made in Parliament on 18 October 1990 makes it quite clear that, while in cases of tax fraud the Revenue will be influenced by a full confession in deciding whether to accept a money settlement (including presumably an appropriate penalty), it gives no undertaking to do so or to refrain from instituting criminal proceedings. Tax fraud involves the commission of a

criminal offence or offences, so that it is in our view evident that the role of the SCO investigating tax fraud involves the investigation of a criminal offence.

[38] Although we recognise that a caution had not been administered in the past at a Hansard interview because such an interview has not been regarded by the Revenue as subject to Code C, in our judgment, that is to give too narrow an interpretation of the expression 'charged with the duty of investigating offences' in s 67(9) of the 1984 Act. The officers of the SCO were charged with investigating serious fraud and, since serious fraud inevitably involves the commission of an offence or offences, it seem to us to follow that they were charged with the duty of investigating offences.

[39] The purpose of Code C is to ensure that interviewees are informed of their rights, one of which is not to answer to questions, and to inform them of the use which might be made of their answers in criminal proceedings. It is clear from the parliamentary statement that the SCO had the possibility of criminal proceedings in mind in respect of the fraud about which they were asking questions and we can see no reason why the Revenue should not have cautioned taxpayers suspected of fraud before asking them questions in these circumstances. We cannot see why a caution should reduce the chances of a taxpayer making a full confession, which was the purpose of the process. However that may be, since the Revenue expressly reserved the right to prosecute for fraud, it appears to us that one of the purposes of asking the questions must have been the 'obtaining of evidence which may be given to a court in a prosecution', even if the Revenue's main aim was to arrive at a monetary settlement.

[40] For these reasons we have reached a different conclusion from the judge and hold that Code C applied to the Hansard interview conducted on 8 March 1995 and that the appellants should have been cautioned and a tape recording made of the interview. The question then arises whether the evidence of what the appellants said at the interview should have been excluded under s 78 of the 1984 Act on the ground that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. We turn to that question.

*Section 78 of the 1984 Act*

[41] It does not follow from the conclusion that Code C applied and that no caution was administered or tape recording made in breach of para 10.1 that evidence of everything said by the appellants at the meeting must be excluded. The principles are stated in this way in *Archbold's Criminal Pleading, Evidence and Practice* (2003 edn) p 1344 (para 15-15), by reference to *R v Absolam* (1989) 88 Cr App Rep 332 and *R v Delaney* (1989) 88 Cr App Rep 338:

> 'They are as follows: (a) a breach of a code does not lead automatically to exclusion (*Delaney*); (b) where there is a breach, the judge has a discretion to exclude the evidence (*Absolam/Delaney*); (c) the breach must be significant and substantial, and the more so, the more likely the judge is to exclude the evidence (*Absolam*); (d) bad faith/flagrant disregard of the codes' provisions will make exclusion more likely (*Delaney*); (e) the test to be applied is the section 78 test (*R. v. Grannell* ((1989) 90 Cr App R 149), CA); (f) in applying the test, the judge should have regard to the rationale of the provisions of the code ... and the extent to which the breach is likely to defeat the rationale (*Delaney*); (g) if there is a breach but the judge admits the evidence, he should

give reasons for so doing: *R. v. Allen* [1995] Crim. L.R. 643, CA, (an identification case); (h) if the evidence is allowed in despite the breach, the judge should explain the significance of the breach to the jury, as it may go to the weight they attach to the evidence (see *R. v. Graham* [1994] Crim. L.R. 212, CA and *R. v. Quinn* ([1995] 1 Cr App R 480) ...'

[42] The opinion stated by Lord Hutton in *R v Allen (No 2)* [2001] 4 All ER 768 at [35], [2002] 1 AC 509 suggests that reliance upon the truth of a statement made at an interview may well not be admissible. It appears that he took that view notwithstanding s 105 of the 1970 Act. It may well be that one of the reasons for such a conclusion would be a breach of para 10.1 of Code C. However, that question does not arise here because the Revenue did not seek to introduce statements by the appellants as true. It sought to introduce the statements as lies told by the appellants, in that they denied that there were any irregularities in their tax affairs and denied the existence of certain offshore accounts the existence of which the Revenue said could be proved at trial. It was submitted that the lies were relevant to the dishonest state of mind adopted by the appellants.

[43] It was not, as we understand it, submitted on behalf of the appellants that, if the evidence was not excluded under s 78, the Revenue was not entitled to rely upon it in that way. The judge subsequently summed up the statements made at the Hansard interview, and indeed on other occasions, by giving an appropriate *Lucas* direction (see *R v Lucas* [1981] 2 All ER 1008, [1981] QB 720) and no complaint is made about the nature of that direction.

[44] We have reached the conclusion that the admission of the evidence would not have had such an adverse effect on the fairness of the proceedings that the court ought not to have admitted it. There was a breach of Code C which we would characterise as significant but it was certainly not caused by any bad faith and could not fairly be regarded as involving a flagrant disregard of the code's provisions. The Revenue took the view that the code did not apply because a criminal investigation was not under way. It did not institute such an investigation until about 30 November 1995. It regarded the Hansard interview as essentially a civil procedure and, it may be noted, the judge agreed. We have formed a different view but we do not regard the Revenue's contrary opinion as in any way irrational.

[45] Section 105 of the 1970 Act contemplates that statements made at Hansard interviews may be admissible in evidence. Although s 105 does not in our judgment prevent reliance upon failure to comply with Code C because a statement ruled inadmissible under s 78 of the 1984 Act would not be inadmissible 'by reason *only*' (our emphasis) of the two matters referred to in paras (a) and (b) of s 105(1) of the 1970 Act quoted above, it is we think relevant to the exercise of the discretion under s 78 that Parliament expected such statements to be admissible in some circumstances.

[46] The rationale of para 10.1 of Code C is that already stated, namely to ensure that interviewees are informed of their rights, one of which is not to answer questions, and to inform them of the use which might be made of their answers in criminal proceedings. However, it seems to us that the principal purpose of such a procedure is to ensure, so far as possible, that interviewees do not make admissions unless they wish to do so and are aware of the consequences. We do not think that the principal purpose of the code is to prevent interviewees from telling lies. That is not to say that lies told by a person at an interview to which Code C applies will always be admissible where there is a breach of the code.

Each case depends upon its own facts but, here, we can see no unfairness in admitting the statements as lies, provided that they were otherwise admissible and an appropriate direction was given, as was the case here.

[47] The appellants were fully informed as to the purpose of the interview and warned that even if they made a full confession the Revenue reserved the right to take criminal proceedings against them. Such proceedings would plainly not potentially be limited to proceedings for a penalty, so that it is not necessary for us to consider whether such proceedings would involve the determination of a criminal charge, although it seems likely that they would (see eg *Han v Customs and Excise Comrs* [2001] EWCA Civ 1040, [2001] 4 All ER 687, [2001] 1 WLR 2253). The appellants were thus aware that criminal proceedings were in prospect. They were advised on several occasions to have professional representation at the interview but chose not to do so.

[48] They must have known that they were not obliged to answer the questions. On the Revenue case, the same can be said here as was said by Lord Hutton in *R v Allen (No 2)* [2001] 4 All ER 768 at [35]:

> 'To the extent that there was an inducement contained in the Hansard statement, the inducement was to give true and accurate information to the Revenue, but the accused in both cases did not respond to that inducement and instead of giving true and accurate information gave false information.'

We do not think that it is arguable that, if a caution had been administered, the appellants would have done anything different from what they did. They had time to consider their position. We accept Mr Abell's submission that responses to questions at the Hansard interview could have been delayed. Instead, each of the appellants answered the standard questions set out in para 17 above, No, Yes, Yes, Yes and Yes. Thus each said that no transactions, receipts or expenses had been omitted from the books and that all accounts and tax returns sent to the Revenue were correct and complete to the best of his knowledge and belief. The Revenue's case at the trial was that those answers were dishonest and untrue. We do not think that there was anything unfair about allowing the Revenue to rely upon those lies if it was otherwise appropriate.

[49] As indicated above, Mr Cole made notes of what was said at the meeting. Although there was no tape recording, so far as we are aware it is not suggested that the notes were in any material respect inaccurate. After recording the answers to the questions, Mr Cole's note includes the following:

> 'Cole said that given the fact that there was no professional representation at the meeting and the importance attached to the Gills' response to the questions, he would await their written response within seven days. Fellows said that their verbal responses effectively denied that there were any irregularities under the Hansard policy. Cole explained that if that was the written response submitted in due course, then the Revenue would investigate the matter in order to satisfy itself that there were no irregularities. Cole added that if it subsequently was established that the responses to the Hansard questionnaire were incorrect, then serious consequences could ensue. Both Gills confirmed that they understood the position but would need to discuss their responses with their professional advisers as soon as possible.'

At the end of the interview, after the appellants had answered a number of specific questions, Mr Fellows said that he knew that the truth had not been told

at the meeting and that, if no disclosure was made, the Revenue would commence its own investigation and look for the evidence to prosecute. a

[50] After the interview the appellants were sent Mr Cole's notes so that they could check the accuracy and sign them but they did not reply to several letters asking them to do so.

[51] Mr Sapsford submits that it was unfair to admit what was said for two further reasons. The first was that the Revenue did not inform the appellants of b all the information in their possession before the interview began. He relies both on information available at the trial and on information which has been disclosed for the purposes of this appeal. It is correct that the documents show that the Revenue did not disclose the detailed nature of its suspicions before the interview but, in our judgment, it was not bound to do so and there was nothing unfair in its not doing so. A defendant in a criminal trial is of course entitled to know what c case he has to meet so that he has an opportunity to meet it but it does not follow that an investigator is bound to reveal all the facts known to him at each stage, provided that he does not mislead the interviewee in any material way. We are not persuaded that the Revenue misled the appellants at the interview and we can see no reason why the Revenue should not have asked the questions it in fact d asked without disclosing more than they in fact did. There is in any event no arguable case that the appellants told the alleged lies as a result of any such non-disclosure.

[52] We also observe in this regard that the failure to disclose the documents now disclosed before the trial does not, in our judgment, affect the safety of the convictions. Finally, there was a suggestion in the course of argument that there e was no equality of arms between the Revenue and the appellants. We reject that submission. The Hansard interviews were fairly conducted, as were the later interviews referred to below, and the appellants had full and entirely adequate representation both at the trial and in this court.

[53] The second reason was that, when the appellants were later interviewed f under caution at Chingford police station between 22 April and 28 October 1997, they should not have been asked questions about the answers given by them in the Hansard interview. We do not accept that submission. During an interview under caution, depending upon the circumstances of the particular case, it is permissible to ask questions regarding previous oral statements made by the g suspect, whether at an earlier interview under caution or otherwise. We can see nothing unfair about such questions being asked on the facts of this case.

[54] In short, we have reached the conclusion that the admission of the statements made in the interview did not have such an adverse effect on the fairness of the proceedings that the court ought not to have admitted it. Indeed, h we do not think that it had *any* adverse effect on the fairness of the proceedings. The appellants chose to tell lies, if that is what they were; the appellants had every opportunity at the trial to explain why they had answered as they did; the jury were correctly directed as to the correct approach; and we have reached the conclusion that there was nothing unsafe about the convictions in this regard.

[55] We would add three points. The first is that, since the judge did not j consider this question separately, he did not of course give reasons for a decision but we have now given the reasons why the evidence was properly admitted. The second is that for the same reason the judge did not explain the significance of the breach of the code to the jury. The reason given in point (h) in the extract from *Archbold* quoted above is that it may go to the weight to be attached to the evidence. That is apparent in an identification case, but less clear here. It is

difficult to see how such a direction could have helped the jury in deciding whether lies were told or the significance of them (if any). We do not think that the absence of such a direction even arguably makes these convictions unsafe.

**[56]** The third point is that it seems to us that the conclusion we have reached is consistent with the approach, not only of the House of Lords in *R v Allen (No 2)* [2001] 4 All ER 768, [2002] 1 AC 509, but also of the European Court of Human Rights in the passages from the same case quoted above (see *Allen v UK* App No 76574/01 (10 September 2002, unreported)).

**[57]** For these reasons the only ground upon which leave to appeal was granted by the single judge fails.

DOMICILE

**[58]** This is the only point contained in the grounds considered by the single judge in respect of which leave was not granted that Mr Sapsford advanced by way of oral argument. He submits that the judge misdirected the jury on the issue of domicile. He submits that it was for the Revenue to prove that each appellant was domiciled in the United Kingdom and that the judge failed correctly to direct the jury in this regard.

**[59]** Mr Sapsford correctly submits that domicile is different from nationality or residence. As we see it, the general position may be summarised in this way. Every person has a domicile of origin which he retains unless and until he acquires a domicile of choice. Mr Sapsford draws our attention to a passage in the judgment of Simon P in *Henderson v Henderson* [1965] 1 All ER 179 at 181, [1967] P 77 at 80, which includes the following:

> 'First, clear evidence is required to establish a change of domicil. In particular, to displace the domicile of origin in favour of the domicil of choice, the standard of proof goes beyond a mere balance of probabilities. Where residence, however long, is neutral or colourless or indeterminate in character, it will not give rise to an inference that the domicil of origin has been abandoned. Secondly, on the other hand, a mere "floating intention" (to adopt the language in STORY'S CONFLICT OF LAWS (8th Edn.) p. 50) to return to the country of origin at some future period is not sufficient for the retention of the domicil of origin if the propositus has settled in some other territory subject to a distinctive system of law with the intention of remaining there for an indefinite time.'

**[60]** It is common ground on the facts that the domicile of origin of both appellants was Indian. Although Paramjit Singh Gill was born in England, Sewa Singh Gill was born in India and both their parents were domiciled in India. There was scope for debate as to whether they had acquired a domicile of choice in the United Kingdom. However, it is important to appreciate how the question of domicile came to be relevant at the trial.

**[61]** As already indicated, the prosecution case was that over the years the appellants had each systematically failed to declare accounts held at various financial institutions, both in the United Kingdom and offshore. The motive behind that conduct was said to be to evade paying tax due on income generated by their business Club Tropicana. It was the prosecution case that the moneys held in those accounts were the undeclared profits of the business and thus liable to tax.

**[62]** One of the appellants' defences was that moneys held offshore in accounts in the name of one or both of the appellants, or held jointly with family

members, were not theirs but the profits of the Indian farm owned by their mother which never came into the United Kingdom. The accounts were funded by the 'Hawala' system, which was a means by which moneys were brought out of India in such a way as to circumvent the Indian exchange control regulations.

**[63]** The Revenue challenged that case on three bases: first, that the farm profits could not account for all the moneys held offshore; secondly, that the appellants were in any event heavily involved in running the farm; and thirdly, that the 'Hawala' system involved moneys being brought to the appellants' home in the United Kingdom before being banked offshore.

**[64]** On any of those bases, the domicile of the appellants would be irrelevant. The defence first raised the issue of domicile on 9 January 2002 when the report of Alan Polling was served on the appellants' behalf. Mr Polling is or was a solicitor employed by a firm of chartered accountants as a tax consultant. The Revenue subsequently called three witnesses as to domicile and the defence called Mr Polling. It is not entirely clear to us on what basis this evidence was admissible, but it was called by both sides, so far as we are aware, without objection.

**[65]** It is stated in the Revenue's skeleton argument on this issue that the witnesses were in broad agreement and there was no suggestion at the hearing of the appeal that that was not the case. The agreed position may be summarised in this way. (i) The only significance of an individual who is resident being treated as not being domiciled here is that he is not liable to United Kingdom tax on overseas income unless that income is brought onshore. A non-domiciled resident in the United Kingdom is liable to United Kingdom tax on income earned here and on income earned offshore but brought here, even if it is subsequently sent back offshore. (ii) By s 65(4) of the Income and Corporation Taxes Act 1988, as it applied in the relevant years, an individual wishing to avail himself of treatment as not being domiciled here must '[satisfy] the Board that he is not domiciled in the United Kingdom'. He does so 'on a claim to the Board'. Such a claim should be made within six years of the year to which the claim relates, unless the Revenue, in assessing the individual, is itself looking further back. (iii) A competent accountant would have advised both appellants that the Revenue would be likely to accept a claim by them to be treated as not being domiciled in the United Kingdom. The key question was whether the appellants intended to remain permanently in the United Kingdom.

**[66]** We note in regard to that last point that in the course of the appeal Mr Sapsford showed us a letter dated 14 July 2003 from the Revenue's Centre for Non-Residents, Residence, Advice and Liabilities, to the appellants' solicitors stating that on the basis of the information given to them they were prepared to treat the appellants as not domiciled in the United Kingdom for the tax year ended April 2003. That seems consistent with point (iii), above.

**[67]** The Revenue's submissions may be summarised as follows. (i) Each of the appellants accepted in cross-examination that they made no claim to be treated as non-domiciled in the United Kingdom, either during the relevant years or subsequently, despite being represented by accountants. (ii) Each of the appellants also accepted in cross-examination that at no time during either the Hansard interviews or the interviews under caution did they contend that, as non-domiciled residents, they would not be liable to pay tax on moneys generated offshore which remained offshore. (iii) The jury could properly infer that the reason the appellants did not claim to be domiciled outside the United Kingdom was that so to assert would not achieve any legitimate tax advantage

because the moneys were not offshore funds at all but were the undeclared profits of the Club Tropicana or because it was not their intention to return to India in due course. (iv) Each of the appellants accepted in cross-examination that what they said was 'Hawala' system money did arrive at their address in the form of cash or cheques before being sent back offshore. (v) The jury were entitled to conclude that, even if some of the moneys came from India, since the moneys arrived onshore and the appellants were involved in the farm and the money movement, they were in any event liable to United Kingdom tax. (vi) It follows that the domicile defence depended upon the jury's finding of the facts. It could only bite if the jury were to conclude that the moneys held offshore had been generated offshore and never came onshore. (vii) The judge dealt adequately with the domicile issue in the summing up.

[68] We have considered the materials to which we were referred and are satisfied that each of submissions (i)–(vi) is correct and that the judge adequately explained the position to the jury. It seems to us that in these circumstances it is very unlikely indeed that the jury ever came to consider the question whether the appellants were in fact domiciled in the United Kingdom or in India at the relevant time. After all, they themselves said in evidence that 'Hawala' money came into the United Kingdom before being sent offshore. It is only in respect of any moneys which were earned offshore and remained offshore that the question of actual domicile was relevant. Otherwise the issue centred round the state of mind of the appellants for the reasons set out in the Revenue's submissions.

[69] To the extent that the issue of actual domicile was live, the judge directed the jury in accordance with the evidence of Mr Polling, who was called on behalf of the defence, and whose evidence (as indicated above) was not in this respect in issue between the parties. In the course of his summing up on this issue the judge said:

> 'Domicile. It is an unusual word. I must say something about it, members of the jury, but the issue is quite simple and, in the end, it will depend on what view you take of the evidence. But, as explained to you by the expert Mr Polling, everybody has a domicile and the defendants had the domicile of their birth because they were the sons of Naranjan and therefore they have an Indian domicile, but then of course were resident in this country. What Mr Polling told you is that in the light of the information that he was given, to the effect that both Sewa and Bob, who are fluent Punjabi speakers, have an intention to return to India on a permanent basis, if that is true, then the consequences are, and the prosecution and defence both agree this, and it was in truth the intention of each defendant to return to live in India permanently, then they are non-domiciled for the purposes of United Kingdom tax. So you do not have to decide whether Mr Polling's conclusions are correct or incorrect. They are in law correct. The issue is whether it is actually true that the defendants have and always have had a clear and settled intention to return permanently to India. In the course of Mr Abell's cross-examination of the defendants, neither defendant was expressly and actually challenged about their evidence that they intended permanently to return to India; but the Crown say, you may think, members of the jury, as a matter of reality, they did not and neither of them did in truth have a clear intention of returning to India to live there permanently (1) because they never claimed to be non-domiciled in their dealings with the Revenue in this case, nor was it ever raised in the detailed questions from

Mr Tulloch in 1997. The defence say that you should be persuaded on the evidence that despite the fact that the defendants never made a formal claim to be treated as non-domicile, they were in reality claiming to be non-domicile as long ago as 1984 when there was a letter written by Mr Mounteer to Sewa Gill on the subject and I will remind you of that letter in the course of my review of their evidence.'

[70] The judge then explained the relevance of the domicile question as we have done above. Later in his summing up he referred expressly to the letter written by Mr Mounteer and to the detailed evidence of the appellants, both in chief and in cross-examination. In that part of his summing up he correctly identified the various questions which the jury had to consider as to the appellants' state of mind at different stages of the case.

[71] We do not think that the judge's explanation of the legal position, based as it was on the statement of principle set out in Mr Polling's evidence and accepted by both sides at the trial, was incorrect. In the light of the principle set out, for example, by Simon P in *Henderson v Henderson* [1965] 1 All ER 179, [1967] P 77 (quoted above), it was a sufficient statement of the relevant question for the purposes of this case to ask whether each defendant intended to return to live in India permanently. If it had not been, counsel for the defence would no doubt have pointed it out to the judge. It was then for the jury to decide what evidence to accept and what to reject.

[72] The judge gave the jury a standard and adequate direction as to the burden of proof and we detect no error in this respect, either as to domicile or, indeed, as to any other aspect of the case. We certainly do not think that the convictions are arguably unsafe by reason of any defect in the summing up under this head. It follows that we take the view that the single judge was right to refuse leave to appeal on this ground and we refuse this renewed application.

CHEATING THE REVENUE

[73] In this ground it is alleged that the judge misdirected the jury in respect of the legal concept of cheat. The judge said this in the course of his summing up:

'The offence of cheating the public revenue does not necessarily require a false representation by words or conduct. The meaning of cheat in this indictment, members of the jury, can include any form of fraudulent conduct which has the result of diverting money from the Revenue and depriving the Revenue of money to which it is entitled. It has of course to be fraudulent conduct; that is to say, deliberate conduct by the defendant whose case you are considering ... to prejudice or to take the risk of prejudicing the Revenue's right to the tax in question, knowing that he has no right to do so ... The Crown do not have to prove that tax was actually evaded, providing that there was deliberate conduct with intent to defraud [and] that there was a risk of tax being evaded.'

[74] The single judge took the view that it was not arguable that the judge misdirected the jury in this regard. We agree.

DIRECTIONS ON THE ISSUES

[75] The final proposed ground of appeal is that the judge failed to give the jury clear directions as to the issues they had to decide on each count on the indictment. Again, the single judge considered this ground, which involves looking at each count, and concluded that it was not arguable. We agree. The judge considered

each count in some detail and, in our judgment, the jury can have been in no doubt as to what they had to decide in each case. The appellants' submission in this regard, if correct, would involve unnecessary and undesirable over-analysis of the facts.

CONCLUSION

[76] For the reasons we have given we dismiss the appeal on the ground in respect of which leave was given, namely that relating to the Hansard interview. We refuse the renewed application on the other grounds, including the suggested ground based on non-disclosure. In our judgment these convictions were safe. We would add that, in our view, Mr Sapsford was right to concentrate in his oral submissions on the Hansard and domicile issues.

*Appeal dismissed.*

Stephen Leake Barrister.

# Miah v Secretary of State for Work and Pensions

[2003] EWCA Civ 1111

COURT OF APPEAL, CIVIL DIVISION
WARD, MANCE LJJ AND NELSON J
19 MAY, 25 JULY 2003

*Social security – Income support – Jobseeker's allowance – Entitlement – Capital disregards – Dwelling occupied as the home – Claimant's large family living in two houses – Whether both houses one dwelling occupied as the home – Jobseeker's Allowance Regulations 1996, Sch 8, para 1.*

The claimant was a married man with eleven children, eight of whom were dependent on him. He owned two three-bedroomed houses in which he and his family lived which were on the same street but separated by two other properties. He claimed income-based jobseeker's allowance, entitlement to which was subject to a requirement that a claimant's capital did not exceed the prescribed amount. The effect of reg 108(2)[a] of and para 1[b] of Sch 8 to the Jobseeker's Allowance Regulations 1996 was that 'the dwelling occupied as the home' was to be disregarded in the calculation of a claimant's capital. When his entitlement to benefit was determined the claimant's first house was disregarded but his second was not, with the result that his capital exceeded the prescribed amount. His claim was therefore disallowed. The claimant appealed to a Social Security Appeal Tribunal on the basis that both houses were occupied as one dwelling. The tribunal dismissed his appeal and he appealed to a social security commissioner. The commissioner held that it was possible that living arrangements in two houses might form only one dwelling but that there was sufficient uncertainty about the facts as to require the matter to be remitted for rehearing before a differently-constituted tribunal. The Secretary of State appealed.

**Held** – For the purposes of para 1 of Sch 8 to the 1996 regulations 'the dwelling occupied as the home' could be spread over two physically separate buildings, so that there was still only one home, the whole value of which was to be disregarded under reg 108(2). Paragraph 1 of Sch 8 used the word 'dwelling', rather than, for example, 'dwelling house' or 'residential accommodation'. The impression given by the expansion of the word 'dwelling' into a phrase, 'dwelling occupied as the home', was that the legislature had intended to convey the function to be served by the concept of a dwelling rather than to connote its bricks and mortar. That function was a place serving as home for a claimant and that place was not necessarily confined to a single building. A test for determining where home was, was to ask whether a claimant's arrangements were such that one house was, in effect, used as an annex of the other, or to put it another way, whether it was a single home on a split site. Applying that test a decision-maker could with common sense determine what a claimant was using

a Regulation 108, so far as material, is set out at [7], below
b Paragraph 1, so far as material, is set out at [8], below

as his home. It was the place where he lived, where he ate, slept, bathed, relaxed, which he enjoyed with his family. The commissioner's decision had therefore been correct, and accordingly, the appeal would be dismissed (see [26], [27], [32], [35], [37], [48], [60], [61], below).

**Notes**

For the calculation of capital, see 44(2) *Halsbury's Laws* (4th edn reissue) para 274.

**Cases referred to in judgments**

*Hinchy v Secretary or State for Work and Pensions* [2003] EWCA Civ 138, [2003] 2 All ER 289, [2003] 1 WLR 2018.
*Social Security Decision CIS 81/91*, Tribunal of Comrs.
*Social Security Decision CIS 427/91*, Tribunal of Comrs.
*Social Security Decision R(SB) 10/89*, Tribunal of Comrs.

**Appeal**

The Secretary of State for Works and Pensions appealed with permission of Social Security Commissioner EAL Bano from his decision on 23 May 2002 remitting the claim of Mohammed Miah for income-based jobseeker's allowance, which had been dismissed by a Social Security Appeal Tribunal, to a differently-constituted tribunal for rehearing. The facts are set out in the judgment of Ward LJ.

*James Maurici* (instructed by the *Office of the Solicitor, Department of Work and Pensions*) for the Secretary of State.
*Daniel Kolinsky* (instructed by *McGrath & Co*) for Mr Miah.

*Cur adv vult*

25 July 2003. The following judgments were delivered.

**WARD LJ.**

THE ISSUE

[1] This is the question which arises in this appeal: is there one dwelling or two dwellings occupied as the home where a claimant for jobseeker's allowance normally occupies as his home two houses separated from each other by other houses in the street, each house being overcrowded if the claimant and his large family were removed from both houses into only one of them? On 23 May 2002 the Social Security Commissioner, Mr EAL Bano, so construed the Jobseeker's Allowance Regulations 1996, SI 1996/207 as to lead him to the conclusion that there could be only one dwelling in those circumstances (*Social Security Decision CJSA 4620 2000*) but he gave the Secretary of State permission to appeal to us.

THE FACTS

[2] Mr Mohammed Miah is a married man. He is the father of 12 children, the baby having been born after the time which is the material time for the purpose of this appeal. At that time, February 2000, his eldest son was 22 years old, working in Leicester and mainly living away from home. He had twin daughters aged 20 at university in Birmingham. But there were eight others still dependent

upon him. He seems to have been a hard-working man who was employed by the Somali bank for 22 years until he was made redundant on 30 June 1999. After his entitlement to contribution-based jobseeker's allowance had expired, he lived on his redundancy moneys and when they had been depleted, he claimed income-based jobseeker's allowance. He would not be entitled to this allowance if his capital were to exceed the prescribed amount set by the 1996 regulations at £8,000. In calculating his capital only one dwelling occupied as the home may be disregarded. Mr Miah and his family occupy two properties. His original home was 11A Haseley Road, Handsworth but as his family grew, the need for further accommodation became pressing. Hence when a nearby house at 19 Haseley Road became available in 1992, he purchased it. Two other houses in the street separate these two properties from each other. Each of these properties is a three-bedroomed house. His eldest son returned to number 19 at weekends and although the twins tended to eat out, they usually slept there. The nature and extent of its other use by Mr Miah and his family was in dispute. If Mr and Mrs Miah and all their dependent children were to occupy only one of those houses, that property would be overcrowded within the meaning of ss 325 and 326 of the Housing Act 1985 and Mr Miah would commit an offence which could lead to his having to pay a fine not exceeding level 2 and a further fine for every day subsequent to the date on which he was convicted on which the offence continued.

**[3]** On 22 March 2000 it was decided that the value of his second house could not be disregarded in determining his entitlement to a jobseeker's allowance. Since the value of that house exceeded the capital limit, the claim for benefit was disallowed. He appealed on 3 April 2000 on the ground that one house was not big enough to house all his children. On reconsideration of the refusal decision on 7 April 2000, the reconsidering officer concluded that the house occupied by the claimant and his dependent children was not overcrowded and he was not minded to change his decision. On 5 May 2000 the claimant's representative submitted further argument that there was statutory overcrowding, a fact now conceded by the Secretary of State. On appeal the appeal tribunal concluded that only one dwelling could be disregarded and so dismissed the appeal. Mr Miah then appealed to the social security commissioner and on 23 May 2002 Mr Commissioner Bano gave Mr Miah his first taste of success.

**[4]** Mr Commissioner Bano took the view that there was sufficient uncertainty about the facts of the case as to require it to be remitted for rehearing before a differently constituted tribunal. He held (*Social Security Decision CJSA 4620 2000* at para 14) that the new tribunal should—

> 'consider in particular whether the claimant's arrangements were such that one house was, in effect, used as an annex of the other, or to put it another way, whether this was a single home on a split site. Occasional use of the second house by the claimant or his dependent children will not assist him, because the tribunal must be satisfied that the second house was "normally" occupied by the claimant as his home.'

**[5]** There is confusion about what happened next. There is some dispute as to whether or not the Secretary of State gave adequate notice of his intention to appeal against Mr Commissioner Bano's decision. Whatever may have gone wrong, the fact is that the tribunal heard the matter remitted to them on 26 July 2002, the very day Mr Commissioner Bano granted his permission to appeal to this court. The Secretary of State was not present nor represented at

the oral rehearing. Mr Miah gave evidence which was accepted. The tribunal was satisfied that 19 Haseley Road was not used solely by the claimant's non-dependent children and that the claimant himself did not use it only occasionally. The conclusion was:

> 'I find that both 11A and 19 Haseley Road were the dwelling normally occupied as the home, and save for being in two different buildings, these houses together were as much part of a single home as are the upstairs and downstairs of any house. 19 Haseley Road was primarily for sleeping and bathing, 11A Haseley Road was for day-to-day family living.'

The Secretary of State's application for leave to appeal against that decision stands adjourned by Mr Commissioner Bano until after the Court of Appeal has decided this appeal.

THE LEGISLATIVE FRAMEWORK FOR JOBSEEKERS

**[6]** Section 13(1) of the Jobseekers Act 1995 provides:

> 'No person shall be entitled to an income-based jobseeker's allowance if his capital, or a prescribed part of it, exceeds the prescribed amount.' Section 12(4) provides: 'Circumstances may be prescribed in which ... (b) capital or income which a person does possess is to be disregarded ...'

**[7]** The contemplated regulations are now contained in the 1996 regulations. Regulation 107 sets the capital limit at £8,000. Regulation 108(2) provides: 'There shall be disregarded from the calculation of a claimant's capital under paragraph (1) any capital, where applicable, specified in Schedule 8.' 'Claimant' had been defined in s 35 of the 1995 Act to mean 'a person who claims a jobseeker's allowance'.

**[8]** Paragraph 1 of Sch 8 to the 1996 regulations, dealing with capital to be disregarded, excludes:

> 'The dwelling occupied as the home but, notwithstanding regulation 88, (calculation of income and capital of members of claimant's family and of a polygamous marriage), only one dwelling shall be disregarded under this paragraph.'

Regulation 88 of the 1996 regulations provides that the income and capital of a claimant's partner which by virtue of s 13(2) of the 1995 Act is to be treated as the income and capital of the claimant, is to be calculated as provided for in that part of the regulations, which part includes reg 108, and, except where the context otherwise requires, 'claimant' is to be construed as if it were a reference to his partner. There is a similar provision for members of a polygamous marriage. The important definition is 'dwelling occupied as the home' which is defined in reg 1(3) of the 1996 regulations to mean—

> 'the dwelling together with any garage, garden and outbuildings, normally occupied by the claimant as his home including any premises not so occupied which it is impracticable or unreasonable to sell separately, in particular, in Scotland, any croft land on which the dwelling is situated ...'

**[9]** A claimant for income-based jobseeker's allowance may also be entitled to housing costs if eligible under Sch 2 to the 1996 regulations. Paragraph 1(1) of Sch 2 provides that the housing costs applicable to a claimant are those costs—

'(a) which he or, where he is a member of a family, he or any member of that family is, in accordance with paragraph 2, liable to meet in respect of the dwelling occupied as the home which he or any other member of his family is treated as occupying ...'

The phrase 'dwelling occupied as the home', is, as I have pointed out, defined in reg 1 of the 1996 regulations and so bears the same meaning for the purposes of Sch 2 as it does for the purposes of Sch 8. Schedule 2 goes further. It contains deeming provisions in para 3 which include:

'(1) Subject to the following provisions of this paragraph, a person shall be treated as occupying as his home the dwelling normally occupied as his home by himself or, if he is a member of a family, by himself and his family and he shall not be treated as occupying any other dwelling as his home.

(2) In determining whether a dwelling is the dwelling normally occupied as the claimant's home for the purposes of sub-paragraph (1) regard shall be had to any other dwelling occupied by the claimant or by him and his family whether or not that other dwelling is in Great Britain ...

(6) Where a person is liable to make payments in respect of two (but not more than two) dwellings, he shall be treated as occupying both dwellings as his home only—(a) where he has left and remains absent from the former dwelling occupied as the home through fear of violence in that dwelling or by a former member of his family and it is reasonable that housing costs should be met in respect of both his former dwelling and his present dwelling occupied as the home; or (b) in the case of a couple or a member of a polygamous marriage where a partner is a full-time student or is on a training course and it is unavoidable that he or they should occupy two separate dwellings and reasonable that housing costs should be met in respect of both dwellings; or (c) in the case where a person has moved into a new dwelling occupied as the home, except where sub-paragraph (5) applies, for a period not exceeding four benefit weeks if his liability to make payments in respect of two dwellings is unavoidable.'

OTHER ALLIED STATUTORY PROVISIONS

**[10]** Paragraph 3 of Sch 2 to the 1996 regulations seems to mirror and replicate closely the provision for the amount payable by way of income support in respect of housing costs (see regs 17(e) and 18(f) of and para 4 of Sch 3 to the Income Support (General) Regulations 1987, SI 1987/1967 (the 1987 income support regulations)). There are other more relevant similarities. 'Dwelling occupied as the home' is defined in reg 2(1) of the 1987 income support regulations in virtually the same terms as reg 1(3) of the 1996 regulations. Paragraph 1 of Sch 10 to the 1987 income support regulations is in almost identical terms to para 1 of Sch 8 to the 1996 regulations. There is, however, one difference between the two statutory schemes. The enabling legislation under which the 1987 income support regulations were made (see s 84(1) of the Social Security Act 1986 now contained in s 137(1) of the Social Security Contributions and Benefits Act 1992) contains a definition of 'dwelling' in these terms:

'... any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises ...'

This definition does not find a place in the 1995 Act.

[11] The Supplementary Benefit (Resources) Regulations 1981, SI 1981/1527 also provided for the claimant's home to be disregarded but here the language is different. Regulation 2(1) defines 'home' to mean—

> 'the accommodation, with any garage, garden and outbuildings, normally occupied by the assessment unit and any other members of the same household as their home and it includes also any premises not so occupied which it would be impracticable or unreasonable to expect to be sold separately, in particular the croft land where, in Scotland, the home is a croft ...'

The 'assessment unit' means 'the claimant, and any partner and dependant of the claimant'.

[12] Finally, from yet another set of welfare benefits, there is reg 5 of the Housing Benefit (General) Regulations 1987, SI 1987/1971 (the 1987 housing benefit regulations) which makes provision for the circumstances in which a person is or is not to be treated as occupying a dwelling as his home. Regulation 5(1) provides:

> 'Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home—(a) by himself or, if he is a member of a family, by himself and his family ... and shall not be treated as occupying any other dwelling as his home.'

[13] Regulation 5(5) provides:

> 'Where a person is liable to make payments in respect of two (but not more than two) dwellings, he shall be treated as occupying both dwellings as his home only—(a) where he has left and remains absent from the former dwelling occupied as his home through fear of violence in that dwelling ... (b) in the case of a married or unmarried couple or a member of a polygamous marriage, where he or one partner is a student ... it is unavoidable that the partners should occupy two separate dwellings ...(c) in the case where, because of the number of persons referred to in paragraph (1), they have been housed by a housing authority in two separate dwellings ...'

THE COMMISSIONER'S DECISION UNDER APPEAL

[14] Mr Commissioner Bano had to consider two other decisions made by his colleagues considering other regulations. One was *Social Security Decision R(SB) 10/89* made by Mrs Commissioner RFM Heggs under the 1981 regulations and the other was a starred decision 17/93, *Social Security Decision CIS 81/91*, made by Mr Commissioner RA Sanders with respect to the 1987 income support regulations. In the former case it was held that a distinction exists between a claimant who owns two houses, each of which can accommodate all members of his assessment unit and which are used at different times for different purposes, and cases where each house is inappropriate for the size of the assessment unit. In that case it was held that the claimant's assessment unit 'normally occupied' the two houses in question. In the latter case, which Mr Commissioner Sanders did not find to be completely straightforward, he held that the language of the 1981 regulations was significantly wider than the 1987 income support

regulations he had to consider. He held (*Social Security Decision CIS 81/91* at para 6): a

> 'And the question is whether a claimant who, as in this case, has some of the family in one house and the rest in the other is entitled to the disregard only in respect of one "dwelling" and, if so in respect of which one. Now one might wonder why that question would ever be asked, having regard to the last few words of para 1, until that is one looks at the definition of "dwelling" in s 84(1) of the 1986 Act ...' b

He concluded that definition did not justify the conclusion that the dwelling could be spread over separate buildings.

**[15]** Mr Commissioner Bano decided (*Social Security Decision CJSA 4620 2000*): c

> '9. I have come to the conclusion that the claimant's representative is correct in submitting that, for the purposes of income support and income-based jobseeker's allowance, a dwelling can consist of more than one building. The commissioner in *Social Security Decision CIS 81/91* considered that the words "only one dwelling shall be disregarded" d precluded the disregard of more than one building from the calculation of capital, but I take the view that para 1 of Sch 8 to the 1996 regulations is not concerned with the physical composition of a dwelling. Regulation 88 of the 1996 regulations, to which para 1 refers, provides for cases where the capital of members of a claimant's family or of other members of a polygamous e marriage is to be treated as the claimant's own capital, and in such cases the concluding words of para 1 operate to prevent the disregard of the dwelling of such a family member, in addition to the claimant's own dwelling. If the claimant has more than one unit of accommodation, which he occupies as separate dwellings, only one such dwelling can be disregarded, but I find nothing in para 1 of Sch 8 to prevent more than one building or other unit of f accommodation from forming a single dwelling.
>
> 10. As the commissioner pointed out in *Social Security Decision CIS 81/91*, the definition of "home" in reg 1 of the 1981 regulations was wider than the definition of "dwelling occupied as the home" in reg 1 of the 1996 regulations, but I do not agree that that difference leads to the g conclusion that only one unit of accommodation can be disregarded under the 1987 income support and 1996 regulations. The approach taken by the commissioner in *Social Security Decision R(SB) 10/89*, under reg 2(1) of the 1981 regulations, was to consider whether both houses concerned were normally occupied by the members of the assessment unit, and then to consider the factors necessary to decide whether the assessment unit h occupied the accommodation in question as "the home". Under para 1 of Sch 8 to the 1996 regulations, the question to be considered is whether the dwelling in question is occupied by the claimant and, if so, whether it is occupied by the claimant as his home. Although the test has changed, I see no reason why para 1 of Sch 8 cannot be applied to more than one unit of j accommodation, in accordance with the approach taken under the earlier legislation in *Social Security Decision R(SB) 10/89*.
>
> 11. I have considered whether the definition of "dwelling occupied as the home" in reg 1 of the 1996 regulations can be applied only to a single building, but I have concluded that that is not the case. As the claimant's representative has pointed out, the definition of "dwelling occupied as the

home" uses the term "dwelling", rather than "dwelling-house" (a term well understood in the law of landlord and tenant), and I see no reason why the definition in reg 1 cannot be applied to a single dwelling which consists of more than one dwelling-house. Although the definition of "dwelling" in s 137(1) of the 1992 Act, which is the same as the definition in s 84(1) of the 1986 Act has not been included in the 1995 Act, the definition of "dwelling occupied as the home" is the same in the 1987 income support and 1996 regulations, and I see no reason why the meaning should not be the same in both regulations. I agree with the commissioner in *Social Security Decision CIS 81/91* in saying that the purpose of the words "any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate of self-contained premises", now in s 137(1) of the 1992 Act, was probably to bring within the scope of the definition premises which would have been outside Rent Act protection. The intention of the provision therefore seems to me to be essentially inclusionary, and I see no reason to construe it as excluding a dwelling consisting of residential accommodation in more than one building.

12. I have therefore been persuaded by the claimant's representative that a "dwelling occupied as the home" may comprise more than one building, but it seems to me that the number of cases in which more than one unit of accommodation can qualify for capital disregard under the income support and jobseeker's allowance provisions may be few.'

**[16]** He concluded that there was too much uncertainty about the evidence to enable him to decide on the facts and he directed that the matter be remitted for rehearing before a differently constituted tribunal.

**[17]** Mr Commissioner Bano rejected the claimant's further submission that the second house fell within reg 1 of the 1996 regulations because it was land which it was unreasonable or impracticable to sell having regard to the claimant's need to house his growing children there. He was of the view that those words in the definition referred to the difficulty in selling land because of its physical relationship to the dwelling.

THE ARGUMENTS PRESENTED TO US

**[18]** I am grateful to counsel for their thorough skeleton arguments and persuasive submissions. At the risk of doing them injustice I will summarise their respective cases. Mr James Maurici for the Secretary of State advanced four reasons for reversing Mr Commissioner Bano's decision. (i) To suggest that two units of accommodation or dwelling houses can constitute 'one dwelling' flies in the face of the words of the 1996 regulations and robs para 1 of Sch 8 of any meaning. (ii) The commissioner should not have relied on *Social Security Decision R(SB) 10/89* because the regulations there were significantly different: he should have followed *Social Security Decision CIS 81/91* where the regulations were wholly similar. (iii) In this field, where a person is to be treated as occupying two dwellings as his home, then the regulations make express provision for this, eg in respect of housing costs, and under the 1987 housing benefit regulations. (iv) Because the 1996 regulations are so similar to the 1987 income support regulations, Parliament in approving the 1996 regulations must be presumed to have endorsed the correctness of *Social Security Decision CIS 81/91* (see *Hinchy v Secretary or State for Work and Pensions* [2003] EWCA Civ 138, [2003] 2 All ER 289, [2003] 1 WLR 2018).

[19] Mr Daniel Kolinsky submitted on Mr Miah's behalf: (i) Mr Commissioner Bano was right for the reasons he gave. (ii) The test adopted, which is one of 'functional coherence' is rigorous enough to give the necessary flexibility without opening the floodgates. (iii) A common sense approach is necessary to avoid the anomaly of having a claimant who occupies a single home on a split site having only part of that home disregarded whereas everyone else's home can be wholly disregarded. (iv) Building upon that anomaly, it would offend the need to provide for positive assistance in a non-discriminatory way contrary to art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). (v) By his respondent's notice he sought to argue, if necessary, that the ambit of what counts as 'impracticable or unreasonable to sell' (see reg 1 of the 1996 regulations) should not be confined only to the physical location of the property.

CONCLUSIONS

[20] As the commissioners have pointed out, there is a sad lack of coherence in the drafting of this wide range of social welfare legislation. One might have hoped for some uniformity in the definition of the essential building blocks, like a claimant's home, which affect the allowing or disallowing of a social security-type benefit. Because of the non-application of the definition of 'dwelling' contained in s 84(1) of the 1986 Act and s 137(1) of the 1992 Act, not even the 1981 and 1996 regulations are wholly and exactly comparable.

[21] Given these differences, be they large or small, I find it impossible to derive from another set of provisions any support for any convincing argument, one way or the other, as to the meaning of the regulations we have to construe. I can only look for clues as to the true meaning of 'dwelling occupied as the home' from within the 1996 regulations themselves.

[22] The first clue is within para 1 of Sch 8 itself in the words 'notwithstanding regulation 88'. Under reg 88 the capital and income of the claimant's partner or polygamous 'wife', which by virtue of s 13(2) of the 1995 Act are to be treated as his, are to be aggregated with his. Without the qualification 'notwithstanding regulation 88', it seems likely or highly arguable that any separate home of the partner/'wife' would also be disregarded. Certainly one can be sure at least that the legislature had in mind the possibility that there would be two dwellings competing for being or both claiming to be disregarded.

[23] The provisions of Sch 2 to the 1996 regulations confirm that the legislature was alive to the possibility of there being two dwellings available for consideration. Paragraph 3(6) of Sch 2 shows that the draftsman had in mind the possibility that a person was liable to make payments in respect of two dwellings and treated him to be occupying both dwellings as his home in the circumstances prescribed, viz, in cases of domestic violence, university residence, and moving house.

[24] I find it difficult, however, to draw any satisfactory conclusion from these fact-specific examples in para 3 of Sch 2 or from the cases of the partner/polygamous 'wife' in reg 88. None of this seems to me to throw light on the crucial question whether separate buildings can constitute a single dwelling occupied as the claimant's home. As Mr Kolinsky submits, simply to conclude that two separate buildings cannot be a single dwelling begs the question.

[25] Given that the draftsman had the possibility of two dwellings in mind, what did he intend to include in or exclude from the meaning of 'dwelling'.

[26] If one approaches construction of the words literally, one notes that the word 'dwelling' has been chosen, not, for example, 'dwelling-house' nor 'residential accommodation'. 'Dwelling' is defined by the *Oxford English Dictionary* as 'place of residence; a dwelling-place, habitation, house'. 'Dwelling-place' is 'A place of abode', whereas 'Dwelling-house' is 'A house occupied as a place of residence, as distinguished from a house of business, warehouse, office, etc.' Because the single word is expanded into a phrase 'dwelling occupied as the home' I am given the impression that the legislature intended to convey the function to be served by the concept of a dwelling rather than to connote its constituent elements, the bricks and mortar of the dwelling. The function is a place serving as home for the claimant. That place is not necessarily confined to a single building. For me this emphasis is reinforced by the inclusion within 'dwelling' of 'any garage, garden and outbuildings normally occupied by the claimant as his home including any premises not so occupied ...' (see reg 1 of the 1996 regulations). A barn converted for residential accommodation is part of the dwelling constituted by the farmhouse and that converted barn. I appreciate that not too much can be derived from that analogy because they both lie within the same curtilage, but it gives the flavour.

[27] A test for determining where home is can conveniently be expressed in the way Mr Commissioner Bano directed the tribunal to approach the question (*Social Security Decision CJSA 4620 2000* at para 14), viz, by asking whether—

> 'the claimant's arrangements were such that one house was, in effect, used as an annex of the other, or to put it another way, whether this was a single home on a split site. Occasional use of the second house by the claimant or his dependent children will not assist him, because the tribunal must be satisfied that the second house was "normally" occupied by the claimant as his home.'

[28] If one needs to look further, one should look to see where common sense, fairness and justice take one. Taking the latter consideration first, the facts of this case provide a proper background for the question. Here is a man who organised his domestic life at a time when he was in good and apparently stable employment. He bought the property two doors away to house his growing family. Then he fell upon hard times. If in 1992 he had sold number 11A and bought a single five/six-bedroom property, that property would have to be disregarded. It surely cannot be fair that he should suffer when the purpose of having two properties is exactly the same as having only one.

[29] Simple justice seems to me to dictate that a man in the applicant's position should not be discriminated against adversely to the owner of a single but large property for his family.

[30] Common sense dictates that the court can construe the words in a way which does not make them unworkable or impractical. Assume, as the tribunal subsequently found, the claimant truly does use both houses as his home, how is a decision-maker to determine which of the two is to be disregarded? Can the claimant elect? Is it the property of greater or of lesser value? Is it the first he acquired or the last? Has some (but goodness knows what) attempt have to be made to ascertain which is the more significant home? Those questions seem to me impossible of answer and militate against the Secretary of State's submissions. One cannot have a scheme which is incapable of easy, sensible and certain application.

[31] On the other hand, the claimant's construction does allow common sense to prevail. In requiring both properties to be occupied as the home at the same point in time, it is perfectly easy to distinguish those two properties seen as a unit from the second home which a hypothetical claimant may have in the country as a weekend retreat. Allowing only one of those homes to be disregarded is entirely just and fair as between the public purse and the claimant for this benefit.

[32] If one applies this functional test as opposed to a structural test, a decision-maker can with common sense determine what the claimant is using as his home. It is the place where he lives, where he eats, sleeps, bathes, relaxes, enjoys with his family. Such a test avoids the absurdities that two semi-detached houses would not be a single dwelling, however used, so long as they remain detached. Not even going out of the back door of one, through the communal garden and in the back door of the other could make it one dwelling. But knock a hole through the party wall and then there is structural integration and presumably two dwellings have been converted into one. The subtleties of such distinctions produce an absurdity that has to be avoided by a more realistic interpretation.

[33] I would test this by applying a purposive construction. The purpose of these provisions is surely to provide benefits for those in need. A liberal, as opposed to a strict, construction demands that they be construed in favour of a claimant to relieve hardship rather than in favour of the Secretary of State to protect the public purse out of which the benefits are to be paid. If the Secretary of State who laid the regulations before Parliament could not do so in a way which made his position clear, then the regulations are to be construed against him.

[34] I am not impressed with Mr Maurici's argument that Parliament must have intended first that the 1996 regulations should have the same meaning as the 1987 income support regulations, and, secondly, that *Social Security Decision CIS 81/91* has received Parliamentary approval. My rejection of that submission owes as much to the absence of an equivalent to s 84(1) of the 1986 Act in the 1995 Act, and hence to a small difference between the two provisions, as to complete cynicism about the adequacy of parliamentary scrutiny of subordinate legislation of this kind.

[35] I do not find it necessary to consider the unfairness and discriminatory effect of the regulations as a discrete human rights point. I am satisfied that domestic principles of construction lead to the conclusion that Mr Commissioner Bano was correct.

[36] It is, therefore, unnecessary to consider the respondent's notice and decide whether or not the claimant's alternative argument is well founded. I say nothing about that question at all.

[37] It follows that, in my judgment, this appeal should be dismissed.

**MANCE LJ.**

[38] This is the Secretary of State's appeal by permission of the Social Security Commissioner, Mr Commissioner Bano, who by decision dated 23 May 2002 determined that a 'dwelling occupied as a home' could in appropriate circumstances consist of two separate (non-adjoining) houses—in this case numbers 11A and 19 Haseley Road, Handsworth—so that, under Sch 8, para 1 of the Jobseeker's Allowance Regulations 1996, SI 1996/207 the value of both houses would fall to be disallowed in calculating the capital of the respondent, Mr Miah, for the purposes of a claim to income-based jobseeker's allowance.

[39] Mr Commissioner Bano remitted the matter to a new tribunal to determine whether on the facts the two houses did in all the circumstances constitute one 'dwelling occupied as the home' by Mr Miah. The Birmingham Unified Appeal Tribunal held on 26 July 2002 that they did. The Secretary of State does not challenge that conclusion, if it was permissible in law, and it is not for us therefore to express any view on its correctness in any other respect. I mention that the tribunal reached its conclusion in the light of what it found were the following unusual facts: neither house is large enough for the whole of Mr Miah's family; and he himself sleeps for four or five nights a week at number 19 and for the remaining nights at number 11A, where he and the whole family spend their leisure time and eat their meals.

[40] The Jobseekers Act 1995 provides:

> **12.** *'Income and capital: general.*—(1) In relation to a claim for a jobseeker's allowance, the income and capital of a person shall be calculated or estimated in such manner as may be prescribed ...
>
> (4) Circumstances may be prescribed in which—(a) a person is treated as possessing capital or income which he does not possess; (b) capital or income which a person does possess is to be disregarded; (c) income is to be treated as capital; (d) capital is to be treated as income.
>
> **13.** *Income and capital: income-based jobseeker's allowance.*—(1) No person shall be entitled to an income-based jobseeker's allowance if his capital, or a prescribed part of it, exceeds the prescribed amount.
>
> (2) Where a person claiming an income-based jobseeker's allowance is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as the income and capital of the claimant.'

[41] The 1996 regulations provide:

> '**Capital limit**
>
> **107.** For the purposes of section 13(1) and (2A) (no entitlement to an income-based jobseeker's allowance if capital exceeds a prescribed amount)—(a) except where paragraph (aa) or (b) applies, the prescribed amount is £8,000 ...
>
> **Calculation of capital**
>
> **108.**—(1) Subject to paragraph (2), the capital of a claimant to be taken into account shall be the whole of his capital calculated in accordance with this Part and any income treated as capital under regulation 110.
>
> (2) There shall be disregarded from the calculation of a claimant's capital under paragraph (1) any capital, where applicable, specified in Schedule 8.'

[42] Regulation 88 of the 1996 regulations supplements s 13(2) of the 1995 Act:

> '**Calculation of income and capital of members of claimant's family and of a polygamous marriage**
>
> **88.**—(1) Subject to paragraphs (2) and paragraph (3) and regulations 88ZA (calculation of income and capital of a joint-claim couple) and 106 (modifications in respect of children and young persons), the income and capital of a claimant's partner and the income of a child or young person which by virtue of section 13(2) is to be treated as the income and capital of

the claimant, shall be calculated in accordance with the following provisions of this Part in like manner as for the claimant; and any reference to the "claimant" shall, except where the context otherwise requires, be construed, for the purposes of this Part, as if it were a reference to his partner or that child or young person.'

[43] Schedule 8 to the 1996 regulations provides:

'SCHEDULE 8
CAPITAL TO BE DISREGARDED
**1.** The dwelling occupied as the home but, notwithstanding regulation 88, (calculation of income and capital of members of claimant's family and of a polygamous marriage), only one dwelling shall be disregarded under this paragraph.'

[44] Regulation 1 of the 1996 regulations contains the following definition:

'"dwelling occupied as the home" means the dwelling together with any garage, garden and outbuildings, normally occupied by the claimant as his home including any premises not so occupied which it is impracticable or unreasonable to sell separately, in particular, in Scotland, any croft land on which the dwelling is situated ...'

[45] The Secretary of State submits that the language of Sch 8 read with the definition in reg 1 of the 1996 regulations excludes any possibility in law of two separate houses constituting a single 'dwelling occupied as the home'. He points out that under reg 1 the unit of assessment is the claimant alone, and submits that the provision in Sch 8, para 1 that 'only one dwelling shall be disregarded under this paragraph' is directly aimed at the present type of situation.

[46] The qualification that 'only one dwelling shall be disregarded under this paragraph' is however introduced with the bracketed direction that it applies 'notwithstanding regulation 88'. That regulation deals with the manner in which the income and capital of a claimant's partner or of a child or young person is to be calculated (for the purpose of treating it as the claimant's under s 13(2) of the 1995 Act). It stipulates that the calculation shall be in accordance with certain further provisions 'in like manner as for the claimant' (see reg 88(1) of the 1996 regulations), and reinforces this with a direction that any reference to 'the claimant' in such provisions shall be construed 'as if it were a reference to his [the claimant's] partner or that child or young person'. Apart from the qualification in Sch 8, para 1 to the 1996 regulations, it would therefore have been well arguable that a separate 'dwelling occupied as the home' by the claimant's partner or a relevant child or young person fell to be disregarded. The most obvious purpose of the qualification was to avoid this. Although the qualification in Sch 8, para 1 says simply that 'only one dwelling shall be disregarded' (rather than that 'only one dwelling occupied as the [or a] home shall be disregarded'), the reference to reg 88 makes it clear that it must at all events embrace situations where two dwellings are each occupied as a (separate) home, eg in one case by the claimant and in the other by a partner.

[47] Another obvious effect of the qualification is that a claimant cannot maintain that he has two dwellings each of which is occupied as a separate home and each of which should be disregarded. A weekend retreat or country cottage could not on this basis be disregarded. But that is not the situation with which Mr Commissioner Bano was concerned. He was asked to determine whether,

under Sch 8, para 1 to the 1996 regulations, and bearing in mind the definition in reg 1, 'the dwelling occupied as the home' may be spread over two physically separate buildings, so that there is still only one home, the whole value of which may be disregarded.

[48] I have come to the conclusion, not without some doubt, that this is possible. A person may acquire two neighbouring houses or flats, but may not or may not be able to incorporate them into one physical building. He may nonetheless, although no doubt relatively rarely, occupy them to all intents and purposes as if they constituted a single enclosed unit. This is particularly likely, if, as here, neither house by itself caters for all his family's needs.

[49] I do not consider that the fact that both Sch 8, para 1 and reg 1 speak in the singular throughout leads to a different conclusion. Whether one is speaking of the 'dwelling occupied as the home' or simply of the 'dwelling', the issue is whether the word can embrace exceptional situations where it can fairly be said that a person's 'dwelling' or his 'dwelling occupied as the home' spreads over more than one physical building.

[50] Regulations 83(f) and 84(1)(g) of the 1996 regulations provide for the inclusion in the weekly amount payable to a claimant of—

> 'any amounts determined in accordance with Schedule 2 (housing costs) which may be applicable to him in respect of mortgage interest payments or such other housing costs as are prescribed in that Schedule'.

Schedule 2, para 1(1) provides:

> 'Subject to the following provisions of this Schedule, the housing costs applicable to a claimant are those costs—(a) which he or, where he is a member of a family, he or any member of a family is, in accordance with paragraph 2, liable to meet in respect of the dwelling occupied as the home which he or any other member of the family is treated as occupying ...'

Schedule 2, paras 2 and 3 provide:

> '**Circumstances in which a person is liable to meet housing costs**
>
> **2.**—(1) A person is liable to meet housing costs where—(a) the liability falls upon him or his partner or, where that person is a member of a joint-claim couple, the other member of that couple, but not where the liability is to a member of the same household as the person on whom the liability falls; (b) because the person liable to meet the housing costs is not meeting them, the claimant has to meet those costs in order to continue to live in the dwelling occupied as the home and it is reasonable in all the circumstances to treat the claimant as liable to meet those costs; (c) he in practice shares the housing costs with other members of the household none of whom are close relatives either of the claimant or his partner, or, where that person is a member of a joint-claim couple, the other member of that couple, and (i) one or more of those members is liable to meet those costs, and (ii) it is reasonable in the circumstances to treat him as sharing responsibility.
>
> (2) Where any one or more, but not all, members of the claimant's family are affected by a trade dispute, the housing costs shall be treated as wholly the responsibility of those members of the family not so affected.
>
> Circumstances in which a person is to be treated as occupying a dwelling as his home

**3.**—(1) Subject to the following provisions of this paragraph, a person shall be treated as occupying as his home the dwelling normally occupied as his home by himself or, if he is a member of a family, by himself and his family and he shall not be treated as occupying any other dwelling as his home.

(2) In determining whether a dwelling is the dwelling normally occupied as the claimant's home for the purposes of sub-paragraph (1) regard shall be had to any other dwelling occupied by the claimant or by him and his family whether or not that other dwelling is in Great Britain ...

(6) Where a person is liable to make payments in respect of two (but not more than two) dwellings, he shall be treated as occupying both dwellings as his home only—(a) where he has left and remains absent from the former dwelling occupied as the home through fear of violence in that dwelling or by a former member of his family and it is reasonable that housing costs should be met in respect of both his former dwelling and his present dwelling occupied as the home; or (b) in the case of a couple or a member of a polygamous marriage where a partner is a full-time student or is on a training course and it is unavoidable that he or they should occupy two separate dwellings and reasonable that housing costs should be met in respect of both dwellings; or (c) in the case where a person has moved into a new dwelling occupied as the home, except where sub-paragraph (5) applies, for a period not exceeding four benefit weeks if his liability to make payments in respect of two dwellings is unavoidable.

(7) Where—(a) a person has moved into a dwelling and was liable to make payments in respect of that dwelling before moving in; and (b) he had claimed a jobseeker's allowance before moving in and either that claim has not yet been determined or it has been determined but an amount has not been included under this Schedule and if the claim has been refused a further claim has been made within four weeks of the date on which the claimant moved into the new dwelling occupied as the home; and (c) the delay in moving into the dwelling in respect of which there was liability to make payments before moving in was reasonable and—(i) that delay was necessary in order to adapt the dwelling to meet the disablement needs of the claimant or any member of his family; or (ii) the move was delayed pending the outcome of an application under Part VIII of the Benefits Act for a social fund payment to meet a need arising out of the move or in connection with setting up the home in the dwelling and either a member of the claimant's family is aged five or under or the claimant's applicable amount includes a premium under paragraph 10, 11, 12, 13, 15 or 16 of Schedule 1; or (iii) the person became liable to make payments in respect of the dwelling while he was a patient or was in residential accommodation, he shall be treated as occupying the dwelling as his home for any period not exceeding four weeks immediately prior to the date on which he moved into the dwelling and in respect of which he was liable to make payments.'

**[51]** These careful provisions of Sch 2, dealing with situations in which housing costs can be claimed, show the legislator's concern to regulate situations in which a claimant might claim to occupy, either alone or with his family, more than one house, including a second house abroad (see para 3(2)). Recognising that they may only assist indirectly in the construction of Sch 8, para 1, they confirm that such situations were at the forefront of the legislator's mind, and

that the concluding words of Sch 8, para 1 may therefore have been directed simply to them, and not to situations where it could properly be said that a claimant had one home only, but spread over two buildings.

**[52]** More broadly, it was submitted on behalf of Mr Miah that, on the Secretary of State's case, there would be an odd difference in what was disregarded, between a claimant whose home was (for whatever reason) spread over two physical buildings and a claimant who had managed to find a house suitable for himself and his whole family. That argument has less force than might at first sight appear, since the issue under Sch 8, para 1 and reg 1 is whether the dwelling is occupied as the *claimant's* home, and a claimant who had two houses, in one of which he lived and in the other of which other of his family members lived, would probably not be able to claim that both houses were normally occupied *'by the claimant'* as his home as required under reg 1.

**[53]** What can, however, be said is that a construction that leads to consistent disregard of the value of the claimant's home is preferable in principle to a construction that leads to its disregard, so long as it consists of a single physical building, but which only disregards part (which part being uncertain) if it spreads over two physical buildings. This point appears to me to have force, whether or not such a distinction would be consistent with arts 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (as it may not be, although I need express no view on that).

**[54]** Both parties sought assistance from a review of the provisions of other primary or subordinate legislation in the social security field, and from various social security commissioners' decisions under that legislation. There may be limited value in comparisons with different statutory provisions. But the position can be summarised as appears in the following paragraphs ([55]–[59], below).

**[55]** The Supplementary Benefit (Resources) Regulations 1981, SI 1981/1527 made under the Supplementary Benefits Act 1976 contained in reg 2 the following definition of the word 'home':

> '"home" means the accommodation, with any garage, garden and outbuildings, normally occupied by the assessment unit and any other members of the same household as their home and it includes also any premises not so occupied which it would be impracticable or unreasonable to expect to be sold separately, in particular the croft land where, in Scotland, the home is a croft.'

Regulation 2 defines 'assessment unit' as meaning 'the claimant, and any partner and dependant of the claimant'. By reg 6 of the 1981 regulations:

> 'In calculating a claimant's capital resources the following shall be disregarded—(a) the value of—(i) the home, (ii) any premises which have been acquired and not yet occupied by the assessment unit but which it is intended will be the home within 6 months of the date of acquisition or such longer period as is reasonable in the circumstances ... except in relation to any part of the premises which, having regard to all the circumstances, it would be practicable or reasonable to regard as a property which could be realised separately ...'

**[56]** By *Social Security Decision R(SB) 10/89* dated 30 January 1989 Mrs Commissioner RFM Heggs considered, in this context, the position of a claimant with two houses, neither big enough to house his whole family, one of which he used for

sleeping only, since it had no working kitchen and in the other of which he and his family ate. Mrs Commissioner Heggs concluded that, on these facts, the former house was, in effect, an annex to the latter, and that both constituted the 'home' within the definition in the 1981 regulations.

**[57]** Regulation 2 of and Sch 3 to the Income Support (General) Regulations 1987, SI 1987/1967 (the 1987 income support regulations) contain the same definition of 'dwelling occupied as the home' and similar provisions regarding housing costs as reg 1 of and Sch 2 to the 1996 regulations. Schedule 10, para 1 to these 1987 income support regulations is in similar form to Sch 8, para 1 to the 1996 regulations. In the context of the 1987 income support regulations, the legislature did go on to provide an additional definition of the word 'dwelling'. The definition, contained in the Social Security Contributions and Benefits Act 1992, s 137 (the Contributions and Benefits Act 1992), reads:

> '"dwelling" means any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises ...'

No such definition is found in the jobseekers legislation. (There is a similar definition in the Social Security Administration Act 1992, under which benefit is defined to include a jobseeker's allowance; however counsel did not suggest that this Act was relevant to the present issue concerning Mr Miah's substantive entitlement to jobseeker's allowance.)

**[58]** The meaning of the phrase 'dwelling occupied as the home' was considered by Mr Commissioner J Mitchell in *Social Security Decision CIS 427/91* dated 21 September 1992 and by Mr Commissioner R A Sanders in *Social Security Decision CIS 81/91* dated 22 March 1993. The former decision concerned the extent to which land could be regarded as a garden or as premises which it was impracticable or unreasonable to sell separately. It is the latter decision that is more relevant. The presently relevant question was the extent to which the value of a second property in which some members of the claimant's family had been housed (but which had in fact been sold shortly after the date of claim) could be disregarded in calculating the claimant's capital at that date. Mr Commissioner Sanders pointed out the difference in wording between the jobseekers legislation (focusing on the position of the claimant and his home) and the 1981 regulations (which focused on the use by the whole 'assessment unit' of accommodation as 'their home'). On that basis he distinguished *Social Security Decision R(SB) 10/89* (see [56], above). He also considered that the definition of 'dwelling' in s 84(1) of the Social Security Act 1986, which was the same as that re-enacted in s 137 of the Contributions and Benefits Act 1992 was not aimed at the present issue, but rather at avoiding the complex question thrown up by Rent Act authorities, whether a unit was sufficiently self-contained to attract protection. Looking at Sch 10, para 1 to the 1987 income support regulations, Mr Commissioner Sanders evidently found little difficulty in concluding that the second building was not occupied by the claimant as his home at the date of claim and did not fall to be disregarded for the purposes of assessing the amount of his capital.

**[59]** The most that the Secretary of State can derive from this decision is that Mr Commissioner Sanders was evidently surprised at the suggestion that two buildings could both be disregarded under provisions paralleling those of reg 1 and Sch 8, para 1 of the 1987 regulations. However, cases of the present nature are fact-intensive, and the present case is on that basis clearly different from any with which Mr Commissioner Sanders was concerned. The question in the

present case is whether a single claimant can ever have a home which spreads across two physical buildings, so as to constitute for the purposes of reg 1 of and Sch 8, para 1 to the 1987 regulations a single 'dwelling occupied as the home' (as the tribunal has held would be the case, if this is possible in law). *Social Security Decision CIS 427/91* does not either cover or in its reasoning exclude that possibility.

**[60]** It follows from [55]–[59], above that there is nothing in other primary or subordinate legislation in the social security field, or in previous social security commissioners' decisions under that legislation, to alter my initial view that the concluding words of Sch 8, para 1 to the 1996 regulations were probably directed to situations in which a claimant might claim to occupy, either alone or with his family, more than one house, including a second house abroad, rather than to situations where it could properly be said that a claimant had one home only, but spread over two physical buildings. That is the conclusion that I reach. While I have reached it independently, I note that it is also evidently the view of the editors of *Social Security Legislation 2002*, vol II, pp 205–207 (para 2.26), where they comment favourably on Mr Commissioner Bano's decision. I therefore consider that the appeal should be dismissed.

**NELSON J**

**[61]** I agree with both judgments for the reasons given by Ward and Mance LJJ.

*Appeal dismissed.*

Kate O'Hanlon Barrister.

# Lucas v Barking, Havering and Redbridge Hospitals NHS Trust

[2003] EWCA Civ 1102

COURT OF APPEAL, CIVIL DIVISION

WALLER, MANTELL AND LAWS LJJ

9, JUNE, 23 JULY 2003

*Evidence – Expert evidence – Experts' reports – Rule of procedure requiring expert's report to state all material 'instructions' – Rule precluding court from ordering, in relation to those instructions, disclosure of specific documents in absence of reasonable grounds to consider statement to be inaccurate or incomplete – Whether 'instructions' including material supplied by instructing party to expert as basis on which he had been asked to advise – CPR 31.14(1), 35.10(3), (4).*

The claimant brought proceedings for personal injury against the defendant. With his particulars of claim he produced, as required by the CPR, two experts' reports relating to his injuries. Those reports both referred to a witness statement of the claimant, provided to the experts. One report also referred to a previous expert's report. The defendant sought an order for inspection of those documents, relying on CPR 31.14(2)[a] which permitted a party to apply for an order for inspection of any document mentioned in an expert's report that had not already been disclosed in the proceedings. That provision was subject to CPR 35.10[b]. Paragraph (3) of the latter required an expert's report to state the substance of all material 'instructions', whether written or oral, on the basis of which the report was written. Paragraph (4) provided that the instructions referred to in para (3) were not privileged against disclosure, but the court would not, in relation to those instructions, order disclosure of any specific document unless it was satisfied that there were reasonable grounds to consider the statement of instructions given under para (3) to be inaccurate or incomplete. The claimant resisted the defendant's application on the basis that the documents requested were part of the instructions provided to the experts, and therefore fell within r 35.10(4). The master, however, granted the application. On the claimant's appeal, the Court of Appeal was required to determine whether the word 'instructions' in r 35.10 should be construed narrowly, so as to apply only to what the expert had been told to do, or more widely, so as to include material supplied to the expert as the basis on which he had been asked to advise.

**Held** – Material supplied by the instructing party to the expert as the basis on which he had been asked to advise should be considered as part of the 'instructions' and thus subject to CPR 35.10(4). The intention of that provision was to encourage the setting out fully of material instructions and indeed facts. Since a party was compelled so to do, it was thought right that some protection should be given where an expert complied with that requirement. Rule 35.10(4) was therefore designed primarily to give protection to a party who would

a Rule 31.14 is set out at [1], below

b Rule 35.10, so far as material, is set out at [1], below

otherwise have waived privilege by being compelled to set out matters in an expert's report. It was also designed so far as possible to prevent lengthy arguments as to whether there had been a waiver of privilege either prior to the trial or indeed at trial leading to an entitlement to further disclosure. In the instant case, the documents sought by the defendant had been part of the instructions given to the experts by the claimant. There was currently no basis for suggesting that the material instructions in either report were in any way inaccurate. Accordingly, the appeal would be allowed (see [28], [31]–[34], [37], [39]–[41], below).

*Taylor v Bolton Health Authority* [2000] CLY 96 disapproved.

**Notes**

For inspection of documents referred to in expert's report, see 37 *Halsbury's Laws* (4th edn reissue) paras 553, 996.

**Cases referred to in judgments**

*Bennett v Compass Group UK and Ireland Ltd* [2002] EWCA Civ 642, [2002] ICR 1177.

*Bourns Inc v Raychem Corp* [1999] 3 All ER 154, CA.

*Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971, [1998] 1 WLR 1478.

*Marubeni Corp v Alafouzos* [1986] CA Transcript 996.

*Morris v Bank of India* (15 November 2001, unreported).

*Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp (No 2)* [1981] Com LR 138.

*Taylor v Bolton Health Authority* [2000] CLY 96.

**Appeal**

The claimant, David Lucas, appealed with permission of Master Ungley from his decision on 23 October 2002 granting an application by the defendants, Barking, Havering and Redbridge Hospitals NHS Trust, for an order for inspection of certain documents referred to in two experts' reports which had been sent to the defendant with Mr Lucas' particulars of claim. The facts are set out in the judgment of Waller LJ.

*Joel Donovan* (instructed by *Gadsby Wicks*, Chelsmsford) for Mr Lucas.

*David Westcott QC* (instructed by *Kennedys*) for the defendant.

*Cur adv vult*

23 July 2003. The following judgments were delivered.

**WALLER LJ.**

[1] This appeal raises a point of some significance in relation to the proper construction and interaction of CPR 31.14(1) and (2) and CPR 35.10(3) and (4). Those provisions read:

> '31.14(1) A party may inspect a document mentioned in—(a) a statement of case; (b) a witness statement; (c) a witness summary; or (d) an affidavit [(e) revoked].

(2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings ...

35.10 ... (3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions—(a) order disclosure of any specific document; or (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.'

**[2]** Mr Lucas is making a claim for personal injury suffered as he alleges as a result of negligence by the defendant. With his particulars of claim he produced as required by the CPR two experts' reports relating to his injuries. Those reports both referred to a witness statement of Mr Lucas provided to the experts. One report also referred to a previous report of an expert. The defendant in reliance on r 31.14(2) sought an order for inspection of those documents. The claimant unsurprisingly was reluctant to disclose a witness statement or an expert's report other than by exchange at the due time. The application was resisted on the basis that the documents requested were part of the instructions provided to the experts, and fell within the exception identified in r 31.14(2), ie r 35.10(4). The defendants did not suggest before the master that *if* the statement and/or the report were instructions within r 35.10(4) there was any basis on which the court should conclude that an order for inspection should be made on the grounds that r 35.10(3) had not been complied with.

**[3]** The defendant was successful in obtaining an order for inspection under r 31.14(2) from Master Ungley. We have a note of his decision which is in the following terms:

'My decision is not affected by the decision of Hart J in *Morris v Bank of India* (15 November 2001, unreported) and reported on rather different facts, because this application is made on almost identical facts to those in *Taylor v Bolton Health Authority* [2000] CLY 96. Following the decision of Morland J and the overriding objective I shall direct that the report of Mr Durdy and the claimant's witness statement be disclosed.'

**[4]** Thus the master felt bound by the decision of Morland J but he granted permission to appeal. The matter has come directly to us.

**[5]** In fact Morland J's decision was concerned with r 31.14 at a time when it was in slightly different terms. At that stage there was no r 31.14(2). Rule 31.14(1) included a sub-para (e). The effect of r 31.14(1)(e) added 'expert's report' to the list of documents in which documents might be referred to and in relation to which the rules gave a right of inspection albeit even at that time 'subject to rule 35.10(4)'. The distinction between the former provision and the current provision seems to be that formerly prima facie there was a right to inspect the documents referred to in experts' reports as in the other specified documents, whereas now in relation to experts' reports an application must be made to obtain inspection. However the word 'instructions' must have the same

meaning whether the court was considering the old form of provision or the new provision since r 35.10(4) has in no way been amended.

[6] The reasoning of Morland J was to the following effect. He appreciated the obligation of the expert under r 35.10(3) to set out 'the substance of all material instructions'. He referred further to the relevant practice direction CPR PD 35, para 2.2(3) requiring the report to—

> 'contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based'.

Morland J then said:

> 'In my judgment, instructions are what an expert is told to do. What answers he is asked to give to specific questions. This is illustrated, in my judgment, by the first paragraph of Dr Wazou's report dated 18 August 1997, in which he says: "I have been instructed to examine Donna Taylor and provide a report on her development from birth, her present neurological and general health state, prognosis for the future and estimation of life expectancy." In my judgment, those in very short form are the instructions given by the claimant through her solicitors to Dr Wazou. Dr Wazou then goes on to say: "Donna was seen in the presence of her parents. I had available to me at the time of preparing this report documentary medical evidence supplied to me by instructing solicitors", and then he sets out those reports, including medical reports by Professor Malcolm Levine dated May 1997. In my judgment, the material upon which an expert is asked to comply with his instructions to answer questions, give a prognosis etc are not part of the instructions, but the basic material upon which the expert is asked to reach his conclusions in accordance with his instructions, and therefore, in my judgment, the material, the basic material supplied to the expert is not part of the instructions. I bear in mind that the philosophy of the CPR is cards on the table. I have in mind that of course the court and cases should not be encumbered by a prolixity of documents, in particular if they are not necessary.'

[7] No claim to privilege appears to have been argued and Morland J ordered disclosure.

[8] The above narrow construction preferred by Morland J is to be contrasted with a rather different view of Hart J in the case to which the master referred. It is necessary to set out some detail of the problem before Hart J in order to place the approach of the judge in context. The case was a banking case and one in which it had been agreed to exchange expert evidence prior to the evidence of witnesses of fact. In the expert's report of a Mr Wragg reference was made to his understanding of the position, an understanding which he can only have obtained from information supplied either by his solicitors or by his clients. The complaint on the application before Hart J was that the expert had not complied with the provisions of r 35.10 including the provisions of r 35.10(3) or the practice direction previously quoted. Mr Wragg's report did not contain any reference to having been provided with a statement but contained information that he must have obtained either from the statement or from the solicitors. There was further before the judge an affidavit of a Mr Dubash explaining how Mr Wragg had been instructed including a statement that certain factual

information had been supplied to Mr Wragg; that statements would have been referred to if they had been exchanged prior to the expert's report; and an assertion that Mr Wragg was asked not to rely on privileged material in preparing his report. The judge then said:

> 'As it appears to me, the expert's report is, as it stands, defective in that it does not contain a statement of "the substance of all material instructions, whether written or oral, on the basis of which the report was written". I am quoting from r 35.10(3). Taking Mr Dubash's statement at face value, it would appear that the report would have so complied had it said that it was based on, inter alia, in addition to the matters that are referred to in the report, the matters confirmed to him by Mr Dubash as being factual information on which to base the report, and had then stated what the substance of that factual information was. That would have to have been done either by reference to a document if the confirmation had in fact been contained in a document, or by a summary of the oral communication if it had been by an oral communication. The fact of the matter is that there is no statement in the expert's report of the statement required by sub-r (3). It appears to me that this is a case where I can be satisfied that the statement of instructions purportedly given in the report is inaccurate or incomplete within r 35.10(4). It is therefore open to the court to order disclosure of the instructions which were given to Mr Wragg for the purposes of his report. The application is resisted on the part of the defendants in so far as it is an attempt by the claimants to obtain disclosure of draft witness statements which may or may not at some stage or another have been supplied to Mr Wragg. However, they say that in so far as all that is sought is an identification of all those matters in the report which are the subject of oral or written confirmation to Mr Wragg by Penningtons for the purposes of his report, they are perfectly prepared to do the exercise, although they submit that it is an empty ritual. They submit that to order the production of draft witness statements would be wrong because those documents are, in their nature, at this stage privileged documents. It seems to me that, as between the two views, the question depends on exactly what happened. If Mr Wragg was in fact instructed by providing him with the draft witness statements but was asked to simply expunge references to those witness statements in his draft report but to use the information contained in them in his report, then the draft witness statements so supplied to him for that purpose would have lost their character as being privileged from disclosure because they would form part of the instructions referred to in r 35.10(3). If, on the other hand, Mr Wragg when instructed to produce his report was instructed to put out of his mind anything he had learned from seeing earlier confidential material which may have included draft witness statements, but simply to invite Penningtons to supply him with certain assumptions of fact to make for the purposes of his draft report, then only those assumptions of fact would, as it seems to me, be matters which fell within his instructions for the purposes of r 35.10(3) and (4). But the evidence of Mr Dubash leaves me unclear as to exactly what procedure was followed, and in the light of that lack of clarity and the patent defect in the report as it stands, it seems to me that the claimant is entitled to the order which it seeks in this respect.

a What the fruit of that order will be will depend very much on exactly how Mr Wragg was instructed for the purposes of this report.'

[9] The basic issue on this appeal is whether the approach of Morland J who preferred a narrow construction of 'instructions' is to be preferred to that of Hart J who would have applied a rather wider construction to that word.

b [10] One other authority to which we were referred was *Bennett v Compass Group UK and Ireland Ltd* [2002] EWCA Civ 642, [2002] ICR 1177. That decision was in fact concerned with the form of order made in the particular case. The order would have allowed the defendant to approach the hospital direct for the purpose of obtaining medical records. But in the reasoning of Clarke LJ with which Chadwick LJ agreed the question of jurisdiction was considered and c Clarke LJ said:

'[12] The order relates to "[general practitioner's] and hospital records". As indicated earlier, Mr McBride referred to entries in both sets of records in his report dated 12 July 2000 annexed to the particulars of claim. The report appears to me to be an expert report within the meaning of d CPR r 31.14(e), which provides: "A party may inspect a document mentioned in ... (e) subject to rule 35.10(4), an expert's report. (Rule 35.10(4) makes provision in relation to instructions referred to in an expert's report.)"

[13] Rule 35.10(4) is thus not relevant here. It follows that the e defendants were entitled to inspect documents referred to in Mr McBride's report, namely the claimant's general practitioner and hospital records.'

[11] It will be seen that the Court of Appeal was concerned with the former provision to which Morland J was directing his attention. The question whether medical records supplied to an expert would form part of the f instructions was clearly not fully argued. Nothing in that decision seems to me to bind this court as to the proper approach to the word 'instructions'.

[12] The appeal is concerned with the interaction of the provisions of the CPR as already quoted. It raises in my view a quite fundamental question as to what effect the new CPR were intended to have on the issue of privilege. A quotation from each of the experts' reports in this case will put a little more g flesh on the bones so far as this particular case is concerned, and will help to demonstrate the problems that need consideration in relation to the way the above provisions are intended to work.

[13] Mr Paul Durdey's report of 16 April 2002 begins:

h 'This report into current condition and prognosis was compiled on request of Gadsby Wicks, solicitors, in a letter of 15 March 2002. The report is compiled on the basis of the following documentation supplied by the instructing solicitors: (1) copy of statement of Mr Lucas dated 10 March 2002; (2) copy of Mr Lucas' general practitioner records; (3) copy of medical records from Oldchurch Hospital (Havering Hospitals NHS Trust); (4) copy j of medical records from Homerton Hospital, London; (5) interview and examination of Mr David Lucas at Litfield House, Medical Centre, Bristol, on 9 April 2002. (Mr Lucas came unaccompanied).'

It then refers to Mr Durdey's qualifications. The body of the report contains a chronology of events over two pages, a description of the 'current situation'

clearly obtained from the interview on 9 April 2002 over two-and-a-half pages; and a prognosis of five paragraphs.

[14] Dr Fiona Mason's report dated 8 May 2002, commences with an introduction dealing first with her qualifications and then with 'instructions' and 'sources of information' both of which sections I should quote:

> '**1.2 Instructions**
>
> 1.2.1 This report is prepared for the court at the request of Fran Pollard of Gadsby Wicks, solicitors, 91/99 New London Road, Chelmsford, Essex CM2 0PP. My instructions were received in a letter dated 22 April 2002. I understand from that letter that Mr Lucas is considering a clinical negligence claim following treatment he received at Oldchurch Hospital. In my letter of instruction his solicitor noted: "As a result of the treatment by Oldchurch Hospital, Mr Lucas has suffered considerable psychological distress and in order to value his claim, I need a report from a psychiatrist ... I would be most grateful if, following the appointment with Mr Lucas on 30 April, you would let me have a report setting out: (1) The extent to which you feel that he has suffered a psychiatric and emotional injury as a result of the treatment he has received from Oldchurch Hospital. (2) His present psychiatric condition and his prognosis. (3) The extent to which you feel that psychiatric treatment, if any, may help him in future together with details of the cost ..."
>
> **1.3 Sources of information**
>
> 1.3.1 In preparing this report I interviewed Mr Lucas for two and a half hours on 30 April 2002 at St Andrew's Hospital, Northampton.
>
> 1.3.2 In addition I examined the following documentation supplied to me: (1) correspondence from solicitors; (2) Mr David Lucas' statement; (3) copy of the general practitioner's records; (4) copy of the Oldchurch Hospital records; (5) copy of the Homerton Hospital records; (6) copy of Mr Paul Durdey's liability/causation report dated 16 April 2002 and condition/prognosis report also dated 16 April 2002.'

[15] The report then continues 'with background information', 'events leading to the current claim', 'subsequent aftermath' all asserted to come from 'Mr Lucas' documentation provided and where specified his medical records', although clearly the information also came from the interview since a number of paragraphs commence with the words 'Mr Lucas told me ...'

[16] My initial comments on the above reports would be these. So far as Mr Durdey's report is concerned, he has not set out the instructions actually obtained from the solicitors but they may not have been material to his report. There is simply a reference to a letter from the solicitors. The report sets out a factual medical history which must have come either from the statement Mr Lucas supplied, or from the solicitor's letter, or possibly from Mr Lucas in interview or conceivably from all those. These facts clearly were material to his report. Thereafter Mr Durdey set out what the present position is by reference to what Mr Lucas had told him in interviews.

[17] Dr Mason does refer to the contents of her instruction letter and presumably to the material part of it. She then summarises a great deal of information she has obtained from a statement and some material which she has obtained from an oral interview. This information she obviously considered material to the report she was being asked to give.

[18] Before turning to the provisions of the CPR with which this appeal is concerned it is worth exploring whether under the law as it stood previously the defendant would have been entitled to disclosure of Mr Lucas' statement and the report of Mr Durdey.

[19] The position would have been that the statement and the report would prima facie have been privileged. The defendant however would have contended that the contents of the statement and the report were to be 'deployed' at the trial in the expert's report as part of the evidence to be given in the case. There might have been an argument as to whether the production of the evidence to the defendant *prior* to any deployment at any actual hearing constituted a waiver of privilege or whether the decision of Bracewell J in *Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971, [1998] 1 WLR 1478 accurately represented the obligation to disclose material in an expert's report. The likelihood is that Bracewell J's approach would have been followed. It would probably have been held that because the contents of Mr Lucas' statement were being deployed in the expert evidence, privilege had been waived in those contents and therefore for the statement as a whole. Certainly deployment of the contents of the statement in the expert's report in court would have produced a waiver of privilege in relation to the whole statement. There is a convenient summary of the principle and the effect of former cases in Matthews and Malek *Disclosure* (2nd edn, 2000) pp 305–306 (para 10.17) where they say:

> 'The general rule is that: "Where a person is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood." [*Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp (No 2)* [1981] Com LR 138 at 139 per Mustill J.] The key word here is "deploying". A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege, and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the *contents* of the document are being relied on, rather than its *effect*. The problem is acute in cases where the maker of an affidavit or witness statement has to give details of the source of his information and belief, in order to comply with the rules of admissibility of such affidavit or witness statement. Provided that the maker does not quote the contents, or summarise them, but simply refers to the document's effect, there is apparently no waiver of privilege. This benevolent view has not been extended to the case where the maker refers to the document in order to comply with the party's need to give full and frank disclosure, *e.g.* on a without notice (*ex parte*) application.'

[20] That summary referred to authorities such as *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp (No 2)* [1981] Com LR 138 at 139 per Mustill J and *Marubeni Corp v Alafouzos* [1986] CA Transcript 996. It might also have referred to the case to which we were referred *Bourns Inc v Raychem Corp* [1999] 3 All ER 154 particularly at 166–167 where Aldous LJ

having disapproved certain statements as to the law of Bracewell J in *Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971, [1998] 1 WLR 1478 summarised the position:

> 'The principles of law are clear. Service of a witness statement, whether it be a statement of an expert or a witness of fact, waives privilege in that statement. As stated in the *Marubeni Corp* case mere reference to a document does not waive privilege of that document: there must at least be reference to the contents and reliance.'

**[21]** So far as the report of Mr Durdey is concerned, referred to only in Dr Mason's report, although there are short references to parts of the contents the argument about deployment would have been less clear.

**[22]** So considerable dispute would have arisen as to whether parts of the statement and the report were being deployed, and as to whether that waived privilege at that stage, or whether only deployment at the trial would have produced the result that the statement had been produced that result.

**[23]** What then was intended to be the position under the new CPR? Under r 31.14(2) the defendant 'may apply' subject to r 35.10(4) for inspection of documents mentioned in an expert's report. As already indicated this is to be contrasted with the right to inspect documents in witness statements, witness summaries, affidavits or statements of case. It is also to be contrasted with the former r 31.14(1)(e).

**[24]** Where there is a right to inspect without application, and without the right being subject to r 35.10(4), it is not absolutely clear whether a party is still entitled to refuse inspection on the grounds of privilege. There is a suggestion in Hollander and Adam *Documentary Evidence* (7th edn) pp 203–204 (para 13.14) that r 31.14(1) provides an absolute right to inspection. The suggestion is that CPR 31.21 then acts as a sanction disallowing the party who has refused inspection from using the document referred to. I have my doubts as to whether that is right. It seems to me unlikely that the CPR would have intended to abolish privilege at a stroke under r 31.14(1) without expressly saying so. In relation to 'instructions' in experts' reports r 35.10(4) expressly refers to there being no privilege and if privilege was to be lost I would expect express reference to that result. There is no indication that there was an intention to revoke privilege in all other cases. In addition if privilege has been waived by deployment of the contents of a privileged statement, it is not a satisfactory sanction that a party should simply be precluded from relying on the document of which it has not allowed inspection. If a party has in fact waived privilege, the other party should be entitled to use the documents then disclosable for its own purposes.

**[25]** It was part of Mr Westcott QC's submissions that it was open to the claimant in the instant case to raise privilege as an answer to an application under r 35.14(2), but his submission was that deployment was such in this case that the claim would obviously have failed. Mr Donovan's submission was to the contrary. His submission was that unless relief were obtained by virtue of r 35.10(4) the claimant would be bound to produce the document for inspection. However the question whether there was an absolute right to inspection under r 35.14(1)(a)–(d) was not fully argued out before us. It is possible that on a proper construction of r 31.15 there is a right to refuse inspection on the grounds of privilege even if documents are referred to in a statement of case, a witness statement, a witness summary or an affidavit.

Rule 31.15 appears in broad terms to refer to a party's right to inspect without any right to refuse so to do but in parenthesis at the end of the rule it says: '(Rules 31.3. and 31.14 deal with the right of a party to inspect a document)'. By bringing in CPR 31.3 at that stage it is possible that the draftsmen contemplated that a party may be able to refuse disclosure on the grounds that it has 'a right' to do so under r 31.3(1)(b) allowing for the matter then to be argued out as to whether reference to the document or deployment of its contents has waived privilege.

[26] As I have said the matter has not been fully argued out before us and the question whether r 31.14(1)(a)–(d) gives an absolute right to inspection is not in my view critical to the proper approach to r 31.14(2). Even if those sub-paragraphs did give an absolute right, the position in relation to experts' reports is separately dealt with. There is furthermore a good reason why those documents should be separately dealt with.

[27] Under r 35.10(3) there is a compulsion on experts to set out their material instructions. It is completely up to a party whether in a statement of case, affidavit or witness statement he refers to a document which might otherwise be privileged. Rule 35.10(3) compels disclosure of what would otherwise be privileged material, and indeed compels that material to be referred to in such a way that under the common law there would be held to be waiver of all other privileged material relevant to showing there was no 'cherry picking' at least where that material was deployed at a hearing.

[28] The intention behind r 35.10(4) seems to me to be to encourage the setting out fully of 'material' instructions and indeed facts. Because a party is compelled so to do, it was thought right that some protection should be given where an expert complies with that requirement. Support for that being the object of r 35.10(4) is gained from a comparison between Lord Woolf's *Interim Report on Access to Justice* (June 1995) as compared to his *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (July 1996) a summary of which appears in the notes to the White Book (*Civil Procedure* April 2003 edn)) vol I, pp 841–842 (para 35.10.5).

[29] Where does that lead in relation to the construction of the word 'instructions'? Mr Westcott submits that a narrow construction should be placed on that word. He says that the CPR cannot have been intended to go backwards. He submits therefore that the correct approach is to construe the word 'instructions' narrowly as Morland J did. The effect of his argument would be (1) that some limitation will be placed on the circumstances on which the instruction letter to the solicitors will have to be disclosed; (2) that if a statement is actually referred to as a document an application to inspect will succeed (although on Mr Westcott's submission a claim for privilege might be made—something which Morland J or those before Morland J did not seem to consider was available); (3) that the effect of deploying the contents of the claimant's statement would be to waive privilege in the same in any event and that Bracewell J's approach in *Clough*'s case should be adopted so that the statement should be ordered to be produced at this stage.

[30] Mr Donovan suggests that r 35.10(4) is intended to reach a reasonable compromise so far as material supplied to experts is concerned. The CPR require a full setting out of the facts; that would have waived privilege; the loss of privilege is confirmed by r 35.10(4) but the court will not make an order for disclosure unless 'it is satisfied that there are reasonable grounds to consider the

statement of instructions given under paragraph (3) to be inaccurate or incomplete'. That he submits supports a wide construction of the word 'instructions' to include the information being supplied by the claimant and all the material which a solicitor places in front of the expert in order to gain advice.

**[31]** In my view Mr Donovan's submissions are to be preferred. It seems to me that r 35.10(4) is designed primarily to give protection to a party who would otherwise have waived privilege by being compelled to set out matters in an expert's report. It is also designed so far as possible to prevent lengthy arguments as to whether there has been a waiver of privilege either prior to the trial or indeed at trial leading to an entitlement to further disclosure.

**[32]** In this case there is no difficulty in relation to the statement of Mr Lucas. That statement was supplied to the expert as part of the instructions to the expert. Substantial parts had been set out as 'material instructions' pursuant to r 35.10(3). The very purpose as it seems to me of r 35.10(4) is to prevent compliance with r 35.10(3) rendering such a statement disclosable unless there are grounds for believing that the statement of instructions given in the expert's report is 'inaccurate or incomplete'.

**[33]** So far as Mr Durdey's previous report is concerned I see no reason why a similar approach should not render that document part of the instructions given to Dr Mason. That report was clearly given to her for a purpose and the purpose must have been to instruct her about what it was that the expert had been saying about Mr Lucas' condition. It is no abuse of language thus as it seems to me to describe the provision of that report as part of the instructions to Dr Mason.

**[34]** It follows that I disagree with the decision of Morland J in *Taylor v Bolton Health Authority* [2000] CLY 96 and would hold that that should no longer be considered authoritative in this area. Material supplied by the instructing party to the expert as the basis on which the expert is being asked to advise should in my view be considered as part of the instructions and thus subject to r 35.10(4).

**[35]** There is however in this court an alternative string to the defendant's bow. They say that it must follow that the experts in this case have not stated 'the substance of all material instructions ...' Thus they say there has been a failure to comply with r 35.10(3) and an order for disclosure of the statement and the report should be made under r 35.10(4).

**[36]** This submission as it seems to me misunderstands the relationship between r 35.10(3) and (4). The obligation under r 35.10(3) is to disclose the substance of all *material* instructions. The protection under r 35.10(4) relates to 'any specific document' and 'questioning in court' unless the statement of instructions given under para (3) is inaccurate or incomplete. There is no requirement to set out *all* the information contained in the statement or *all* the material that has been supplied to an expert. The only obligation on the expert is to set out '*material* instructions' (my emphasis). But the protection applies to any particular document and any particular question over any area, and has to do so because disclosure of part of privileged material by implication when deployed may waive other privileged material.

**[37]** There is no basis at this stage that I can see for suggesting that the 'material instructions' are in any way inaccurate in either report.

**[38]** It may be that at the trial a different picture will appear. For example a statement may be served by Mr Lucas that tells a very different story from that

which appears in the experts' reports. It could be that the expert's report of Mr Durdey referred to in Dr Mason's report is not produced and some different picture appears from a different expert's report. This is all speculation and it will only be at a trial or conceivably when there has been a further exchange of experts' reports and witness statements that there will or could be any foundation for such an argument.

[39] In those circumstances I would allow the appeal and refuse the order for disclosure of Mr Lucas' statement and Mr Durdey's report.

**MANTELL LJ.**

[40] I agree.

**LAWS LJ.**

[41] I gratefully adopt the account of the facts and circumstances giving rise to this appeal set out in the judgment of Waller LJ, which I have had the advantage of reading in draft. I agree that the appeal should be allowed for the reasons given by him. I add a few short observations because of the importance of the point of practice which the case raises, and we are distinctly holding that the approach taken by Morland J in *Taylor v Bolton Health Authority* [2000] CLY 96 should not be followed.

[42] As it seems to me the key to the case, and to the sense to be attributed to the term 'instructions' in CPR 35.10(3) and (4), is the imperative of transparency, a general theme of the CPR but here specifically applied to the deployment of experts' reports. Thus the aim of r 35.10(3) and (4) is broadly to ensure that the factual basis on which the expert has prepared his report is patent. That approach demands a wide reading of the term 'instructions', and would be frustrated by the approach taken by Morland J in *Taylor*'s case ('instructions are what an expert is told to do').

[43] There is a plain impact on the scope of legal professional privilege, and thus a degree of protection against the loss of privilege is given by the restrictions on disclosure provided for by r 35.10(4). I think it a premise of the arrangements constituted by r 35.10(3) and (4) that in the ordinary way the expert is to be trusted to comply with r 35.10(3): the effect of the r 35.10(4) restrictions is that the party on the other side may not as a matter of course call for disclosure of documents constituting the expert's instructions as a check to see that r 35.10(3) has been fulfilled. There must be some concrete fact giving rise to 'reasonable grounds' within the closing words of r 35.10(4). It is unsurprising that the expert is thus to be trusted; it is of a piece with his overriding duty to help the court (r 35.3). Overall, r 35.10(4) in my view strikes an important balance between on the one hand the protection of the party whose privilege is lost, and on the other the vindication of r 35.10(3) where there is a real question mark as to its fulfilment.

[44] Although (as Waller LJ has pointed out at [25], above) the matter has not been argued fully before us, and thus no doubt it would be wrong to express a concluded view, for my part I would have very great difficulty in accepting that CPR 35.14(1)(a)–(d) confers an absolute right to inspect, thus abrogating privilege otherwise inherent in any document there referred to. Such a construction would require very clear words. The sub-paragraphs are not generally concerned with documents which would attract privilege, and so have ample scope to operate without the assumption of any incursion into the

law of privilege. It is inconceivable that they abrogate the impact of public interest immunity, which presumably they would if they created absolute rights. And it would be quixotic if documents whose privilege is expressly withdrawn (see r 35.10(4)) were subject only to limited rights of disclosure but those (see r 35.14(1)) whose privilege is only impliedly withdrawn were liable to be inspected without restriction.

*Appeal allowed.*

Kate O'Hanlon Barrister.

# Clark v Cutland and others

[2003] EWCA Civ 810

COURT OF APPEAL, CIVIL DIVISION
SCHIEMANN, POTTER AND ARDEN LJJ
16 MAY, 18 JUNE 2003

*Companies – Director – Duty – Fiduciary duty – Breach of fiduciary duty – Company owing debt to trustees of pension fund – Director making unauthorised transfers of company assets to trustees of pension fund – Whether assets traceable by company in hands of trustees – Whether value of assets transferred to be set off against debt.*

The petitioner and the first respondent (the respondent) were equal shareholders and the only directors of a company. Without authority, the respondent took remuneration from the company which included payments totalling £145,000 (the payments) taken from the company's assets and paid into his pension fund. The petitioner commenced a derivative action on behalf of the company against the trustees of the pension fund to recover moneys which had been misapplied and he also brought unfair prejudice proceedings against the respondent under the Companies Act 1985. The derivative action was later consolidated with the unfair prejudice proceedings. The judge found in favour of the petitioner and an order was made for the acquisition of the respondent's shares. Judgment was given against the respondent in favour of the company in the sum of £1,150,753. The judge also found that the company was indebted to the pension fund in the sum of £100,000. The petitioner appealed against the judge's refusal to order that that debt should be set off against the payments. The petitioner accepted that a personal remedy for breach of trust would not be available as against the pension fund trustees as they had received the payments without notice of the respondent's want of authority to make them. He submitted that the payments were voidable as they had been made in breach of duty by the respondent and the trustees now had notice of the company's claim so that while title to the payments had passed to the trustees it could be revested in the company or, alternatively, that the trustees held the payments on constructive trust, since they had been made in breach of fiduciary duty, and that the payments or their traceable proceeds could be recovered. The proprietary remedy sought was that the assets of the pension fund be charged to secure the sum of £145,000, that that sum be set off against the £100,000 owed by the company to the pension fund trustees, and that the balance be paid. The respondent contended inter alia that the payments having been made without authority, the transaction was therefore void, with the consequence that title had passed despite the invalidity of the transaction, and that the petitioner could not succeed in asserting that the trustees held the payments on constructive trust since he had conceded that the company had no personal remedy available against the trustees.

**Held** – If the payments to the pension fund trustees had merely been made by the respondent in breach of his duty to the company, and had he not also made them without the authority of the company, the payments would have been voidable. However, when an agent carried out a transaction without authority the consequence was that the transaction was without legal effect. Under the

company articles the directors were not entitled to any remuneration unless it had been authorised by the company in general meeting. In the instant case there had been no such authorisation. It followed that the payments to the pension fund trustees were without legal effect and not merely voidable. For the purpose of considering liability on the basis of constructive trust it did not matter that the payments were void rather than voidable. What mattered was that the respondent acted in breach of his fiduciary duty to the company and that the pension fund trustees had received notice of the company's claim. In the context of the company's claim for a proprietary remedy the concession that the company had no personal remedy against the trustees amounted only to an acceptance by the company that the trustees had received the contributions as innocent volunteers. Accordingly, the company was entitled to trace the payments that the respondent had made without authority into the pension fund assets. The proprietary remedy sought of a charge over the pension fund assets was an appropriate one and it was open to the court to impose a charge on the benefit of the loan to the company so that set off could occur and declare that the balance was charged on the cash reserves of the pension fund. The appeal would accordingly be allowed (see [23], [26]–[28], [30], [31], [34], [36], [37], below).

**Notes**

For powers and duties of directors generally and directors as trustees of the company's property, see 7(1) *Halsbury's Laws* (4th edn) (1996 reissue) paras 582, 591.

**Cases referred to in judgments**

*Agip (Africa) Ltd v Jackson* [1992] 4 All ER 385, [1990] Ch 265, [1989] 3 WLR 1367; *affd* [1992] 4 All ER 451, [1991] Ch 547, [1991] 3 WLR 116, CA.

*Allan v Rea Bros Trustees Ltd* [2002] EWCA Civ 85, (2002) 4 ITELR 627.

*Anderson v Hogg* 2002 SC 190, Ct of Sess (IH).

*Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1979] 3 All ER 1025, [1981] Ch 105, [1980] 2 WLR 202.

*Diplock's Estate, Re, Diplock v Wintle* [1948] 2 All ER 318, [1948] Ch 465, CA; *affd* sub nom *Ministry of Health v Simpson* [1950] 2 All ER 1137, [1951] AC 251, HL.

*Duomatic Ltd, Re* [1969] 1 All ER 161, [1969] 2 Ch 365, [1969] 2 WLR 114.

*Foskett v McKeown* [2000] 3 All ER 97, [2001] 1 AC 102, [2000] 2 WLR 1299, HL.

*Guinness plc v Saunders* [1990] 1 All ER 652, [1990] 2 AC 663, [1990] 2 WLR 324, HL.

*Hailey Group Ltd, Re* [1993] BCLC 459.

*Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, [1843–60] All ER Rep 378, V-C.

*Kaye v Croydon Tramways Co* [1898] 1 Ch 358, CA.

*Lowe v Fahey* [1996] 1 BCLC 262.

*Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL.

**Cases also cited or referred to in skeleton arguments**

*Bank of Credit and Commerce International (overseas) Ltd (in liq) v Akindele* [2000] 4 All ER 221, [2001] Ch 437, [2000] 3 WLR 1423, CA.

*Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, CA.

*Birch v Blagrave* (1755) Amb 264, 27 ER 176, LC.

*Childers v Childers* (1857) 1 De G & J 482, 44 ER 810, DC.

*Hallett's Estate, Re, Knatchbull v Hallett* (1879) 13 Ch D 696, [1874–80] All ER Rep 793, CA.
*Jones (FC) & Sons (a firm) (Trustee of the property of) v Jones* [1997] Ch 159, CA.
*Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512, [1991] 2 AC 548, [1991] 3 WLR 10, HL.
*Little Olympian Each Ways Ltd, Re* [1994] 2 BCLC 420.
*Muller, Re, Cassin v Mutual Cash Order Co Ltd* [1953] NZLR 879, NZ SC.
*Polly Peck International plc (in admin), Re (No 2)* [1998] 3 All ER 812, CA.
*Vinogradoff, Re, Allen v Jackson* [1935] WN 68.

**Appeal**

The petitioner, George Clark, a shareholder in Tulgrove Ltd (the company), appealed with permission of Arden LJ granted on 2 December 2002 from the order of Judge Norris QC in Birmingham District Registry of the Chancery Division on 12 July 2002 granting relief in unfair prejudice proceedings under s 459 of the Companies Act 1985 in respect of the conduct of his fellow shareholder in the company, Roger John Charles Cutland, the respondent, in the management of the affairs of the company but refusing to order that a debt of the company to the trustees of the company's directors pension scheme be set off against payments out of the company's assets which the respondent had, without authority paid or caused to be paid to the pension scheme trustees. The facts are set out in the judgment of Arden LJ.

*David Stockill* (instructed by *FBC Solicitors*, Wolverhampton) for Mr Clark.
*Thomas Seymour* (instructed through the *Bar Pro Bono Unit*) for Mr Cutland.
The company was not represented.
The trustees did not appear.

*Cur adv vult*

18 June 2003. The following judgments were delivered.

**ARDEN LJ** (giving the first judgment at the invitation of Schiemann LJ).

[1] This is an appeal against the order of Judge Norris QC sitting in the High Court of Justice, Chancery Division, Birmingham District Registry, on 12 July 2002. In the proceedings the appellant, Mr Clark, has claimed relief under s 459 of the Companies Act 1985 in respect of unfairly prejudicial conduct by his fellow shareholder, Mr Cutland, in the management of the affairs of Tulgrove Ltd (the company). Mr Clark succeeded in showing unfair prejudice and an order was made for the acquisition of Mr Cutland's shares.

[2] So far as material, Mr Clark and Mr Cutland were equal shareholders in the company. At all material times, they were also the only directors of the company. The judge found that, without Mr Clark's knowledge, Mr Cutland had misappropriated from the company sums totalling £517,734. The exact method of his misappropriation is not material for present purposes. When the misappropriation came to light, Mr Clark commenced a derivative action on behalf of the company against the trustees to recover the moneys which had been misapplied. Later he commenced unfair prejudice proceedings under s 459 of the 1985 Act. The derivative action was in due course consolidated with the unfair prejudice proceedings but it was in the latter proceedings that relief was ultimately granted.

[3] The judge also found that Mr Cutland had taken from the company, without authority, remuneration in the form of salary, pension contributions and other benefits in the further sum of £432,432. This sum included contributions of £45,000 and £50,000 made in 1998 and 1999 out of the company's assets and a further contribution of £50,000 made in 2000, which Mr Cutland paid personally but then recouped out of the company's funds. These payments were made to Mr Cutland's pension fund and were included in the judgment given against Mr Cutland in favour of the company in the sum of £1,150,753.

[4] The judge also found that the company was indebted to the pension fund in the sum of £100,000. The circumstances in which this debt arose are not relevant for the purposes of this appeal. This appeal is only against the judge's refusal to order that that debt should be set against the contributions totalling £145,000 which Mr Cutland paid or caused to be paid on his behalf to the fund.

[5] The judge rejected a defence to Mr Cutland's unauthorised drawings based on the alleged unanimous consent of both shareholders. The drawings were included in a balance sheet item for directors' remuneration in the annual accounts for the relevant years, and if Mr Clark had analysed the global figures, he would have appreciated that Mr Cutland was drawing remuneration which he had not approved. The judge held:

> '... to say that, because Mr Clark did not carry out that calculation he is bound by his "approval", would be to substitute a test of non–objection to the test of positive approval which *Re Duomatic Ltd* [1969] 1 All ER 161, [1969] 2 Ch 365 lays down and I decline to do so. This is all the more the case where, not only was the attention of the shareholders not drawn to the remuneration being paid to Mr Cutland, but their attention was specifically diverted away by the clear statement that he was not making any drawings. I am satisfied that taking money in pension contributions whilst not disclosing that he was doing so, and indeed asserting that he was not doing so, amounts to "unfair prejudice" as well as being unlawful. It may well be that if Mr Clark had been asked, he would have approved some level of remuneration related to his own. However, that does not stop the fact that the money was taken without his being asked as "unfair prejudice".'

[6] It is common ground that the trustees of the pension fund made loans to the company and that at the date of the trial the company was indebted to the trustees in the sum of £100,000. The only beneficiaries of the pension fund are Mr Cutland and his wife and dependants. The trustees of the pension fund are Mr Cutland and the third respondent. Neither the company nor the third respondent has played any part in these proceedings. Neither appeared before the judge or on this appeal. They have, however, been duly served.

[7] The judge also found that there was unfair prejudice in that Mr Cutland obtained an allotment of shares intended for a new director. We are not concerned with that allegation. The judge directed that these shares should be acquired by the company. The judge ordered a purchase by Mr Clark of Mr Cutland's remaining shares on terms which are not material. The judge rejected a number of other allegations of unfair prejudice but we are not concerned with them and accordingly it is unnecessary for me to set them out.

[8] The judge acceded to the submission that there was a wide jurisdiction under s 461 to give relief against third parties which could have been granted in a derivative action. The judge cited inter alia *Re Hailey Group Ltd* [1993] BCLC 459 and *Lowe v Fahey* [1996] 1 BCLC 262 and concluded that it was appropriate for him to treat the petition as if it were a derivative action, particularly as there was a derivative action in the background with which the petition had been consolidated. The same view of the law was taken by the Inner House of the Court of Session in *Anderson v Hogg* 2002 SC 190.

PRELIMINARY ISSUE

[9] A preliminary point arises as to whether the appeal in this case can proceed at all. Mr Thomas Seymour, for Mr Cutland, contends that the remedy now sought on appeal was not pleaded below. Only very brief reference was made to it by the appellant in his opening and closing submissions at trial. What is sought on appeal is an order setting the amounts which Mr Cutland paid into the pension fund from the company's assets without authority against the loan owed by the company to the trustees of the pension fund. This order is at variance with Mr Clark's case in that in his petition Mr Clark accepted that he would have been content if Mr Cutland had drawn about the same remuneration as he did. In fact, Mr Cutland had only drawn about £128,000 in all more than Mr Clark.

[10] Mr Seymour makes a number of further submissions. First, the order now sought is not set out in the petition; Mr Clark could not rely on the fact that the prayer in the petitions sought unspecified 'further or other relief'. To allow unpleaded points to be raised on an appeal would be to turn the appeal into a fresh hearing when it should in general be no more than a review of the judge's order (CPR 52.11). Second, Mr Seymour submits that the judge refused the relief now sought on appeal specifically on the grounds that no such relief had been sought. Third, Mr Seymour submits that an unpleaded point should not have been taken against Mr Cutland who was representing himself. Mr Cave did not appear. The trustees were effectively third parties. Fourth, Mr Seymour submits that an action has been started by the trustees for repayment of the sums due to the trustees, in which it is open to the company to plead as a defence that it is entitled to a proprietary remedy against the pension fund by reason of the matters found in this action. He concedes, however, that if the company takes that course, it might be open to the trustees to rely on abuse of process (see *Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378). Likewise, if the appeal were dismissed and the company were to start a new action seeking to recover assets from the pension fund, the trustees might be entitled to have the proceedings dismissed as an abuse of process.

[11] Mr David Stockill, for Mr Clark, submits that the relief now sought was in fact sought in the court below. He refers to his written submissions which he submitted on 8 July 2002 before making his closing speech. The written submissions state in material part as follows:

> '3.10 The company has, it is submitted, a straightforward case for recovery of the unauthorised pension contributions in the sum of £145,000. Clearly these funds remain in the pension scheme.
>
> 3.11 They should be used to offset the loan liability …'

[12] Mr Stockill submits that, although arguments were addressed to the judge on set-off, the judge did not deal with the point in his judgment. According to the transcript of the discussion after judgment, Mr Stockill pointed out to the judge that his judgment did not deal with the question of a proprietary remedy against the pension fund trustees and the judge replied that, as the moneys were paid without authority, and the trustees had no notice of the lack of authority, the company could not retain title to the moneys and accordingly no proprietary remedy lay against the pension fund trustees. Mr Stockill applied for permission to appeal against this ruling. The judge's reasons for refusing permission to appeal were that that relief had not been claimed in the petition and that there was no real prospect of success on appeal.

[13] Mr Stockill submits that s 461 of the 1985 Act is wide enough to encompass relief of this nature, and the petition sought 'further other relief'. Moreover, if the judge was concerned that the third respondent was not before the court, he could have been given a right to apply to discharge the order within a specific period after service of the order.

[14] In my judgment it is quite clear from the written submissions and transcript of proceedings quoted above that the question of the entitlement of the company to a tracing remedy was before the judge and that he did deal with it. The case had complications and the question of the appropriate remedy is one which naturally fell to be developed after judgment because it depended on the judge's findings of fact. For my own part, I have no doubt that it can properly be raised in this court. It raises a question of law on which Mr Cutland now has the benefit of an experienced Chancery junior. Accordingly, he is at no disadvantage even if he was taken by surprise below. All the relevant facts have been found. The only alternative would be for this court to order an inquiry, or for a separate set of proceedings to take place in which the company would seek to resist liability for the loan on the basis that it should be set against the sums which were paid into the pension fund. I do not see that any purpose would be served by those separate proceedings and indeed Mr Seymour has very properly intimated that, if the question of set-off was raised in separate proceedings, it would be open to the pension fund trustees to raise a question of an abuse of process and have the proceedings dismissed. Further proceedings would lead to a duplication of costs and entail delay. They could also prejudice the company's claim to a proprietary remedy. Accordingly, I would dismiss the preliminary point. I now turn to deal with the detailed submissions on the substantive questions raised by this appeal.

THE APPELLANT'S SUBMISSIONS

[15] Mr Stockill accepts that a personal remedy for breach of trust would not be available as against the pension fund trustees because they received the contributions made by the company without notice of Mr Cutland's want of authority to make them. However, he submits that where money subject to one express trust is paid improperly and without valuable consideration to the trustees of another trust, that money or its traceable proceeds still belongs in equity to the first trust and its trustees have a proprietary claim to recover them. He cites *Allan v Rea Bros Trustees Ltd* [2002] EWCA Civ 85, (2002) 4 ITELR 627 and *Foskett v McKeown* [2000] 3 All ER 97, [2001] 1 AC 102 as authority for this proposition.

[16] Mr Stockill submits that in order to establish an equitable proprietary remedy, he must establish a fiduciary relationship and traceable trust property. In this case, the fiduciary relationship was that between Mr Cutland and the company. In misappropriating its funds he breached that duty (see, for example, at first instance Millett J in *Agip (Africa) Ltd v Jackson* [1992] 4 All ER 385 at 402–403, [1990] Ch 265 at 290 and in the Court of Appeal per Fox LJ (with whom Butler-Sloss and Beldam LJJ agreed) ([1992] 4 All ER 451, [1991] Ch 547).

[17] He further submits that the company can trace the contributions which Mr Cutland made to his pension fund without authority out of the company's assets into the hands of the trustees and that the company has an option whether to claim a proportionate share of the fund or a lien on its assets (see *Foskett v McKeown*). The remedy sought by the company is a charge, and the most appropriate assets on which to impose this charge are the benefit of the loans from the pension fund trustees to the company, and, as to any balance, the cash held by the pension fund trustees. The loan and the sums traceable by the company can then (pro tanto) be set off against each other. Amounts recovered from the pension fund trustees would be credited against Mr Cutland's judgment debt. Interest should be added to the loan and judgment debt at the appropriate rates.

[18] Mr Stockill argues that, if necessary, the funds paid to the trustees should be treated as having been routed through Mr Cutland so that the legal and beneficial interest in the moneys becomes divided.

THE RESPONDENT'S SUBMISSIONS

[19] Mr Seymour accepts that the right to trace will exist if there was an equitable interest in the moneys. However, he submits that such an equitable interest only exists if money is taken fraudulently and without any disclosure in the accounts. Here the unauthorised remuneration was disclosed in the accounts within the global item for directors' remuneration. The drawing of unauthorised remuneration was thus not embezzlement or theft. The petition stated that Mr Clark would have been content for Mr Cutland to receive equal remuneration. Mr Seymour submits that on this basis the legal and beneficial interest in the moneys paid without authority passed to the pension fund trustees (see *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961 at 989–990, [1996] AC 669 at 707 per Lord Browne-Wilkinson). Alternatively, the payments were void. Moreover, if as is conceded, the trustees are not personally liable as constructive trustees there can be no equitable proprietary remedy as against them. In the circumstances, there is simply a personal liability to account on the part of Mr Cutland.

[20] Mr Seymour submits that the final £50,000 was paid out of Mr Cutland's own funds and not out of company funds.

CONCLUSIONS

[21] At the heart of Mr Seymour's submissions on behalf of Mr Cutland is a submission that there is a difference in legal consequence between (on the one hand) a breach of duty which consists of making a payment out of the company's funds which could have been lawfully made if procedures for obtaining approval under the company's constitution had been followed and (on the other hand) a payment which was in effect a theft. Both such payments are, however, breaches of duty. It is the duty of directors to follow the appropriate procedures in the company's constitution as much as it is their duty

to apply corporate property only for proper purposes. Failure to obtain appropriate approval and insufficient disclosure is a serious matter. Disclosure plays an important role in company law and the quality of disclosure is important. Disclosure is required for many purposes and it performs at least two valuable functions. It ensures that information is passed from the directors to the shareholders or from one director to another. It also acts as a deterrent against self-dealing. As Brandeis J (a justice of the United States Supreme Court) said extra-judicially, 'sunlight can be the best of disinfectants'. Meaningless disclosure does not perform these functions and inadequate disclosure is often little better than no disclosure at all. Thus in *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, a notice of meeting was held to give insufficient notice of a resolution which (among other purposes) was to approve directors' benefits when the fact of such benefits under the resolution was not fairly and candidly disclosed. The present case is not a case where a person who was entitled to receive certain information was, in fact, given that information in some other way so that his claim not to have had appropriate disclosure can be seen to be unmeritorious and the non-disclosure merely technical. The judge here concluded that the disclosure of Mr Cutland's remuneration within a global sum for remuneration in the accounts, seen against the context of statements by Mr Cutland that he was not taking any remuneration, was inadequate disclosure. I would add that there is no cross-appeal against his rejection of the defence based on unanimous consent, often referred to as 'the *Duomatic* principle' following the decision of Buckley J in *Re Duomatic Ltd* [1969] 1 All ER 161, [1969] 2 Ch 365.

**[22]** The difference in legal consequence which Mr Seymour seeks to draw between unauthorised and stolen payments is (on his main submission) based on a passage from the judgment of Lord Browne-Wilkinson in the *Westdeutsche* case. In that case the bank lent money to the local authority for the purposes of a transaction which was outside its powers. The question was whether the bank was entitled to compound interest on the ground that the local authority was a trustee of the moneys lent to it. The bank argued that it only intended to part with its beneficial ownership of the moneys lent in the performance of a valid contract and accordingly neither the legal interest nor the equitable interest passed the local authority at the date of the payment. Lord Browne-Wilkinson rejected this argument. He held:

> 'A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title. Therefore to talk about the bank "retaining" its equitable interest is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the local authority. If so, an equitable interest arose for the first time under that trust.' (See [1996] 2 All ER 961 at 989, [1996] AC 669 at 706.)

**[23]** In my judgment, this passage does not apply in the present situation. The payment made to the local authority was intended to be made by the bank when it was made. By contrast in this case, there was no organ of the company which was duly authorised to form any intention about making the payments. Mr Cutland made the payments as an agent lacking the authority. Accordingly

this is not a situation where the full legal and beneficial ownership in the pension contributions passed.

**[24]** Mr Stockill relied on the following extracts from a passage headed 'Establishing a proprietary claim' by Graham Virgo in *Buckley on the Companies Acts* (15th edn, 2000) vol 3:

> *'Establishing a proprietary claim*
>
> T[A70.229B]
>
> Regardless of whether the company seeks a personal or proprietary restitutionary remedy, whenever its claim is founded on the defendant's interference with the company's property rights it is necessary for the company to establish that the defendant has, at the very least, received property in which the company has a property interest. This property interest may arise either at law or in equity. The recognition of proprietary interests is a matter of law and does not involve the discretion of the court.
>
> T[A70.229C]
>
> (1) *Retention of a legal property interest*: Generally, where property is transferred from one party to another legal title in the property will also pass because this is what the parties intended. However, in certain limited circumstances title will not pass because the transferor's intention was vitiated in some way. For example, where the company's property has been stolen, it will not have intended title to pass and so it will retain title to the property, at least as long as the property can still be identified ... In other circumstances title may have passed but it will be revested in the company, as will occur where a transaction is voidable at law and has been rescinded. In certain circumstances title will pass even though the nature of the transfer may be suspect for some reason. For example, if property has been transferred pursuant to a void transaction, then title will pass despite the invalidity of the transaction. Similarly, where property has been transferred pursuant to an illegal transaction then title will pass despite the invalidity of the transaction itself.
>
> T[A70.229D]
>
> (2) *Creation of an equitable proprietary interest:* An equitable proprietary interest cannot be created unless there is some event which enables the equitable title to be separated from the legal title. This can happen in three different circumstances. (1) Where an express trust has been constituted so that the trustee holds the legal title to property and the beneficiary will have an equitable interest in the same property. (2) Where property is held on resulting trust ... (3) Where property is held on a constructive trust. A constructive trust arises by operation of law in a number of different circumstances. Two of the most important are where a defendant receives property in breach of a fiduciary duty and where the defendant has acted unconscionably, which will especially be the case where the defendant receives property knowing that it had been stolen or had been transferred by mistake.' (Footnotes omitted.)

**[25]** Mr Stockill contends that the proprietary remedy which he seeks falls within para T[A70.229C] because the payments to the pension fund were voidable as a result of Mr Cutland's breach of duty in making them and the pension fund had notice of company's claim. In the alternative, he submits that the court can grant a proprietary remedy because the pension fund trustees

now hold the contributions on constructive trust and that category (3) in para T[A70.229D] applies. To these submissions, Mr Seymour responds that the contributions were, on the judge's findings, paid without authority. They are therefore void. Moreover, he submits that category (3) of para T[A70.229D] does not apply because it is conceded by Mr Stockill there is no personal remedy against the trustees. It is not, however, in doubt but that the pension fund trustees still hold assets representing the contributions totalling £145,000 in question. Moreover, the pension fund trustees are volunteers.

**[26]** There seems to me to be a basic inconsistency between Mr Seymour's submission that the payments to the pension fund trustees were void and his main submission. His submission on this point seems to me to accept that the contributions were misapplications of the company's assets. However that may be, the position is that reg 76 of table A in the First Schedule to the Companies Act 1948 applied to the company. Under this article, directors were not entitled to any remuneration unless it was authorised by the company in general meeting. The judge held that there was no such authorisation in the present case. It follows that the payments of pension contributions to the pension fund trustees were without legal effect and not merely voidable (see *Guinness plc v Saunders* [1990] 1 All ER 652 at 661, [1990] 2 AC 663 at 693 per Lord Templeman, with whom Lord Keith of Kinkel, Lord Brandon of Oakbrook and Lord Griffiths agreed, and [1990] 1 All ER 652 at 665–668, [1990] 2 AC 663 at 698–702 per Lord Goff of Chieveley, with whom Lord Griffiths also agreed).

**[27]** If those payments had merely been made by Mr Cutland in breach of his duty to the company, and he had not also made them without the authority of the company, Mr Stockill's submission that the payments were voidable would have been correct. However, where an agent carries out a transaction without authority, the consequence is (as I have stated) that the transaction is without legal effect. This consequence is more serious in law than that which attaches to a transaction which is voidable since the right to rescind a voidable transaction can be lost. Because the sanction attaching to an unauthorised transaction is more serious, it must supersede the sanction of voidability that would otherwise attach in the present case.

**[28]** That still leaves category (3) in para T[A70.229D], namely liability on the basis of constructive trust. For this purpose, it does not matter that the payments were void or without legal effect, rather than voidable (see *Guinness v Saunders*). What matters is that Mr Cutland acted in breach of his fiduciary duty to the company, as to which there is no doubt, and that the pension fund trustees have received notice of the company's claim, which again is not disputed. A further passage from the speech of Lord Browne-Wilkinson in the *Westdeutsche* case [1996] 2 All ER 961 at 989–990, [1996] AC 669 at 707 illustrates those points:

> 'The bank contended that where, *under a pre-existing trust*, B is entitled to an equitable interest in the trust property, if the trust property comes into the hands of a third party, X (not being a purchaser of the value of the legal interest without notice), B is entitled to enforce his equitable interest against the property in the hands of X because X is the trustee for B. In my view the third party, X, is not necessarily a trustee for B: B's equitable right is enforceable against the property in just the same way as any other

> specifically enforceable right can be enforced against the third party. Even if the third party, X, is not aware that what he has received is trust property B is entitled to assert his title in that property. If X has the necessary degree of knowledge, X may himself become a trustee for B on the basis of knowing receipt. But unless he has the requisite degree of knowledge he is not personally liable to account as a trustee; [*Re Diplock's Estate, Diplock v Wintle* [1948] 2 All ER 318 at 325, [1948] Ch 465 at 478] ...'

[29] Lord Browne-Wilkinson confirmed the existence of a proprietary remedy against a third party in his analysis, in a later passage in the *Westdeutsche* case [1996] 2 All ER 961 at 996–997, [1996] AC 669 at 714–715, of the decision by Goulding J in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1979] 3 All ER 1025, [1981] Ch 105. In that case, a bank claimed to recover moneys paid under a mistake to another bank. Goulding J held that the paying bank retained an equitable property in the payments and that the conscience of the receiving bank was subject to a fiduciary duty to respect that proprietary right. Lord Browne-Wilkinson disagreed with this approach. In his judgment, the receiving bank did not become a trustee for the paying bank until it learnt of the mistake two days after the receipt of the moneys. He considered that the case would have been correctly decided on that basis.

[30] Mr Seymour relies on the concession which Mr Stockill has made that the company has no personal remedy against the pension fund trustees. Seen in the context of the company's claim for a proprietary remedy it is clear that all that concession amounts to is an acceptance by the company that the pension fund trustees received the contributions as innocent volunteers. The concession is clearly not intended to pull the rug from under the proprietary claim. Furthermore, there is no suggestion that the continued retention of the contributions by the pension fund trustees would not be unconscionable.

[31] Accordingly, in my judgment, the company is entitled to trace the payments of pension fund contributions which Mr Cutland made without authority into the pension fund assets. Mr Clark, on behalf of the company, has elected to pursue a proprietary remedy by seeking a charge over the pension fund assets. In my judgment, this is an appropriate form of remedy and it is open to the court to impose it in the way that Mr Stockill submits, namely by imposing a charge on the benefit of the loan to the company so that set-off can occur and by declaring that the balance is charged on the cash reserves of the pension fund.

THE CONTRIBUTION OF £50,000 IN 2000

[32] As regards the £50,000 paid in 2000, the judge allowed a deduction from misappropriations in the sum of £50,000:

> 'I propose to allow this deduction to Mr Cutland. My reason is that the £50,000 pension contribution which he seeks to offset here as having been loaned to the company and paid out again is also the subject of the express remuneration claim, being the £50,000 paid in respect of the pension contribution for the year ending 31 December 2000. It would in my judgment be double counting if I were to refuse payment here and allow the excess remuneration claim ...'

In effect, the judge treated the £50,000 as having been lent to the company when it was paid to the pension fund trustees and accordingly it must be treated on the same basis for the purpose of the tracing remedy sought.

INTEREST

[33] As to interest, there is no dispute but that interest should be added to the loan at the contractual rate. Likewise, there is no dispute but that interest should be added to the amount to be recovered by the company. Mr Seymour has not suggested that interest should accrue only from the date when the pension fund trustees acquired notice, which might have been the appropriate course if a personal claim had been made against them.

DISPOSITION

[34] Accordingly, in my judgment, the court should allow the appeal and grant a proprietary remedy to the company by making orders in the following terms: (i) a declaration that the company is entitled to a charge over the assets of Mr Cutland's pension fund to secure the sum of £145,000 (being the aggregate of the contributions which Mr Cutland caused to be made to the company in breach of duty) together with interest thereon; (ii) an order that pursuant to such charge the said sum is thereby set against the sum of £100,000 owed by the company to the trustees of Mr Cutland's pension fund, and interest thereon; (iii) an order that the balance of the moneys secured by the charge shall stand charged on the cash reserves of Mr Cutland's pension fund until payment in full; (iv) an order that such balance shall be paid within 28 days of the date of the service of this order on the pension fund trustees with interest calculated down to the date of payment; (v) an order that, forthwith upon such payment being made in full, Mr Cutland is to be given credit in the said sum of £145,000 and interest against the sum of £1,150,753, which by virtue of the judge's order he is liable to pay to the company.

[35] As to costs, in a derivative action it is open to the court to order the company, for whose benefit the action was brought, to indemnify the claimant against the costs reasonably incurred by it (see *Buckley* para [127.12]). By contrast, in s 459 proceedings, the company is not usually ordered to pay any of the costs (see *Buckley* para [459.33]). My provisional view in this case (subject to any submissions that Mr Cutland may wish to make) is that, although the relief sought is claimed under s 461 of the 1985 Act, it is sought for the benefit of the company and that it is, therefore, open to Mr Clark to seek an order against the company for payment to him of any costs incurred by him on this appeal (and, possibly, with respect to this issue in the court below). Such costs would then be payable by the company unless Mr Clark obtains an order for them against Mr Cutland and recovers them from him. If the company paid Mr Clark's costs, it would (to that extent) be subrogated to any order for such costs made against Mr Cutland and in favour of Mr Clark.

**POTTER LJ.**

[36] I agree.

**SCHIEMANN LJ.**

[37] I agree with the orders proposed by Arden LJ. In particular I agree that: (i) the question of the entitlement of the company to a tracing remedy can properly be raised in this court; (ii) Mr Cutland made the payments of £145,000

a without having any authority from the company to do so; (iii) in making those payments he acted in breach of his fiduciary duty to the company; (iv) the trustees have received notice of the company's claim; (v) in those circumstances the company is entitled to trace the payments; and that (vi) set-off is a convenient and permissible way of doing so.

*Appeal allowed.*

Celia Fox Barrister.

# Trafigura Beheer BV v Golden Stavraetos Maritime Inc

# The Sonia

[2003] EWCA Civ 664

COURT OF APPEAL, CIVIL DIVISION
SIR ANDREW MORRITT V-C, CLARKE AND KAY LJJ
15 MAY 2003

*Shipping – Charterparty – Time for bringing claims – Suit barred unless brought within one year after delivery of goods or date on which goods should have been delivered – Consignee alleging goods contaminated and refusing delivery – Charterers ordering vessel to deliver cargo elsewhere – Claim brought within one year of delivery at second port but more than one year from notice of readiness at original discharge port – Whether claim time-barred – Carriage of Goods by Sea Act 1971, Schedule, art III, r 6.*

The claimant charterers entered into a voyage charterparty with the defendant owners in respect of a shipment of aviation fuel on the owner's vessel. The charterparty incorporated the Hague-Visby Rules (as set out in the Schedule to the Carriage of Goods by Sea Act 1971) (the rules). Pursuant to the charterparty, the vessel was loaded at a port in Saudi Arabia for delivery at Mombasa. Shortly after sailing, the parties varied the destination to Lagos. The vessel arrived off Lagos on 2 February 2000 and served notice of readiness. Following tests, the intended purchaser of the cargo refused delivery, alleging that the fuel was off-specification. The vessel was thereafter ordered to proceed to Abidjan. In March 2000 the claimant indicated that it wished to sell the cargo, without prejudice to a future claim, in an effort to mitigate damages, and subsequently directed the vessel to a port in Greece, where the cargo was discharged on 1 April 2000. The claimant issued proceedings on 27 March 2001, alleging that the defendant was in breach of contract and claiming the difference between the original contract price to the consignee in Lagos and the price actually received from the sale in Greece. The defendant applied for summary judgment, submitting that the proceedings had been issued out of time because suit had to be brought within the one-year limitation period provided by art III, r 6 of the rules, which provided that the carrier and the ship would in any event be discharged from all liability whatsoever in respect of the goods, 'unless suit is brought within one year of their delivery or of the date when they should have been delivered'.[a] The judge granted the application, holding that the relevant suit was for damage to cargo during the voyage to Lagos, and that nothing which had happened thereafter was relevant to the question he had to decide. The claimant appealed, contending that the judge had misconstrued art III, r 6 of the rules.

**Held** – Article III, r 6 naturally meant, and could only mean, that the carrier's liability was only to be discharged if suit were not brought either within a year of delivery or within a year of the date when the goods should have been delivered.

a Article III, r 6 is set out, so far as material, at [2], below

Thus, if suit was brought within a year of delivery, the carrier was not discharged of liability even if suit was not brought within a year of the date when the goods should have been delivered. The first question in every case should therefore be whether there was 'delivery' of the goods within the meaning of art III, r 6. If there had been, there remained a second question, namely whether suit had been brought within a year of that delivery. It followed that the essential question in the instant case was whether there had been delivery of the cargo within the meaning of art III, r 6. The relevant question in deciding when delivery had been made was whether the delivery was delivery in performance of the contract. However, an important consideration in deciding that question was whether the delivery was made under an entirely separate and distinct transaction. If, looking at all the circumstances of a case, it could fairly be said that there was delivery under the contract of carriage, even if that contract had been varied in some respects in the light of problems that had arisen during the voyage, it would in general be appropriate to hold that there had been 'delivery' within the meaning of art III, r 6. If, on the other hand, the delivery had been made under an entirely separate and distinct transaction, it would in general be appropriate to hold that there had been no such 'delivery'. Furthermore, there was nothing in art III, r 6 to restrict the meaning of 'delivery' to delivery at the original contractual place of delivery. On the facts of the present case, the delivery in Greece had been made under the contract of carriage, albeit as varied, and not under an entirely separate and distinct transaction. There had therefore been delivery of the goods within the meaning of art III, r 6 and so the proceedings had not been issued out of time. Accordingly, the appeal would be allowed (see [31]–[33], [59]–[63], [68]–[70], below).

Decision of Morison J [2002] 2 All ER (Comm) 984 reversed.

**Notes**

For carrier's liability under the Hague-Visby Rules, see 5(1) *Halsbury's Laws* (4th edn reissue) para 418.

For the Carriage of Goods by Sea Act 1971, Schedule, art III, see 39 *Halsbury's Statutes* (4th edn) (2002 reissue) 330.

**Cases referred to in judgments**

*Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL.

*Cargill International SA v CPN Tankers (Bermuda) Ltd, The Ot Sonja* [1993] 2 Lloyd's Rep 435, CA.

*Cerro Sales Corp v Atlantic Marine Enterprises Inc* 1976 AMC 376, US DC.

*Leo Hess International Corp v Isthmian Steamship Co* 1958 AMC 1380, NY SC.

*New Hampshire Insurance Co v Saipan Shipping Co Inc* 1973 AMC 792.

*Universal Ruma Co v Mediterranean Shipping Co* 2001 AMC 110, US DC.

*Western Gear Corp v States Marine Lines Inc* (1966) F 2d 328, US Ct of Apps.

**Appeal**

The charterers, Trafigura Beheer BV, appealed with permission of Morison J from his order of 12 June 2002 ([2002] 2 All ER (Comm) 984) granting the application under CPR Pt 24 of the owners, Golden Stavraetos Maritime Ltd, for summary judgment against the charterers. The facts are set out in the judgment of Clarke LJ.

*Richard Lord QC* and *Michael Bools* (instructed by *Clyde & Co*) for the charterers.

*Stewart Boyd QC* and *Sara Cockerill* (instructed by *Watson, Farley & Williams*, Piraeus) for the owners.

**CLARKE LJ** (giving the first judgment at the invitation of Sir Andrew Morritt V-C).

INTRODUCTION

**[1]** This appeal arises out of a cargo claim brought by the appellant charterers against the respondent owners of the vessel SONIA for damages for breach of a voyage charterparty. The owners issued a Pt 24 application for summary judgment on the basis that the claim had no real prospect of success. The application raised two questions, namely whether the owners had agreed to extend the period of one year in art III, r 6 of the Hague-Visby Rules (as set out in the Schedule to the Carriage of Goods by Sea Act 1971) and, if not, whether suit was brought within the relevant period of one year. Morison J resolved both questions in favour of the owners and on 12 June 2002 gave judgment for them on the claim ([2002] EWHC 1154 (Comm), [2002] 2 All ER (Comm) 984). He refused permission to appeal on the first point (the 'extension of time point') but granted permission on the second point ('the art III, r 6 point'). The charterers now renew their application for permission to appeal the extension of time point, but it is convenient to consider first the art III, r 6 point, which raises an interesting question of construction of the Hague-Visby Rules.

ARTICLE III, RULE 6

**[2]** Article III, r 6 of the Hague-Visby Rules provides so far as relevant:

> '... the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered.'

THE FACTS

**[3]** The charterers chartered the SONIA from the owners under a voyage charterparty in an amended BEEPEETIME form dated 16 December 1999 for a voyage from 1/2 safe ports in Saudi Arabia to 1/2 safe ports in various places including West Africa at charterers' option at a lump sum freight. The freight for a voyage to and discharge at Lagos was $US470,000 and, by cl 7, was payable immediately after completion of discharge. The charterparty naturally included detailed provisions for laytime and demurrage. It is not necessary to recite those clauses in detail, save perhaps to note that by cl 18 laytime was to be a total of 84 hours (subsequently amended to 96 hours) for loading and discharging and by cl 22 the demurrage rate was to be $US11,000 per running day or pro rata for part of a day. Clause 46 provided that the provisions of arts III, (other than r 8), IV, IV bis and VIII of the Schedule to the Carriage of Goods by Sea Act 1971 should apply to the charterparty. Those are of course articles of the Hague-Visby Rules and thus include art III, r 6. Clause 52 provided that all bills of lading issued under the charterparty should include a clause paramount making the carriage subject to the Hague-Visby Rules. Finally, cl 55 provided that the charterparty was governed by English law and, subject to an option of London arbitration, conferred exclusive jurisdiction on the High Court in London.

[4] Between 8 and 10 January 2000 the vessel was loaded with a cargo of some 30,596·93 metric tons of Jet A-1 fuel for carriage from Rabigh in Saudi Arabia to Mombasa in Kenya under a bill of lading dated 10 January 2000. It is common ground that the relevant contract of carriage between the owners and the charterers is contained in the charterparty and not in the bill of lading. Shortly after the voyage began the parties varied the port of discharge to Lagos and the charterers provided the owners with a letter of indemnity requesting them to discharge the cargo at Lagos without production of the original bills of lading and agreeing to indemnify them against the consequences of relying upon the request. Given that Mombasa is not (so far as I can see) a port within the range of discharge ports in the charterparty, it is not clear why Mombasa was named as the discharge port in the bill of lading. However, neither party suggested in argument that the agreed change of discharge port from Mombasa to Lagos is relevant to the determination of the issues in this appeal.

[5] The vessel arrived off Lagos at 2142 hrs local time on 2 February 2000 and the master tendered notice of readiness. He tendered it only to the charterers because he had been told that the cargo was on 'financial hold'. The cargo was subsequently sampled by the receivers who rejected it on the ground that it was off-specification.

[6] On 11 February the charterers ordered the vessel to proceed to Abidjan for orders. The master complied and the vessel sailed from Lagos on the same day and arrived at Abidjan at 0400 hrs on 13 February. Further samples of the cargo were thereafter taken and the vessel remained at Abidjan for some considerable time. Nearly a month later, on 7 March, the charterers indicated that they would like to sell the cargo, without prejudice to any future claim, 'at best in an effort to mitigate damages'. Discussions then took place between the parties. They included a consideration of the possibility that the vessel would discharge the cargo in the Mediterranean. The owners quoted a figure of $US 320,000 as a lump sum freight for taking the cargo to the Mediterranean.

[7] On 9 March the charterers asked the owners to confirm the position and on the same day the owners replied that they were 'requesting for west africa/med usd 320,000 lump sum basis 1/1 max d/a 20,000 usd'. On 10 March the owners faxed the charterers saying that they were happy to assist the charterers but that the contractual position needed to be resolved. They observed that the cargo was not discharged at Lagos 'for reasons which still are not known to owners'. They added:

> 'Two issues need to be determined:
>
> a. *Compensation in respect of waiting/storage off West Africa.*
>
> The basis on which the ship is presently employed by you has yet to be formalised. The ship has left the designated discharge port of Lagos and is now being effectively used as floating storage. Owners are happy to agree compensation for this activity to be at the demurrage rate.
>
> b. *Addendum new charter in respect of on-carriage of cargo.*
>
> If the cargo has to be on-carried that is outside the scope of the presently agreed charter. Charterers' discharge option has been exercised. For any new voyage an addenda to the present charter or a new agreement need to be made.'

[8] During discussions on 11 March the charterers orally agreed to the owners' quotation for freight for the voyage to the Mediterranean and to the proposal that they should pay storage charges at the demurrage rate plus the costs of the deviation to Abidjan. The vessel accordingly sailed from Abidjan towards Gibraltar for orders at about 2300 hrs on 11 March. As the voyage progressed there were a number of exchanges between the parties. In fact they were I think between the owners' managers and the charterers' brokers but for simplicity I refer to them as being between the owners and charterers.

[9] On 14 March the owners faxed the charterers with an invoice which claimed $US470,000 (less address commission of $US5,875) in respect of the lump sum freight to Lagos under the charterparty, $US21,370 in respect of deviation costs to Abidjan and $US426,257·64 (less $US150,000 paid on account) in respect of 'demurrage/storage'. The total was $US761,752·64.

[10] Although this point was not discussed in argument, the documents appear to me to show that the figure of $US21,370 was calculated as if the order that the vessel proceed to Abidjan was a revised instruction to vary the discharging port from Lagos to Abidjan within the meaning of cl 24 of the charterparty and charging demurrage and other expenses as set out in the clause. The figure of $US426,257·54 was arrived at by reference to a time sheet which in essence showed the following. Laytime began to run at Rabigh in Saudi Arabia. The 96 hours' laytime expired at the load port and the vessel was thus on demurrage while still at Rabigh. She was again on demurrage at Lagos from six hours after notice of readiness was given until she sailed at 1805 hrs on 11 March. As just stated, the period of the voyage to Abidjan was treated as if under cl 24. Finally the vessel was treated as on demurrage at Abidjan from her arrival at 0400 hrs on 13 February to her departure at 2300 hrs on 11 March. The total figure of $US 426,257·54 thus comprised just under two-and-a-half days at Rabigh, just over eight-and-a-half days at Lagos and just over 27¾ days at Abidjan. That invoice, which was sent under cover of a fax headed 'TRAFIGURA CP 16.12.99', was paid on 24 March.

[11] In the meantime it appears that the vessel was proceeding towards Gibraltar, although the documents show that there was a short period in which the vessel drifted waiting for precise orders. In a fax of 18 March, headed 'C/P 16.12.99 TRAFIGURA', the owners told the charterers that the vessel was proceeding towards Gibraltar for orders 'for the final port of discharge' and that any sampling of the cargo done at Gibraltar would be at the charterers' expense. They added that 'as already stated, the cargo remains always Charterers' property and vessel is at their disposal and expenses until the time the cargo is discharged'. On 22 March in a similarly headed telex the charterers asked the owners to instruct the vessel to proceed to Agioi Theodori ready to discharge and deliver to Motor Oil (Hellas) SA, although again subject to specific instructions because of a 'financial hold' on the cargo.

[12] Also on 22 March, the owners faxed the charterers with a further invoice in respect of freight from Abidjan to the new discharge port of Agioi Theodori in Greece in the sum of $US316,000, which was the agreed freight of $US320,000 less address commission. That fax was headed 'TRAFIGURA CP 9.3.00'. The invoice was paid on 3 April.

[13] On 24 March the charterers sent the owners a further telex, again headed 'CP DD 16.12.99', which included the following, having referred to the cargo and the bill of lading:

> 'The above cargo was shipped on the above vessel ... at Rabigh ... for delivery at the port of Mombasa but we, Trafigura Beheer BV, hereby request you to order the vessel to proceed to Agioi Theodori and give delivery of the said cargo at the port of Agioi Theodori and give delivery to Motor Oil (Hellas) SA without production of the original bill(s) of lading.'

The telex continued that in consideration of the owner's complying with that request the charterers would indemnify them against the consequences of delivering the cargo without production of the original bill of lading. The document was in almost identical form to that previously provided when it was proposed to deliver the cargo in Lagos. The owners agreed on the same day in a telex headed 'CP DD 16/12/99', saying

> 'Chrts latest LOI, for the delivery of the goods at Ag Theodori, rcvd and found in order.
>
> The master instructed accordingly.'

**[14]** Later on 24 March there was an exchange of telexes regarding a possible addendum to the charterparty to reflect the agreement reached. There is in the bundle a document entitled 'Addendum Nr 2' which states that 'it has been mutually agreed and understood between' the owners and the charterers that:

> 'Owners grant the option to charterers to discharge in the Med Area as follows:
>
> Rate: Lumpsum 320,000 USD basis 1/1
>
> Max D/A for owners account USD 30,000
>
> All other terms, conditions, details remain unaltered.'

The document was sent to the owners by the charterers attached to a fax sent on 24 March which simply stated 'kindly find attached herewith charter party + addendum nr 1 – nr 2'.

**[15]** The judge said in para 4 of his judgment that in formal terms the parties agreed an addendum no 2 to the original charterparty. He must have had the above 'Addendum Nr 2' in mind. However, the owners say in their respondent's notice that the judge was wrong to hold that the parties agreed addendum no 2. They say that they rejected the proposed addendum and that, following that rejection, no further addendum was drawn up. They rely upon the reply which they sent to the charterers' fax, also on 24 March, which includes the following:

> '... many tks indeed for yr addendum no 2 which its content dly ntd and pls note that the same is referred to the new voyage which vsl is performing right now and therefore as per our freight invoice dtd 9.3.00 has to have a complete different cp date ie 9.3.00.
>
> Not only but on top of it you should specify that the l.sum of usd 320,000 has been agreed to perform a voyage ex novo ie from Abidjan to eastmed and all other terms and conditions remain unchanged as per cp dtd 16.12.99 hope above clear enough to enable you to draw the addendum accordingly ...'

It is not, I think, suggested that the charterers replied to that fax.

**[16]** In compliance with the charterers' requests the vessel in fact proceeded to Agioi Theodori. She tendered notice of readiness at about 0700 on 27 March and made fast at noon. In a document said to have been attached to an invoice dated 31 March it was estimated that discharge would be complete and her hoses

disconnected at about 2400 hrs on 31 March. In the event discharge of the cargo at Agioi Theodori by delivery to Motor Oil (Hellas) SA was completed on 1 April.

[17] On 31 March the owners sent the charterers a fax under the heading 'CP 09.03.00' attaching an invoice for $US28,410·30 in respect of drifting expenses off West Africa, sampling at Gibraltar Roads and 12 hours' estimated demurrage at Agioi Theodori. The first two items were presumably simply costs said to have been incurred. The third was calculated on the basis that laytime would began to run at 1200 hrs on 27 March, that the laytime allowed was four days and that it followed that, if the hoses were disconnected at 2400 on 31 March, the owners would be entitled to 12 hours' demurrage at $US11,000 per day or pro rata for part of a day. There is no other evidence of an agreement relating to laytime at the discharge port of Agioi Theodori. The charterers paid the invoice on 3 April.

[18] The contractual position seems to me to have been as follows. I would accept the submission that the owners did not agree addendum no 2 as proposed by the charterers on 24 March. Nor, as I see it, did the charterers accept the proposal in the owners' reply fax. The position is that no further written agreement was drawn up, either by way of fresh charterparty or by way of addendum to the existing charterparty. There is, however, no doubt that the parties reached an agreement with regard to the voyage to and delivery of the cargo at Agioi Theodori. The question is what the agreement was.

[19] As already stated, it was an oral agreement reached on 11 March. The freight was agreed as $US 320,000. It was also agreed that the charterers would pay storage charges at the demurrage rate plus the costs of the deviation to Abidjan. As indicated above, the charterers paid the invoices which the owners sent them. There was thus no issue in respect of the voyage to Abidjan. The owners were paid their expenses together with demurrage at the charterparty rate. Nor was there any issue as to the freight for the voyage to the Eastern Mediterranean or as to the charterers' liability to pay the expenses connected with sampling off Gibraltar.

[20] The exchange of telexes on 24 March suggests that both parties were content that an addendum to the charterparty should be drawn up. It appears that the owners' objection to the proposed addendum no 2 was that it referred to an option being granted by owners, whereas since the vessel was performing a new voyage, the addendum should be given a 'completely different cp date'. For some reason the owners referred to a charterparty of 9 March, although it is correctly accepted by Mr Boyd that no agreement was made on 9 March which was capable of being drawn up either by way of separate charterparty or by way of addendum to the existing charterparty.

[21] Subject to the question whether the agreement made on 11 March should be described as a new charterparty or not, there seems to me to have been little, if anything, between the parties. Indeed, in the exchanges of 24 March both parties expressly contemplated that there should be an addendum to the charterparty. The charterers suggested 'all other terms, conditions, details remain unaltered', whereas the owners suggested 'all other terms and conditions remain unaltered as per cp dtd 16.12.99 hope above clear enough to enable you to draw the addendum accordingly'.

[22] To my mind the difference between the parties is not of any real importance for present purposes. I agree with the judge that whether the new arrangements amounted to a variation of the original charterparty or to a new charterparty is not decisive of the real issue between the parties. If necessary, I

would hold that they amounted to a variation of the charterparty, if only because the parties cannot have contemplated that there should be new obligations, for example, of seaworthiness. The purpose of the agreement of 11 March was that the cargo already on board the vessel should be taken to a discharge port and delivered in accordance with the charterers' instructions on terms that the owners would be paid freight for the new voyage, any extra expenses incurred and demurrage at the discharge port. It was also important to the parties, especially the owners, that any possible dispute as to the basis upon which they had carried the cargo to Abidjan and (as it were) stored it off Abidjan should be resolved at the outset. I agree with the judge that the issues should be decided on the basis of the substance of the matter.

[23] As the judge put it, on any view there was an agreement for a new voyage at a new freight rate. I am more doubtful whether it was agreed that there was a new period of laytime. There is no evidence that a new period of laytime was agreed on or before 11 March. Thus it does not appear that the parties applied their minds to that question when the oral agreement was made, although it seems likely that they contemplated that the demurrage rate would be the same as in the charterparty. What seems to have happened with regard to laytime is that for some reason, when the owners sent the invoice of 31 March, they included an estimate for demurrage based on 96 hours' laytime at Agioi Theodori. That compares with the total laytime of 96 hours for both loading and discharging in the charterparty. Why they should have given charterers a further period of laytime at the new discharge port is something of a mystery. One might have thought that they would have asserted either that since the vessel was already on demurrage, it was not appropriate to allow any laytime, or that, since 96 hours was originally allowed for both loading and discharging, the appropriate rate for discharging was, say, no more than 48 hours.

[24] If it were important to ascertain what, if any, agreement was made as to laytime on 11 March, it would in my view be necessary for the evidence to address this point more precisely. However, I do not think that it is. The facts set out above seem to me to be sufficient to resolve the art III, r 6 point.

[25] It is common ground that 'suit was brought' within the meaning of art III, r 6 of the Hague-Visby Rules when the claim form was issued on 27 March 2001. The question is whether the owners had by then been discharged from liability in respect of the goods because suit had not been brought 'within one year of their delivery or of the date when they should have been delivered' within the meaning of art III, r 6 as applied to the facts of this case.

THE CLAIM

[26] The charterers' claim may be summarised shortly as follows. They were the owners of the cargo and the holders of the bill of lading. Clause 2 of the charterparty provided, so far as relevant:

> 'Owners shall before, at the commencement of, and throughout the voyage exercise due diligence to make and maintain the Vessel, her tanks, pumps, valves and pipelines, tight, staunch, strong, in good order and condition, in every way fit for the voyage and fit to carry the cargo provided for in Clause 3, with the Vessel's machinery, boilers and hull in a fully efficient state ...'

The charterers say that the owners were under a duty as carriers and/or bailees for reward to carry the cargo to Lagos and there deliver it in the same good order

and condition as when shipped and to take reasonable care not to lose or damage the cargo. The owners also owed similar duties under art III, rr 1 and 2 of the Hague-Visby Rules, which were incorporated into the charterparty by cl 46.

[27] The charterers say that the owners were in breach of each of the above duties in that they tendered delivery of the cargo in a condition in which it was 'severely damaged and/or off specification' due to contamination by residues of soya bean oil. The particulars of claim include an allegation that the owners failed to take reasonable care of the cargo in that they failed to clean the tanks properly before loading. On arrival at Lagos the cargo was rejected by the original receivers because of alleged contamination. In reasonable mitigation of their loss the charterers arranged for the vessel to proceed to Abidjan thence to Gibraltar and Agioi Theodori where the cargo was discharged pursuant to a contract of sale between the charterers and Motor Oil (Hellas) Corinth Refineries SA.

[28] The quantum of the alleged loss is $US2,980,811·92 which is (or is said to be) made up of four items. The first is the difference in the value of the cargo under the original sale to receivers in Lagos and under the sale to Motor Oil. The second is comprised of the additional costs referred to above which were paid to the owners in respect of the deviation from Lagos to Abidjan, the 'demurrage/storage costs Lagos/Abidjan', the freight from Abidjan to Agioi Theodori and the 'demurrage Gibraltar Roads and drifting expenses in West Africa'. The third is the time value of money and the fourth is what is said to be 'cargo hedging and SWAPS loss'. We are not of course concerned with the validity of any of those claims.

[29] There has been some debate between the parties as to how the charterers' claim should properly be described. The charterers say that the owners classified it as a claim for misdelivery, whereas the owners say that they did not. However, whether they did or not, it seems to me that this is a standard cargo claim in which the charterers' principal claim is a claim for damages in respect of damage to cargo which is said to have been caused by contamination which is in turn said to have been caused by the owners' failure properly to prepare the tanks and to look after the cargo. The principal head of claim is loss of value of the cargo which is said to have been so caused, namely the difference between the value of uncontaminated cargo in Lagos and its value where they could reasonably realise it, namely in Greece. In addition they claim what they say are the reasonable costs of mitigating their loss.

[30] In short, this is a standard cargo claim. It is important to note that it is not a claim in respect of misdelivery of the cargo in the sense of delivery to the wrong receiver. It was delivered to the charterers by being delivered to Motor Oil (Hellas) SA in accordance with the charterers' request.

DISCUSSION

[31] The judge held that the court must adopt a process of construction of art III, r 6 which is appropriate to the interpretation of a set of rules agreed internationally and enacted into United Kingdom law. He added that such a process is both purposive and practical. I entirely agree. It seems to me to be appropriate, however, to consider first the wording of the rule. By art III, r 6 a carrier is discharged from liability in respect of the goods 'unless suit is brought within one year of their delivery or of the date when they should have been delivered'. It is to my mind important to note that the rule does not expressly provide 'unless suit is brought within one year of delivery or of the date when the

goods should have been delivered, *whichever is the earlier*' or indeed '*whichever is the later*' (my emphasis). The rule naturally means, and I think can only mean, that the carrier's liability is only to be discharged if suit is not brought either within a year of delivery or within a year of the date when the goods should have been delivered. Thus, if suit is brought within a year of delivery, the carrier is not discharged from liability even if suit is not brought within a year of the date when the goods should have been delivered.

[32] It seems to me that in every case the first question is whether there was 'delivery' of the goods within the meaning of art III, r 6. If there was, there remains a second question, namely whether suit was brought within a year of that delivery. If there was not, two further questions arise. The first is on what date the goods 'should have been delivered' and the second is whether suit was brought within a year of that date. I do not understand Mr Boyd to submit the contrary.

[33] It follows that, in my opinion, the essential question here is whether there was delivery of the cargo within the meaning of art III, r 6. Mr Lord submits that there was. He submits that there was delivery to the charterers at Agioi Theodori, delivery being of the same cargo on board the same vessel under the same bill of lading and being completed on 1 April 2000. Mr Boyd submits, on the other hand, that there was no delivery of the cargo within art III, r 6 at all. The judge preferred the submissions of Mr Boyd. The issue in this appeal is whether he was right to do so.

[34] There is no doubt that the cargo was in fact delivered by the owners to the charterers (by delivery to Motor Oil) in Greece. Indeed in para 12 of his judgment the judge posed the question as being whether time runs from the date when the goods should have been delivered in Lagos or when they were delivered in Greece. It is to my mind natural to describe the cargo as being delivered to the charterers in Greece. Mr Lord submits that in those circumstances it is also natural to hold there was 'delivery' of the cargo within art III, r 6.

[35] What then led the judge to reach a different conclusion? As I read his judgment, his conclusion depends upon an analysis of the nature of the charterers' claim. In para 12 he identified the complaint which led to the 'suit' as the non-delivery of the cargo at Lagos, due allegedly to its condition. He said that that was the substance of the claim and observed that no complaint was made about the voyage from Abidjan to Greece or delivery there. The voyage was an attempt by the charterers to mitigate their loss arising from 'the non-delivery of the cargo in Lagos'. He added ([2002] 2 All ER (Comm) 984 at [12]):

> 'Whether the voyage to Greece was a new venture or an amendment to the old one, the fact is that it did not impinge on the previous contractual obligations, otherwise there could have been no claim in relation to the events at Lagos and no claim for damages following on from the voyage to Abidjan and thence to Greece.'

[36] The considerations which persuaded the judge to hold that the relevant period of one year had expired are essentially contained at [13] and [14], which are in these terms:

> '[13] It seems to me, on the facts of this case, that the relevant suit (referred to in the rule) is a claim which is essentially for damaging the

cargo during the contractual voyage from the load port to Lagos. The commercial purpose and effect of the rule would be distorted if, as Mr Lord suggests, the second limb does not apply because the goods were eventually delivered in Greece. The delivery in Greece is not the subject of the suit and it would be contrary to the underlying need for certainty and clarity to suggest that time started on delivery in Greece. The cargo might never have been delivered or the vessel lost. In either event, there was a completed cause of action when the vessel was in Lagos and no good reason could be advanced for suggesting that time did not run from that moment; the fact that the cargo was either lost or subsequently delivered does not, I think, alter the position. Lagos was the only legitimate place of delivery in relation to the voyage about which complaint is made; and there was a wrongful refusal by the claimant at Lagos to take delivery there; the defendant had fulfilled the owners' obligations under the voyage charter, subject to any claims that might have been made in relation to the state of the cargo. It would be entirely artificial to extend the contractual time limit period as a result of the new arrangement for the voyage to Greece. Had there been a further problem during the second voyage then art III, r 6 would operate and time would start running from the date of delivery in Greece.

[14] In short, I reject Mr Lord's submission that "[t]here is no basis for saying that 'delivery' during the currency of the contract of carriage pursuant to which the cargo was loaded". What must be identified is the relevant suit; that is, what the claimant is alleging. If the cause of action was complete then it makes good commercial sense in a case such as the present to hold that time starts to run from that date. The owners say that the cargo should have been delivered at Lagos; the claimant complains that it was not. At that time the parties were aware of their rights and an action could have been started there and then. If the cargo was destroyed, stolen or sold on and subsequently delivered to a third party [as here] that would affect the amount of any recovery but not delay the running of time. Had the vessel sunk en route to Greece time would not start running from that time, but rather from the time when delivery should have occurred in Greece, assuming the fulfilment of all contractual obligations; but it could not cause time to start running from the events in Lagos. The delivery in Greece and the non-delivery in Lagos are two separate and distinct events.'

[37] In reaching those conclusions the judge essentially accepted the submissions which had been made to him by Mr Boyd, who submits that the judge was right for the reasons he gave. As I read those paragraphs of the judgment, the key reasons for the judge's conclusions were that the relevant suit was for damage to cargo during the voyage to Lagos and nothing that happened thereafter was relevant to the question he had to decide. In particular the delivery in Greece was not the subject of the suit and was not the relevant delivery because Lagos was the only legitimate place of delivery in relation to the voyage about which complaint is made. The judge also stressed that the charterers' cause of action was complete in Lagos and that it made good sense to hold that time starts to run 'from that date' although I am not quite sure what specific date the judge had in mind.

[38] I am not sure that the judge was asking himself the correct question, which to my mind is whether the delivery which undoubtedly took place in

Greece was 'delivery' within art III, r 6 on the facts here. However, if he was asking himself that question he answered it in the negative and, if he was not, it seems clear that he would have answered it in the negative. For my part, I have reached a different conclusion from the judge.

**[39]** The judge was of course right to say that the charterers' claim did not arise out of the voyage from Abidjan to Greece and that their cause of action had accrued before the vessel left Lagos. In fact, since the charterers assert a number of breaches of contract, they no doubt have a number of causes of action accruing on different dates. For my part, I do not think that those facts, while perhaps relevant, are of any real assistance in deciding whether the cargo was 'delivered' within the meaning of art III, r 6.

**[40]** The judge also said (at [13]) that the cargo might never have been delivered or the vessel lost, which is of course true. In that event there could have been no delivery and the relevant period of one year would expire one year after the date when the cargo should have been delivered. That consideration does not, however, seem to me to help to answer the question whether the goods were delivered. Nor, to my mind, does an analysis of the nature of the suit. The judge was correct to hold (as in my opinion he did) that the nature of the suit was a claim for damages in respect of cargo damage which had occurred before arrival in Lagos. However, for my part, I do not see that either the nature of the suit or the accrual of the cause of action is central to the question for decision, which is whether there was delivery of the goods. Thus I do not see that the conclusion that delivery in Greece and the non-delivery in Lagos were, as the judge put it, two separate and distinct events helps to determine whether delivery in Greece was relevant 'delivery' within art III, r 6.

**[41]** Was there delivery of the goods within the meaning of art III, r 6? It is common ground that there is no English authority which assists in identifying the correct approach to this question. We have, however, been referred to a number of American cases which were unfortunately not cited to the judge but which seem to me to be of some assistance. It is perhaps appropriate to refer briefly first to such English materials as are available, which were referred to by the judge.

**[42]** In *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398 at 402, [1977] 1 WLR 185 at 188 Lord Wilberforce said, obiter, that the purpose of providing for discharge of claims of this kind after 12 months meets an obvious commercial need, namely to allow shipowners after that period to clear their books. In *Cargill International SA v CPN Tankers (Bermuda) Ltd, The Ot Sonja* [1993] 2 Lloyd's Rep 435 this court held that the limit applied where goods had not been loaded and that time would start to run from the date when the goods ought to have been delivered. Unfortunately neither of those cases helps to identify what is meant by 'delivery'.

**[43]** In *Carver on Bills of Lading* (1st edn, 2001), edited by two distinguished former professors, namely Sir Guenter Treitel QC and Francis Reynolds QC, para 9-165 is in these terms:

> '"The term 'delivery' in a bill of lading is ordinarily taken to refer to transfer of possession to a consignee ... or to the consignee's agent ... It certainly does not mean the same thing as 'discharge'". [See *Cooke on Voyage Charters* (1993) p 738.] It seems that the first date provides the rule, with the second providing a variant, principally for the case where the goods are lost or in some other way not delivered (eg because they are so

damaged as to have lost their commercial character as goods of the type shipped) or because they are delivered wrongfully, for example not against a bill of lading. The choice, where there is one, must however be that of the claimant. Thus if the goods are delivered late, even though there may be a date at which they should have been delivered, it will be to the claimant's advantage to take the date of actual delivery for the purposes of the time bar.'

[44] For my part, subject to one point of difference between those views and the views of the editors of *Cooke on Voyage Charters* and subject to one small point, I respectfully agree with that passage, although unfortunately it does not help on what amounts to delivery. The small point is that I am not sure that it is entirely apt to describe the claimant as having a choice. It is simply that if suit is brought within a year of their delivery, the effect of art III, r 6 is that the shipowner is not discharged from liability even though suit was not brought within a year of the date when they should have been delivered.

[45] In *Cooke on Voyage Charters* (2nd edn, 2001) paras 85.189 and 85.190 include the following:

'85.189 The Hague Rules distinguish discharge (eg Article I(e)) and delivery (Article III, rule 6). Discharge is a purely physical act, whether performed by carrier, charterer or receiver, whereas delivery is a legal concept concerned with the passing of actual or constructive possession. The two are not coextensive. The latter is the concept by reference to which time starts to run under the Hague Rules. However the Rules offer no definition of "delivery" and various different situations may arise.

(i) Delivery of the proper quantity of goods, even in a damaged condition, is clearly delivery for this purpose. There is no reason to produce a different result when the damage is such that the goods are no longer *in specie* and no longer "the goods" as shipped.

(ii) Where there is no delivery of any goods at all, the rule adopts the starting point "or of the date when they should have been delivered" and for those purposes one must assume that all parties had performed their obligations and then find when the goods ought to have been delivered.

(iii) There are hybrid situations where, by an over-carriage, goods are not delivered when they ought to be but are delivered subsequently or where part of the shipped goods are actually delivered (albeit late) but the rest have been lost, but ought to have been delivered earlier or where the vessel lawfully discharges at a place short of the intended one, or where delivery is tendered but not taken.

(iv) Delivery of goods may be spread over a period of time and receivers can take the different deliveries from the same consignment separately. Does one start time counting from the moment of the first such delivery, on the basis that that is when the undelivered balance "should have been delivered", or is constructively delivered? or does one treat the last such delivery as starting time running, on the basis that it is only then that delivery is complete? or does one count a time period in respect of each instalment of delivery?

85.190 It is thus necessary to impose a gloss as a matter of construction of the rule to give effect to its business purpose and it is important that there should be a practical and easily identifiable starting time. It is

therefore submitted that the purposive or pragmatic construction of the Rules, consistent with the reasoning of the Court of Appeal in *The Ot Sonja*, should be that, where the goods in respect of which the claim is made (or what is left of the goods shipped) actually arrive at a legitimate place of delivery and absent any wrongful refusal by the receiver, time starts when that delivery (or the material part) is completed, and, in all other cases, time starts from the time when delivery of the relevant goods ought to have been completed assuming due performance of all contractual obligations.'

[46] It can be seen that there is a difference between the views expressed in that passage and the views expressed in *Carver* so far as goods no longer in specie are concerned. However, it is not necessary to express a view on that question here and I do not do so. Indeed, the passage raises a number of questions which might arise in future cases. The editors do not address the precise question which arises here. Nevertheless the passage, in my opinion correctly, stresses the importance of there being a practicable and easily identifiable starting time.

[47] Thus the editors, again in my view correctly, say that where the goods in respect of which the claim is made actually arrive at a legitimate place of delivery time starts when delivery is completed and, in all other cases, time starts when delivery of the relevant goods ought to have been delivered assuming the due performance of all contractual obligations. For my part I agree with that approach, subject to what is meant by a legitimate place of delivery. Was Agioi Theodori a legitimate place of delivery in the sense in which the phrase is used in *Cooke*? In my view it was. It is I think in connection with questions of this kind that the American cases are of some assistance.

[48] Before turning to the American cases, I should note a reservation which I have as to the qualification in para 85.190 'absent any wrongful refusal by the receiver'. If the goods are delivered to the charterer or contractual receiver I do not think that the qualification can have any effect. It seems to me that there is no reason why there should not be 'delivery' of the goods even if, for example, the charterer or receiver initially wrongfully refuses to accept delivery. It may be that the qualification is simply included to make the point that there will be no 'delivery' if there is misdelivery in the sense that the goods are misdelivered to the wrong receiver.

[49] In my opinion it is a question of fact to be determined in all the circumstances of the case whether there has been 'delivery' of the goods or not. The American cases have considered the problems which can arise where goods have been delivered under what some of them have called an entirely separate and distinct transaction. We were referred to five cases. In all of them the contract of carriage was subject to the Hague or the Hague-Visby Rules so that art III, r 6 (or its equivalent) fell to be considered.

[50] The first in time was *Leo Hess International Corp v Isthmian Steamship Co* 1958 AMC 1380, which was a decision of the Appellate Division of the Supreme Court of the State of New York. The facts were very unusual and I do not think that it is necessary to set them out. The court observed that art III, r 6 is a disjunctive limitation provision and held (consistently with the view I expressed earlier) that, where delivery occurs after the goods should have been delivered, time runs from the date of delivery. It then considered whether 'delivery really was made in discharge of the bill of lading' on the facts and held

that that question could not be decided on an application for summary judgment.

**[51]** The second case was *Western Gear Corp v States Marine Lines Inc* (1966) F 2d 328, a decision of the Ninth Circuit of the United States Court of Appeals. The facts were these. A Barc (a Barge, Amphibious Re-Supply Craft) was shipped on a ship called P&T NAVIGATOR for carriage from Seattle to New Orleans. On 11 March 1963 it was swept overboard. It was recovered by the US Coast Guard and returned to the shipper. The extensive damage to it was repaired and it was shipped on another of the original carrier's ships under a new bill of lading, again for carriage from Seattle to New Orleans. This time it arrived safely and was delivered on 23 August 1963. Suit was brought on 13 August 1964, which was less than a year after delivery on 23 August 1963 but more than a year after it would and should have been delivered from the P&T NAVIGATOR.

**[52]** The court held that there had not been 'delivery' within art III, r 6. Its reasoning can be seen from the following passage (at 331):

> 'The Court [ie in *Leo Hess*] concluded that the issue of fact which precluded summary judgment was whether or not the June 1952 delivery and acceptance of the goods was made in discharge of the bill of lading.
>
> This rationale seems to us to be entirely correct. Whenever there is an actual delivery of the goods in performance by the carrier of its obligations under the contract of carriage, the time to sue runs from the date of delivery rather than from the date when the goods should have been delivered. The difficulty with the instant case is that the undisputed evidence shows that the delivery of Barc No 26 on August 23 1963 was not in the performance of the obligations of the contract of carriage (Bill of Lading 106-1395) upon which suit was brought. On the contrary, it was finally delivered under an entirely separate contract of carriage, to wit, Bill of Lading 206-2943. This is not to imply that the presence of two bills of lading would necessarily be conclusive in every case, but here Marine Lines [the carrier] has confirmed, without dispute, that the two shipments, first on the SS P&T Navigator and next on the SS Copper State, were entirely separate and distinct transactions.'

**[53]** That case seems to me to be of considerable assistance because it stresses that delivery under an entirely separate and distinct transaction will not be 'delivery' of the goods for the purposes of art III, r 6. On the other hand the court made it clear that the fact that there were two bills of lading would not necessarily be decisive. I respectfully agree. All will depend upon the circumstances of the particular case. However, it does seem to me that it is helpful to ask whether the delivery can properly be regarded as delivery under the relevant contract of carriage or under an entirely separate and distinct transaction.

**[54]** The third case was *New Hampshire Insurance Co v Saipan Shipping Co Inc* 1973 AMC 792 but it does not seem to me to be of any real assistance here; so I say no more about it.

**[55]** The fourth case was *Cerro Sales Corp v Atlantic Marine Enterprises Inc* 1976 AMC 376, which was a decision of the United States District Court for the Southern District of New York. The relevant voyage was from San Fernando to Callao, Peru. During the voyage a fire broke out on board and the vessel was

abandoned. The vessel was subsequently salved and taken to Honolulu under tow. At Honolulu the cargo was transhipped into another vessel, largely at the plaintiffs' expense and carried to Callao. It was delivered on 31 October 1968. Suit was brought on 23 July 1969, which was less than a year after that delivery but more than a year after the goods should have been delivered.

**[56]** The plaintiffs said that delivery took place in Callao. The court rejected that argument in this way (at 377–378):

> 'The delivery eventually made at Callao was made under a separate and distinct bill of lading separate and distinct from the contract of carriage sued upon here. In such cases the delivery date is of no importance and the limitations period runs from the date the goods should have been delivered. *Western Gear Corporation v States Marine Lines Inc* ...'

There was a second point which does not seem to me to be directly relevant. However, as can be seen, the court followed the approach in the *Western Gear* case.

**[57]** The fifth and most recent case was the decision of the United States District Court for the Southern District of New York in *Universal Ruma Co v Mediterranean Shipping Co* 2001 AMC 110. The facts were that palm oil was shipped in a single container for carriage from Dar es Salaam to Baltimore under a single bill of lading which was subject to the Hague or the Hague-Visby Rules, including art III, r 6. During the voyage, which was initially on a ship called the MSC FLORIANO, the palm oil was found to be leaking and about half of it was transferred to another container so that the consignment was now in two containers. Both containers seem to have been transhipped in Felixstowe. The original container was shipped to Baltimore on board the MSC LEVINA and arrived on 8 June 1988, whereas the second container, which (as the report puts it) was misplaced, was shipped to Baltimore on board the MSC BOSTON and arrived on 3 October 1998. The claimant said that it was not aware of the arrival of the second container until 5 November 1998. Suit was brought on 28 October 1999.

**[58]** The claimant said that the relevant 'delivery' was delivery of the second container and that delivery was not complete until it was aware of the arrival of the container. On the first question the court held that the relevant 'delivery' was indeed delivery of the second container. In doing so it applied the principles in the *Western Gear* case. Its approach can be seen from the following extracts from the judgment of District Judge Denise Cote:

> 'In *Western Gear Corporation v States Marine Lines Inc* ... [t]he Ninth Circuit reasoned that a COGSA claim is in essence a breach of contract claim arising from the contract of carriage or bill of lading. Consequently, "only a delivery in performance of that contract ... fixes the date from which time runs" ... Because the delivery in *Western Gear* was made under a second bill of lading the court concluded that there were "two entirely separate and distinct transactions", the first of which gave rise to the cause of action and therefore provided the date of reference for the statute of limitations, that is the date delivery should have been made under the original bill of lading ... where a delayed shipment is made pursuant to the original bill of lading. In that situation [art III, r 6] is best understood to mean that the statute runs from actual delivery; the statute runs from the time delivery should have been made only where there is no delivery at all

> ... Here, where there was a single bill of lading I hold that the statute ran against Universal Ruma from the date of the delivery of the second bill of lading.'

There was again a second point which is not relevant for present purposes.

**[59]** As already indicated, those cases do seem to me to be of some assistance. They say that the question is whether the delivery is delivery in performance of the contract but they also seem to me to make it clear an important question in deciding that question is whether the delivery was made under an entirely separate and distinct transaction. In my opinion if, looking at all the circumstances of the case, it can fairly be said that there was delivery under the contract of carriage, even if that contract has been varied in some respects in the light of problems that have arisen during the voyage, it will in general be appropriate to hold (subject perhaps to the circumstances of a particular case) that there has been 'delivery' within the meaning of art III, r 6. If, on the other hand, the delivery is under an entirely separate and distinct transaction it will in general be appropriate to hold that there has been no such 'delivery.'

**[60]** It might be said that there cannot be delivery under the contract of carriage unless delivery takes place at the original contractual place of delivery or at a place of delivery in accordance with an amended contract of carriage where the amendment is made without reference to the breach of contract of either party. However, for my part, I would not so hold. There is nothing in art III, r 6 to restrict the meaning of 'delivery' in that way. In my opinion, so to restrict it would be to give art III, r 6 too narrow a meaning. The question should be the broad one, whether in all the circumstances of the case the delivery was 'delivery' within the rule.

**[61]** As appears from the extracts from his judgment set out above, the judge did not approach the problem in quite the way suggested above. He would I think have been more likely to do so if he had had the assistance of the American cases. Mr Lord submits that there was here delivery under the contract of carriage, albeit as varied, and that the delivery was not made under an entirely separate and distinct transaction, whereas Mr Boyd submits, on the other hand, that the voyage from Abidjan in West Africa to Agioi Theodori in the Eastern Mediterranean was an entirely new voyage to a different discharge port and that delivery cannot fairly be held to have been under the contract of carriage.

**[62]** I prefer the submissions of Mr Lord. For my part, I would hold that there was delivery of the goods within the meaning of art III, r 6. The principal considerations which have led me to that conclusion are the following. (i) The cargo delivered was the same jetoil as was shipped in Rabigh. It remained on the same ship and was delivered by the same shipowners at the same charterers' request to receivers nominated by the charterers, albeit at a different destination. (ii) Although the voyage to Agioi Theodori was a new voyage it was made necessary because of problems at Lagos, whatever the causes of those problems were. Both parties were faced with the problem of what should be done with the cargo on board after it had been rejected by the proposed receivers in Lagos. (iii) In these circumstances both the voyage to Abidjan and the subsequent voyage to the Eastern Mediterranean arose out of the original charterparty and the fact that the cargo remained on board the vessel. Whether the oral agreement was a variation of the charterparty or a new charterparty, it

was not to my mind an entirely separate and distinct transaction. Both parties contemplated that an addendum to the charterparty would be drawn up and that many of the terms of the charterparty would continue to apply. (iv) There was no transhipment of the cargo and no new bill of lading was issued in respect of it. The exchange of telexes on 24 March in which the charterers requested the owners to deliver the cargo at Agioi Theodori was a request that delivery be made without production of the original bill of lading, it no doubt being appreciated on both sides that there were potential problems for the owners if they delivered the cargo without either production of the original bill of lading or an indemnity. The owners reply was that the 'latest LOI, for the delivery of the goods at Ag Theodori, recd and found in order'. That exchange suggests to me that both parties regarded the delivery at Agioi Theodori, in one sense at least, as delivery under the bill of lading, even though the bill of lading was not of course the contract of carriage as between the owners and the charterers. (v) The contractual bailment, which began at Rabigh, only came to end when the cargo was delivered to Motor Oil (Hellas) SA at Agioi Theodori.

**[63]** In short, I have reached the clear conclusion that if all the circumstances of the case are taken into account, there was here 'delivery' of the goods within the meaning of art III, r 6 at Agioi Theodori and that suit was therefore brought within a year of the delivery. In these circumstances I would allow the appeal.

**[64]** Although the judge was considering the question of delivery in the context of the owners' application for summary judgment and not at a trial, I did not understand Mr Boyd to be saying that if we allowed the appeal on this basis, there would be any purpose in a trial of the question whether there was relevant delivery. Subject to hearing submissions on the question of appropriate relief, I would allow the appeal and make a declaration that the suit was brought within a year of delivery of the goods and that the owners are not discharged from liability by reason of art III, r 6 of the Hague-Visby Rules.

**[65]** I note by way of postscript that the conclusion which I have reached seems to be consistent with the views at first formed by those advising the parties. For example, the extension of time point arises out of correspondence between the parties in March 2001 because, as Clyde & Co put it in a fax to the owners' club dated 22 March 2001 'it appears that the anniversary of the discharge of the cargo will shortly be upon us' and asked for an extension of time. There followed exchanges between the parties in which the owners' club indicated that it had been verbally advised that owners would give a extension. Clyde & Co issued proceedings because they were not quite sure whether an extension had in fact been granted and the club subsequently expressed disappointment on the basis of the indication that an extension would be granted. No one seems to have contemplated the possibility that time had already expired. Also, in a skeleton argument drafted by leading counsel then representing the owners (not Mr Boyd), it was stated that the charterers issued proceedings on 27 March 2001 'just 3–4 days before the expiry of the contractual time limitation for such a claim'. The point now taken was not taken until the defence served on 2 November 2001.

**[66]** Finally, difficult questions can sometimes arise as to when cargo should have been delivered for the purposes of art III, r 6 but, at any rate in the light of the conclusion reached above, they do not arise here.

EXTENSION OF TIME

**[67]** The conclusion on the art III, r 6 point makes it unnecessary to consider the charterers' application for permission to appeal on the extension of time point. I will not therefore further lengthen this judgment by doing so.

CONCLUSION

**[68]** For the reasons I have given, I would allow the appeal on the ground that the cargo was delivered at Agioi Theodori and that suit was brought within a year of that delivery.

**KAY LJ.**

**[69]** I agree.

**SIR ANDREW MORRITT V-C.**

**[70]** I also agree.

*Appeal allowed.*

James Brooks Barrister.

# R v G and another

[2003] UKHL 50

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD BROWNE-WILKINSON, LORD STEYN, LORD HUTTON AND LORD RODGER OF EARLSFERRY

21, 22 JULY, 16 OCTOBER 2003

*Criminal law – Damage to property – Arson – Recklessness whether property would be destroyed or damaged – Test for determining recklessness – Criminal Damage Act 1971, s 1.*

The defendants, two boys aged 11 and 12, went camping without their parents' permission. They entered the back yard of a shop in the early hours of the morning, lit some newspapers which they had found in the yard and threw some lit newspaper under a large plastic wheelie-bin. They left the yard without putting out the fire. The newspapers set fire to the wheelie-bin, and the fire spread to a second wheelie-bin next to the shop wall. From the second wheelie-bin, the fire spread up under the overhanging eave, to the guttering and the fascia and then up into the roof space of the shop. Eventually the roof of the shop and the adjoining buildings caught fire. The roof collapsed. Approximately £1m worth of damage was caused. The defendants were charged with 'reckless' arson contrary to s 1[a] of the Criminal Damage Act 1971. Their case at trial was that they had expected the newspapers to extinguish themselves on the concrete floor of the yard. It was accepted that neither of them had appreciated that there was any risk whatsoever of the fire spreading in the way that it eventually did. The judge, holding himself to be bound so to do by binding authority, directed the jury that the prosecution had to prove, inter alia, that the defendants had created a risk which would have been obvious to an ordinary, reasonable bystander that the building would be damaged by fire, either without giving any thought to the possibility of there being such a risk, or, having recognised that there was some risk involved, had none the less gone on and done the act. The defendants were convicted, and their convictions were upheld by the Court of Appeal. On the defendants' appeal to the House of Lords, their Lordships considered the correct test to be applied in determining whether a defendant had acted recklessly within the meaning of s 1 of the 1971 Act, both in respect of a circumstance and a result. In particular, they considered whether a defendant had to be aware of the risk in question.

**Held** – A person acted recklessly within the meaning of s 1 of the 1971 Act with respect to (i) a circumstance when he was aware of a risk that it existed or would exist; (ii) a result when he was aware of a risk that it would occur; and it was, in the circumstances known to him, unreasonable to take the risk. It was a salutary principle that conviction of serious crime should depend upon proof not simply that the defendant had caused (by act or omission) an injurious result to another, but that his state of mind when so acting was culpable. Although the most obviously culpable state of mind was an intention to cause the injurious result,

a Section 1, so far as material, is set out at [4], below

knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily acceptable as culpable also. It was clearly blameworthy to take an obvious and significant risk of causing injury to another. It was not, however, clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication) one genuinely did not perceive the risk. Such a person might fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment. Moreover, it was neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had had no such apprehension. Accordingly, the appeal would be allowed (see [32], [33], [41], [42], [60]–[62], [71], below).

*R v Caldwell* [1981] 1 All ER 961 disapproved.

Decision of the Court of Appeal [2003] 3 All ER 206 reversed.

**Notes**

For recklessness and foresight generally and for the offence of destroying or damaging property, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 14, 594.

For the Criminal Damage Act 1971, s 1, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 522.

**Cases referred to in opinions**

*B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428, [2000] 2 WLR 452, HL.
*Beckford v R* [1987] 3 All ER 425, [1988] AC 130, [1987] 3 WLR 611, PC.
*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.
*British Railways Board v Herrington* [1972] 1 All ER 749, [1972] AC 877, [1972] 2 WLR 537, HL.
*DPP v Majewski* [1976] 2 All ER 142, [1977] AC 443, [1976] 2 WLR 623, HL.
*DPP v Morgan* [1975] 2 All ER 347, [1976] AC 182, [1975] 2 WLR 913, HL.
*Elliott v C (a minor)* [1983] 2 All ER 1005, [1983] 1 WLR 939, DC.
*Lawrence v Texas* 123 S Ct 2472 (2003), US SC.
*R v Bowen* [1996] 4 All ER 837, [1997] 1 WLR 372, CA.
*R v Briggs* [1977] 1 All ER 475, [1977] 1 WLR 605, CA.
*R v Caldwell* [1981] 1 All ER 961, [1982] AC 341, [1981] 2 WLR 509, HL.
*R v Child* (1871) LR 1 CCR 307, CCR.
*R v Coles* [1995] 1 Cr App R 157, CA.
*R v Cunningham* [1957] 2 All ER 412, [1957] 2 QB 396, [1957] 3 WLR 76, CCA.
*R v Faulkner* (1877) 13 Cox CC 550, CCR.
*R v Graham* [1982] 1 All ER 801, [1982] 1 WLR 294, CA.
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*R v Miller* [1983] 1 All ER 978, [1983] 2 AC 161, [1983] 2 WLR 539, HL.
*R v Mowatt* [1967] 3 All ER 47, [1968] 1 QB 421, [1967] 3 WLR 1192, CA.
*R v Parker* [1977] 2 All ER 37, [1977] 1 WLR 600, CA.
*R v Pembliton* (1874) LR 2 CCR 119, [1874–80] All ER Rep 1163, CCR.
*R v Reid* [1992] 3 All ER 673, [1992] 1 WLR 793, HL.

*R v Smith* [2000] 4 All ER 289, [2001] 1 AC 146, [2000] 3 WLR 654, HL.
*R v Stephen Malcolm R* (1984) 79 Cr App R 334, CA.
*R v Stephenson* [1979] 2 All ER 1198, [1979] QB 695, [1979] 3 WLR 193, CA.
*R v Welch* (1875) 1 QBD 23, CCR.

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*Andrews v DPP* [1937] 2 All ER 552, [1937] AC 576, HL.
*Barbera v Spain* (1989) 11 EHRR 360, [1988] ECHR 10588/83, ECt HR.
*Fayed v UK* (1994) 18 EHRR 393, [1994] ECHR 17101/90, ECt HR.
*Kerry v Carter* [1969] 3 All ER 723, [1969] 1 WLR 1372, CA.
*Lederer v Hitchins* [1961] WAR 99, W Aust SC.
*Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435.
*McHale v Watson* (1966) 115 CLR 199, Aust HC.
*Mullin v Richards* [1998] 1 All ER 920, [1998] 1 WLR 1304, CA.
*Nortier v Netherlands* (1994) 17 EHRR 273, [1993] ECHR 13924/88, ECt HR.
*R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2002] 3 WLR 1800.
*R v Adomako* [1994] 3 All ER 79, [1995] 1 AC 171, [1994] 3 WLR 288, HL.
*R v Bateman* (1925) 19 Cr App R 8, CCA.
*R v Egan* (1985) 15 A Crim R 20.
*R v Latimer* (1886) 17 QBD 359, [1886–90] All ER Rep 386, CCR.
*R v Martin* (1881) 8 QBD 54, [1881–5] All ER Rep 699, CCR.
*R v Satnam, R v Kewal* (1983) 78 Cr App R 149, CA.
*R v Seymour* [1983] 2 All ER 1058, [1983] 2 AC 493, [1983] 3 WLR 349, HL.
*R v Sheppard* [1980] 3 All ER 899, [1981] AC 394, [1980] 3 WLR 960, HL.
*R v Stone, R v Dobinson* [1977] 2 All ER 341, [1977] QB 354, [1977] 2 WLR 169, CA.
*R v Tutton* (1989) 48 CCC (3d) 129, Can SC.
*R v Waite* (1986) 28 CCC (3d) 326, Ont CA.
*R v Wozniak* (1977) 16 SASR 67, Aust SC.
*Tziavrangos v Hayes* (1991) 55 SASR 416, Aust SC.
*V v UK* (2000) 30 EHRR 121, [1999] ECHR 24888/94, ECt HR.
*Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, [1982] ECHR 7906/77, ECt HR.

**Appeal**

The appellants, two boys known as G and R, appealed with leave of the Appeal Committee of the House of Lords given on 9 December 2002 from the decision of the Court of Appeal (Dyson LJ, Silber J and Judge Beaumont QC) on 17 July 2002 ([2002] EWCA Crim 1992, [2003] 3 All ER 206) dismissing their appeal against their convictions on 23 March 2001, following a trial before Judge Maher and a jury in the Crown Court at Aylesbury, of an offence of arson contrary to s 1(1) and (3) of the Criminal Damage Act 1971. The Court of Appeal certified that a point of law of general public importance, set out at [1], below, was involved in its decision. The facts are set out in the opinion of Lord Bingham of Cornhill.

*Alan Newman QC* and *Andrew Jefferies* (instructed by *Pictons*, Milton Keynes) for G.
*Alan Newman QC* and *Isobel Ascherson* (instructed by *Borneo Linnells*, Milton Keynes) for R.
*David Perry* and *Richard Whittam* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration.

16 October 2003. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

[1] My Lords, the point of law of general public importance certified by the Court of Appeal to be involved in its decision in the present case is expressed in this way:

> 'Can a defendant properly be convicted under s 1 of the Criminal Damage Act 1971 on the basis that he was reckless as to whether property was destroyed or damaged when he gave no thought to the risk but, by reason of his age and/or personal characteristics, the risk would not have been obvious to him, even if he had thought about it?'

The appeal turns on the meaning of 'reckless' in that section. This is a question on which the House ruled in *R v Caldwell* [1981] 1 All ER 961, [1982] AC 341, a ruling affirmed by the House in later decisions. The House is again asked to reconsider that ruling.

[2] The agreed facts of the case are very simple. On the night of 21–22 August 2000 the appellants, then aged 11 and 12 respectively, went camping without their parents' permission. In the early hours of 22 August they entered the back yard of the Co-op shop in Newport Pagnell. They found bundles of newspapers which they opened up to read. The boys then lit some of the newspapers with a lighter they had with them. Each of them threw some lit newspaper under a large plastic wheelie-bin, between which and the wall of the Co-op there was another similar wheelie-bin. The boys left the yard without putting out the burning papers. The newspapers set fire to the first wheelie-bin and the fire spread from it to the wheelie-bin next to the shop wall. From the second bin the fire spread up under the overhanging eave, to the guttering and the fascia and then up into the roof space of the shop until eventually the roof of the shop and the adjoining buildings caught fire. The roof collapsed. Approximately £1m worth of damage was caused. The appellants' case at trial was that they expected the newspaper fires to extinguish themselves on the concrete floor of the yard. It is accepted that neither of them appreciated that there was any risk whatsoever of the fire spreading in the way that it eventually did.

[3] An indictment was preferred against the appellants charging them with arson contrary to s 1(1) and (3) of the 1971 Act. The particulars of the offence charged were that they on 22 August 2000 'without lawful excuse damaged by fire commercial premises belonging to ... others being reckless as to whether such property would be damaged'.

[4] Section 1 of the 1971 Act provides:

> '(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.
>
> (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to

endanger the life of another or being reckless as to whether the life of another would be thereby endangered; shall be guilty of an offence.

(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.'

Section 4(1) of the Act provides that a person guilty of arson under s 1 shall on conviction on indictment be liable to imprisonment for life.

THE TRIAL

[5] The appellants stood trial before Judge Maher in March 2001. At the outset of the trial, submissions were made on the meaning of 'reckless' in s 1(1) of the 1971 Act since the appellants were charged with being reckless whether the premises would be destroyed or damaged and not with intending to destroy or damage them. The judge ruled (in effect) that he was bound to direct the jury in accordance with *R v Caldwell*.

[6] This is what the judge did. He helpfully provided the jury with a typed copy of this part of his direction and said:

'If we look at this together, what the prosecution have to prove is: (1) the defendant damaged by fire the building, the commercial premises, shown in the photographs; (2) that the defendant in doing what he did, created a risk which would have been obvious to an ordinary, reasonable bystander watching that the building, the commercial premises, would be damaged by fire; and (3) that when he, meaning a defendant, did what he did, either he had not given any thought to the possibility of there being such a risk, or having recognised that there was some risk involved in doing what he did, none the less went on and did the act. The word "risk" which appears in para 3 means, as will be apparent, I hope, from the wording of para 2, the risk that the building would be damaged by fire. So, those are the matters which the prosecution have to prove.'

The judge pointed out that proof of the first of these matters was not in dispute. The judge then addressed the second matter and continued:

'That does not mean the boys are guilty of this offence, because it is question nos 2 and 3 which are at the heart of this case. Question no 2: that the defendant, in doing what he did, created a risk which would have been obvious to an ordinary, reasonable bystander watching that the building, the commercial premises, would be damaged by fire. So, this requires you to find as a fact on the whole of the evidence in the case, what did they do? Having established that, this is the test that you will apply: first, focus upon the moment when the two boys left the compound. Then, find as a fact, upon the evidence, what it was that would have been visible to the reasonable bystander, the ordinary, reasonable bystander, looking on. Then, ask yourselves question no 2: at that moment, having determined that, would it have been obvious to that ordinary, reasonable bystander that there was a risk that the fire would spread from paper, or papers, to bin, or bins, up to the building? It is not necessary for the ordinary, reasonable bystander to have foreseen in his mind the full extent of the damage which in fact occurred because, as you will well know, once fire takes hold, it is probably anybody's guess where it is going to end up. The ordinary, reasonable bystander is an adult. He does not have expert knowledge. He has got in his mind that stock of everyday information which one acquires in the process

of growing up. This is why to leave this question to a jury of 12 is probably the best tribunal that one could have for answering this question. You will notice also that we are using the language, the vocabulary, of risk—not certainty. When you answer this question as to whether it would have been obvious to an ordinary, reasonable bystander watching that the fire, in effect, would spread as I have just explained it, the ages of these defendants are irrelevant. Their good characters are irrelevant. No allowance is made by the law for the youth of these boys or their lack of maturity or their own inability, if such you find it to be, to assess what was going on. So, if it would have been obvious to an ordinary, reasonable bystander that there was a risk of the fire spreading (as I have just described) to the building, it is irrelevant that you say, "Well, we think this is a bit harsh. We don't think it would have been apparent to these boys, even though it might have been apparent to an ordinary, reasonable bystander." It is too bad. So, in that sense, when you are answering this question, you leave wholly on one side everything you know about these two young boys here because—I repeat—it is what would have been perceived by the ordinary, reasonable bystander which is the test.'

The judge observed:

'Now, I say to you, quite frankly, that you may think this is a harsh test to apply to youngsters, because no allowance is made for age and immaturity. Many people would be sympathetic with you. But, it is my task to expound the law to you as it is, and it is your duty to apply the law as it is—not as you might like it to be—to the facts of the case. Sympathy can play no part in the answering of this question. Now, I cannot tell you—or even begin to help you—and it would be quite wrong for me to try and help you, with what the ordinary, reasonable bystander would not have perceived as a risk in terms of the fire spreading from paper, to bin, to building. You have heard the evidence and you will decide.'

The judge then directed the jury on the third of the matters he had listed:

'Let me assume the prosecution have jumped hurdle no 2. Hurdle no 3 must also be jumped, and here you see it is in two parts: that when he did what he did, either he had not given any thought to the possibility of there being such a risk, or having recognised that there was some risk involved in doing what he did, none the less he went on and did the act. Now, I begin with the second part of para 3 which is a question that does concern the state of mind of the two boys. If you were to say, "We are, all 12 of us, satisfied so that we are sure that these boys when they started the fire and left the compound, appreciated in their minds that there was some risk of the fire spreading from paper to bin, to soffit, to building, and none the less went on and did what they did", then it is difficult to see how they could be anything other than guilty of this offence. It is not primarily the way the prosecution put their case. As you know, to cut a long story short, the boys have said to you, each of them, as they said in their second interview to the police, that it never crossed their minds for a moment that there was this risk of the fire actually spreading to the building itself. Now, it is a matter for you whether you believe them, but I am going to proceed on the basis that you will say either that you are satisfied that they—that their minds did not perceive the risk of the fire spreading to the building, or you will say, "Well, we can't be sure that that serious finding can be made against them". If that is so, then

the first part of para 3 is satisfied—that they had not given any thought to the possibility of there being such a risk—that is, a risk of the fire spreading, as I have just described, to the building itself. You will see that if a defendant says, "I didn't give any thought whatsoever to the possibility of the fire spreading from what I had done to a building itself", that is no defence if question no 2 is answered by a jury against such a person. So, pulling it all together—and I suspect that your deliberations may centre around this—if you say, "Well, hurdle no 1 is jumped, and we don't think these young boys, in their minds, gave any thought to the possibility of the fire spreading from paper, to bin, to soffit, to building, but—but, it would have been obvious to an ordinary, reasonable bystander watching that the fire might spread to the building, and that the building might be damaged by the fire", then they are guilty of the offence.'

[7] After the jury had retired on the afternoon of 21 March 2001 the judge made clear, in the presence of the appellants, that 'nothing unpleasant' awaited them even if the jury convicted. But the jury had difficulty reaching a verdict. Later that afternoon they asked the judge why they should consider the risk as perceived by a reasonable person or layman. He replied:

'The answer to that lies in my task. My task is to give you directions on the law as it is, and it is your task to apply the directions on the law as I have expounded it to you to the facts as you find them. I am not free to give you a direction on the law which perhaps some of us might like it to be; nor are you free to substitute your own view of what the law is for the law as I have explained it to you. At the beginning of the trial you took an oath to try the case on the evidence presented to you, and part of that involves taking the law from me. That is my function. Just to explain a little more to you, the Criminal Damage Act 1971 creates the offence of criminal damage. It was not new; it has existed, as you know, for centuries. But, that is the up-to-date statute. The higher courts—the House of Lords, in particular—the Law Lords have given guidance to all courts as to how juries are to be directed as to the meaning of the word "reckless" in this context. That direction must be followed by trial judges because I am no more free to invent the law, or to make it up as I go along, than anyone else is. It is my task to do my best to identify the law, and to expound it to a jury clearly and accurately so that the jury know what the relevant principles of law are. That is what I have done. That is the task that every judge in every trial has. The jury must act upon the direction which they are given. You may remember, I said that some may feel it is a harsh test, and there are many who would be sympathetic to that view. But, sympathy does not permit me to give you a direction on the law other than as it is. Similarly, applying that direction means that you—if I may answer your question—must consider the risk as perceived by a reasonable person or layman because that is the test; that is the law which is applicable in this area.'

The judge went on to repeat his direction on the three matters the prosecution had to prove. The jury were unable to agree on a verdict that afternoon. They returned on another day and convicted. On receiving the verdict the judge adjourned the proceedings for a pre-sentence report, but said:

'For the benefit of whoever may speak to the preparer of the report, I am quite satisfied that they did not intend to burn down the building. Indeed,

> the prosecution never alleged that they so intended. I am quite satisfied in my mind that they subjectively did not perceive a risk in their minds that the building would be burned down. As we know, the question posed by the jury as to why they had to act upon the direction which I gave to them strongly suggests to me—and this is the basis upon which I propose to proceed—that the correct approach to sentence is that they have been convicted—this is the basis upon which I propose to sentence—that the risk they created would have been perceived by an adult; by a reasonable bystander as carrying with it a risk of damage to the building.'

The judge expressed regret at the law he had felt bound to apply, and added:

> 'I am satisfied in my mind that this is just one of those almost childish—maybe "prank" is too mild a word—which just went horribly wrong, and there, but for the grace of God, go many people. Members of the jury, with respect, it is irrelevant as to whether you share these sentiments, but I see that some of you may do.'

In due course the judge made a one-year supervision order in the case of each appellant. It was not suggested in argument before the House that the judge's directions to the jury were other than correct on the law as then understood and applied.

THE HISTORICAL BACKGROUND

**[8]** Section 51 of the Malicious Damage Act 1861 provided, so far as relevant:

> 'Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever ... the damage, injury, or spoil being to an amount exceeding *5l.*, shall be guilty of a misdemeanour ...'

The defendant in *R v Pembliton* (1874) LR 2 CCR 119, [1874–80] All ER Rep 1163 was charged under this section. He had been fighting in the street and had picked up a large stone and thrown it at the people he had been fighting with. The stone missed its human target but broke a window causing damage of a value exceeding £5. The jury convicted the defendant, although finding that he had not intended to break the window, and the recorder referred the case to the Court of Crown Cases Reserved (Lord Coleridge CJ, Blackburn J, Pigott B, Lush J and Cleasby B) which quashed the conviction. The words 'unlawfully and maliciously' were very widely used in the Malicious Damage Act 1861 and the issue on appeal was whether the defendant had acted 'maliciously'. Lord Coleridge CJ said ((1874) LR 2 CCR 119 at 122, [1874–80] All ER Rep 1163 at 1164):

> '[I]t seems to me that what is intended by the statute is a wilful doing of an intentional act. Without saying that if the case had been left to them in a different way the conviction could not have been supported, if, on these facts, the jury had come to a conclusion that the prisoner was reckless of the consequence of his act, and might reasonably have expected that it would result in breaking the window, it is sufficient to say that the jury have expressly found the contrary.'

Blackburn J was of the same opinion ((1874) LR 2 CCR 119 at 122, [1874–80] All ER Rep 1163 at 1165):

'The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do.'

Thus the court interpreted 'maliciously' as requiring proof of intention, but were inclined to accept that intention could be shown by proof of reckless disregard of a perceived risk. This was also the approach followed in *R v Welch* (1875) 1 QBD 23, where the defendant faced charges of unlawfully and maliciously killing, maiming and wounding a mare contrary to s 40(1) of the Malicious Damage Act 1861. The trial judge was held to have been right to direct the jury to convict if they found that the defendant in fact intended to kill, maim or wound the mare or, in the alternative, that he knew that what he was doing would or might kill, maim or wound the mare and nevertheless did what he did recklessly and not caring whether the mare was injured or not.

[9] The first eight sections of the Malicious Damage Act 1861 all related to arson and all used the expression 'unlawfully and maliciously'. In the first edition of his *Outlines of Criminal Law* published in 1902, Professor Kenny addressed the meaning of 'maliciously' with particular reference to arson. He wrote (pp 163–165, footnotes omitted):

'(*a*) "*Maliciously.*" Burning a house by any mere negligence, however gross it be, is, as we have seen, no crime; (an omission in our law which may well be considered as deserving the attention of the legislature). Even the fact that this gross negligence occurred in the course of the commission of an unlawful act, or even of a felonious one, will not suffice to render the consequent burning-down indictable as an arson. For in any statutory definition of a crime, "malice" must, as we have already seen, be taken—not in its vague common law sense as a "wickedness" in general, but—as requiring an actual intention to do the particular kind of harm that in fact was done. Consequently, if a criminal, when engaged in committing some burglary or other felony, negligently sets fire to a house, he usually will not be guilty of arson ... But it must not be supposed that everyone who has maliciously set fire to some article which it is not arson to burn, will necessarily become guilty of arson if the fire should happen to spread to an arsonable building. For when a man mischievously tries to burn some chattel inside a house, and thereby, quite accidentally and unintentionally, sets fire to the house, this does not constitute an arson. And even if his setting fire to this chattel inside the building was intrinsically *likely* to result in setting fire to the building itself, he still will not necessarily be guilty of arson. For it is essential to arson that the incendiary either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so. Of course the mere fact that this probability was an obviously manifest one will be strong evidence to warrant the jury in finding, if they think fit, that the prisoner did, in fact, thus recognise the danger and regard it with indifference.'

One of the cases cited by Professor Kenny was *R v Harris* (1882) 15 Cox CC 75, where the charge was of setting fire to a dwelling house. The judge (at 77) directed the jury:

> 'Again, if you think that the prisoner set fire to the frame of the picture with a knowledge that in all probability the house itself would thereby be set on fire, and that he was reckless and utterly indifferent whether the house caught fire or not, that is abundant evidence from which you may, if you think fit, draw the inference that he intended the probable consequences of his act, and if you draw that inference, then, inasmuch as the house was in fact set on fire through the medium of the picture frame, the prisoner's crime would be that of arson.'

This was consistent with the ratio of *R v Child* (1871) LR 1 CCR 307 (also cited by Professor Kenny) where it was held that the defendant had not intended to set fire to a house and had thought that what he was doing would not do so. Another case cited by Professor Kenny was *R v Faulkner* (1877) 13 Cox CC 550, decided in the Irish Court of Crown Cases Reserved. The defendant had set fire to a ship while stealing rum from its hold. He had been boring a hole by candlelight and some rum had spilled out and been ignited. It was conceded that he had not intended to burn the vessel, and his conviction was quashed. Barry J said (at 555):

> '[*R v Pembliton* (1874) LR 2 CCR 119, [1874–80] All ER Rep 1163] must be taken as deciding that to constitute an offence under the Malicious Injuries to Property Act, sect. 1, the act done must be in fact intentional and wilful, although the intention and will may (perhaps) be held to exist in, or be proved by, the fact that the accused knew that the injury would be the probable result of his unlawful act, and yet did the act reckless of such consequences.'

**[10]** *R v Pembliton* was again relied on in *R v Cunningham* [1957] 2 All ER 412, [1957] 2 QB 396. The defendant in that case had wrenched a gas meter from the wall and stolen it. Gas had escaped. He was charged under s 23 of the Offences against the Person Act 1861 with unlawfully and maliciously causing a noxious thing, namely coal gas, to be taken by the victim. He pleaded not guilty but was convicted. Giving the reserved judgment of the Court of Criminal Appeal, Byrne J said ([1957] 2 All ER 412 at 414, [1957] 2 QB 396 at 399–400):

> 'We have considered those cases [among others, *R v Pembliton* and *R v Faulkner*], and we have also considered, in the light of those cases, the following principle which was propounded by the late Professor C. S. KENNY in the first edition of his OUTLINES OF CRIMINAL LAW published in 1902, and repeated in the sixteenth edition, edited by Mr. J. W. CECIL TURNER, and published in 1952 (ibid., at p. 186): "... in any statutory definition of a crime, 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular *kind* of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require any ill-will towards, the person injured." The same principle is repeated by Mr. TURNER in his tenth edition of RUSSELL ON CRIME [vol 2, p 1592].'

That was accepted as an accurate statement of the law. In the course of his able address, Mr Perry (for the Crown) pointed out, correctly, that the words quoted had not appeared in the first (1902) edition written by Professor Kenny. It does not, however, appear that the later summary misrepresents what the professor had written, quoted at [9], above.

**[11]** *R v Mowatt* [1967] 3 All ER 47, [1968] 1 QB 421 arose from the robbery by the defendant of a victim W. When W retaliated, the defendant struck him in the face. He was charged with wounding with intent to do grievous bodily harm contrary to s 18 of the Offences against the Person Act 1861, on which an alternative verdict of unlawful wounding contrary to s 20 of that Act was open to the jury. The trial judge gave no direction to the jury on the meaning of 'maliciously' and the jury convicted under s 20. The defendant's appeal against conviction on the ground of this non-direction failed. In a judgment of the Court of Appeal (Diplock LJ, Brabin and Waller JJ) reference was made to *R v Cunningham* and the court ([1967] 3 All ER 47 at 49, [1968] 1 QB 421 at 425) cast no doubt on the proposition that '"maliciously" in a statutory crime postulates foresight of consequence', but the court regarded Professor Kenny's more general statement as inapposite to the specific alternative statutory offences described in ss 18 and 20. The court held ([1967] 3 All ER 47 at 50, [1968] 1 QB 421 at 426) that 'maliciously' imports an awareness that an act may have the consequence of causing some physical harm to some other person, even if the harm foreseen was relatively minor. The court ruled:

> 'But where the evidence for the prosecution, if accepted, shows that the physical act of the accused which caused the injury to another person was a direct assault which any ordinary person would be bound to realise was likely to cause some physical harm to the other person (as, for instance, an assault with a weapon or the boot or violence with the hands) and the defence put forward on behalf of the accused is not that the assault was accidental or that he did not realise that it might cause some physical harm to the victim, but is some other defence such as that he did not do the alleged act or that he did it in self-defence, it is unnecessary to deal specifically in the summing-up with what is meant by the word "maliciously" in the section ... In the absence of any evidence that the accused did not realise that it was a possible consequence of his act that some physical harm might be caused to the victim, the prosecution satisfy the relevant onus by proving the commission by the accused of an act which any ordinary person would realise was likely to have that consequence.'

THE 1971 ACT

**[12]** In its second programme of law reform the Law Commission, then under the chairmanship of Scarman J, envisaged the codification of the criminal law. As part of that project it examined a number of specific offences, among them the law of malicious damage, on which it published its Working Paper No 23 in April 1969. This described the Malicious Damage Act 1861, despite five later amending statutes, as 'unsatisfactory' (p 1 (para 2)). In a brief statistical introduction the Law Commission drew attention (pp 4–5 (para 9)) to the prevalence of malicious damage offences among the youngest criminal age group (the 10–14-year-olds) as well as among other juveniles, and to the fact that more than half of those convicted of the most serious offence (arson) were under 21. In a section on 'The Mental Element' the Law Commission referred to a working party which was

formulating draft propositions on the mental element in crime and observed (p 19 (para 31)):

> 'For the present purpose, we assume that the traditional elements of intention, knowledge and recklessness (in the sense of foresight and disregard of consequences or awareness and disregard of the likelihood of the existence of circumstances) will continue to be required for serious crime.'

The Law Commission identified (p 20 (para 33)) 'intent to do the forbidden act or recklessness in relation to its foreseen consequences' as the 'essential mental element in the existing malicious damage offences' and quoted with apparent approval the passage from *R v Cunningham* which is set out at [10], above. The Law Commission considered that the word 'maliciously' should be avoided (p 21 (para 34)) and favoured its replacement by 'wilful or reckless' (p 35 (para 64)). It proposed (p 37 (para 68)) that the new group of offences should require—

> 'traditional *mens rea*, in the sense of intention or recklessness in relation to prescribed consequences, and, where appropriate, knowledge or recklessness in relation to prescribed circumstances.'

The working paper does not suggest that the law as then understood was thought to be leading to unjustified acquittals. In a published comment on the working paper ('Malicious Damage: The Law Commission's Working Paper' [1969] Crim LR 283), Professor Brian Hogan wrote (at 288) :

> 'What is implicit in "maliciously" in the present law will appear explicitly as intention or recklessness in the new code. No doubt the meanings ascribed to intention and recklessness in the codification of the general principles will be applied *mutatis mutandis* to offences of damage to property.'

**[13]** In its *Report on Offences of Damage to Property* (Law Com no 29) published in July 1970, the Law Commission broadly followed, in respects relevant to this appeal, the lines of the working paper. On the mental element of criminal damage offences the Law Commission said (p 17):

> '44. In the area of serious crime (in contrast to offences commonly described as "regulatory offences" in which the test of culpability may be negligence, or even a test founded on strict liability) the elements of intention, knowledge or recklessness have always been required as a basis of liability. The tendency is to extend this basis to a wider range of offences and to limit the area of offences where a lesser mental element is required. We consider, therefore, that the same elements as are required at present should be retained, but that they should be expressed with greater simplicity and clarity. In particular, we prefer to avoid the use of such a word as "maliciously", if only because it gives the impression that the mental element differs from that which is imposed in other offences requiring traditional *mens rea*. It is evident from such cases as *R.* v. *Cunningham* ([1957] 2 All ER 412, [1957] 2 QB 396) and *R.* v. *Mowatt* ([1967] 3 All ER 47, [1968] 1 QB 421) that the word can give rise to difficulties of interpretation. Furthermore, the word "maliciously" conveys the impression that some ill-will is required against the person whose property is damaged.'

It does not appear from the report that the Law Commission's consultation had elicited any complaint that the existing law was unduly favourable to defendants. Annexed to the report was a draft Bill: in this cl 1(1) and (2) were exactly as enacted in the 1971 Act, but what became s 1(3) was omitted. On 16 June 1970, a month before this report was published, the Law Commission had published its *Codification of the Criminal Law: General Principles: The Mental Element in Crime* (Working Paper No 31). In that working paper a definition of recklessness was proposed (p 48):

> 'A person is reckless if, (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.'

In the 1971 Act as passed all except six sections of the Malicious Damage Act 1861, a lengthy Act, were repealed, very much as the Law Commission had proposed.

**[14]** Enactment of the 1971 Act did not at once affect the courts' approach to the causing of unintentional damage. In *R v Briggs* [1977] 1 All ER 475, [1977] 1 WLR 605 the defendant had been charged under s 1(1) of the 1971 Act as a result of damage caused to a car and the appeal turned on the trial judge's direction on the meaning of 'reckless'. The appeal succeeded since the judge had not adequately explained that the test to be applied was that of the defendant's state of mind. The Court of Appeal (James LJ, Kenneth Jones and Peter Pain JJ) ruled ([1977] 1 All ER 475 at 477–478, [1977] 1 WLR 605 at 608):

> 'A man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act.'

This definition was adopted but modified in *R v Parker* [1977] 2 All ER 37, [1977] 1 WLR 600 where the defendant in a fit of temper had broken a telephone by smashing the handset violently down on to the telephone unit and had been convicted under s 1(1) of the 1971 Act. The court (Scarman and Geoffrey Lane LJJ and Kenneth Jones J) ([1977] 2 All ER 37 at 39–40, [1977] 1 WLR 600 at 603–604) readily followed *R v Briggs* but held that the defendant had been fully aware of all the circumstances and that if—

> 'he did not know, as he said he did not, that there was some risk of damage, he was, in effect, deliberately closing his mind to the obvious—the obvious being that damage in these circumstances was inevitable.'

The court accordingly modified the *R v Briggs* definition in this way:

> 'A man is reckless in the sense required when he carries out a deliberate act knowing or closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act.'

This modification made no inroad into the concept of recklessness as then understood since, as pointed out by Professor Glanville Williams *Textbook of Criminal Law* (1st edn, 1978) p 79, cited by Lord Edmund-Davies in his dissenting opinion in *R v Caldwell* [1981] 1 All ER 961 at 970, [1982] AC 341 at 358:

'A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter.'

**[15]** The meaning of 'reckless' in s 1(1) of the 1971 Act was again considered by the Court of Appeal (Geoffrey Lane LJ, Ackner and Watkins JJ) in *R v Stephenson* [1979] 2 All ER 1198, [1979] QB 695. The defendant had tried to go to sleep in a hollow he had made in the side of a haystack. Feeling cold, he had lit a fire in the hollow which had set fire to the stack and damaged property worth £3,500. He had been charged and convicted under s 1(1) and (3) of the 1971 Act. The defendant however had a long history of schizophrenia and expert evidence at trial suggested that he may not have had the same ability to foresee or appreciate risks as the mentally normal person. Giving the reserved judgment of the court, Geoffrey Lane LJ ([1979] 2 All ER 1198 at 1201–1203, [1979] QB 695 at 700–703) reviewed the definition of recklessness in the Law Commission's Working Paper No 31 (see [13], above), the acceptance of that definition by the leading academic authorities and the House of Lords' adoption of a subjective meaning of recklessness in tort in *British Railways Board v Herrington* [1972] 1 All ER 749, [1972] AC 877. The court thought it fair to assume that those who were responsible for drafting the 1971 Act were intending to preserve its legal meaning as described in Kenny and expressly approved in *R v Cunningham*. The court then continued:

'What then must the prosecution prove in order to bring home the charge of arson in circumstances such as the present? They must prove that (1) the defendant deliberately committed some act which caused the damage to property alleged or part of such damage; (2) the defendant had no lawful excuse for causing the damage (these two requirements will in the ordinary case not be in issue); (3) the defendant either (a) intended to cause the damage to the property, or (b) was reckless whether the property was damaged or not. A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. It is however not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take. Proof of the requisite knowledge in the mind of the defendant will in most cases present little difficulty. The fact that the risk of some damage would have been obvious to anyone in his right mind in the position of the defendant is not conclusive proof of the defendant's knowledge, but it may well be, and in many cases doubtless will be, a matter which will drive the jury to the conclusion that the defendant himself must have appreciated the risk.'

The appeal was accordingly allowed. But the court recognised that what it called the subjective definition of recklessness produced difficulties. One of these was where a person by self-induced intoxication deprived himself of the ability to foresee the risks involved in his actions. The court suggested that a distinction was to be drawn between crimes requiring proof of specific intent and those, such as offences under s 1(1) of the 1971 Act, involving no specific intent ([1979] 2 All ER 1198 at 1204, [1979] QB 695 at 704):

'Accordingly it is no defence under the 1971 Act for a person to say that he was deprived by self-induced intoxication of the ability to foresee or appreciate an obvious risk.'

**[16]** In *Archbold's Pleading, Evidence and Practice in Criminal Cases* (40th edn, 1979) p 958 (para 1443c), on which jury directions were no doubt routinely based at the time, the better view was said to be—

'that whereas "intent" requires a desire for consequences or foresight of probable consequences, "reckless" only requires foresight of possible consequences coupled with an unreasonable willingness to risk them.'

*R v CALDWELL*

**[17]** *R v Caldwell* [1981] 1 All ER 961, [1982] AC 341 was a case of self-induced intoxication. The defendant, having a grievance against the owner of the hotel where he worked, got very drunk and set fire to the hotel where guests were living at the time. He was indicted upon two counts of arson. The first and more serious count was laid under s 1(2) of the 1971 Act, the second count under s 1(1). He pleaded guilty to the second count but contested the first on the ground that he had been so drunk at the time that the thought there might be people in the hotel had never crossed his mind. His conviction on count 1 was set aside by the Court of Appeal which certified the following question ([1981] 1 All ER 961 at 964, [1982] AC 341 at 344):

'Whether evidence of self-induced intoxication can be relevant to the following questions—(a) Whether the defendant intended to endanger the life of another; and (b) Whether the defendant was reckless as to whether the life of another would be endangered, within the meaning of Section 1(2)(*b*) of the Criminal Damage Act 1971.'

In submitting that the two questions should be answered (a) Yes and (b) No, counsel for the Crown did not challenge the correctness of *R v Briggs* or *R v Stephenson*.

**[18]** In a leading opinion with which Lord Keith of Kinkel and Lord Roskill agreed, but from which Lord Wilberforce and Lord Edmund-Davies dissented, Lord Diplock discounted ([1981] 1 All ER 961 at 964–965, [1982] AC 341 at 351) Professor Kenny's statement of the law approved in *R v Cunningham* (see [10], above) as directed to the meaning of 'maliciously' in the Malicious Damage Act 1861 and having no bearing on the meaning of 'reckless' in the 1971 Act. It was, he held, no less blameworthy for a man whose mind was affected by rage or excitement or drink to fail to give his mind to the risk of damaging property than for a man whose mind was so affected to appreciate that there was a risk of damage to property but not to appreciate the seriousness of the risk or to trust that good luck would prevent the risk occurring. He observed ([1981] 1 All ER 961 at 965, [1982] AC 341 at 352):

'My Lords, I can see no reason why Parliament when it decided to revise the law as to offences of damage to property should go out of its way to perpetuate fine and impracticable distinctions such as these, between one mental state and another. One would think that the sooner they were got rid of the better.'

Reference was made to *R v Briggs*, *R v Parker* and *R v Stephenson*, but Lord Diplock saw no warrant for assuming that the 1971 Act, whose declared purpose was to

revise the law of damage to property, intended 'reckless' to be interpreted as 'maliciously' had been ([1981] 1 All ER 961 at 966, [1982] AC 341 at 353). He preferred the ordinary meaning of 'reckless' which— a

> 'surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was. If one is attaching labels, the latter state of mind is neither more nor less "subjective" than the first. But the label solves nothing. It is a statement of the obvious; mens rea is, by definition, a state of mind of the accused himself at the time he did the physical act that constitutes the actus reus of the offence; it cannot be the mental state of some non-existent hypothetical person.' b c

To decide whether a person had been reckless whether harmful consequences of a particular kind would result from his act it was necessary to consider the mind of 'the ordinary prudent individual' ([1981] 1 All ER 961 at 966, [1982] AC 341 at 354). In a passage which has since been taken to encapsulate the law on this point, d and which has founded many jury directions (including that in the present case) Lord Diplock then said ([1981] 1 All ER 961 at 967, [1982] AC 341 at 354):

> 'In my opinion, a person charged with an offence under s 1(1) of the 1971 Act is "reckless as to whether or not any property would be destroyed or damaged" if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has none the less gone on to do it. That would be a proper direction to the jury; cases in the Court of Appeal which held otherwise should be regarded as overruled.' e f

On the facts Lord Diplock concluded ([1981] 1 All ER 961 at 967, [1982] AC 341 at 355) that the defendant's unawareness, owing to his self-induced intoxication, of the risk of endangering the lives of hotel residents was no defence if that risk would have been obvious to him had he been sober. He held ([1981] 1 All ER 961 at 967, [1982] AC 341 at 356) that evidence of self-induced intoxication was g relevant to a charge under s 1(2) based on intention but not to one based on recklessness.

**[19]** In his dissenting opinion Lord Edmund-Davies expressed ([1981] 1 All ER 961 at 969, [1982] AC 341 at 357) 'respectful, but profound, disagreement' with Lord Diplock's dismissal of Professor Kenny's statement which was— h

> 'accurate not only in respect of the law as it stood in 1902 but also as it has been applied in countless cases ever since, both in the United Kingdom and in other countries where the common law prevails ...'

Lord Edmund-Davies drew attention to the Law Commission's preparation of j the 1971 Act and its definition of recklessness in Working Paper No 31 and continued:

> 'It was surely with this contemporaneous definition and the much respected decision of *R v Cunningham* in mind that the draftsman proceeded to his task of drafting the 1971 Act.'

He observed ([1981] 1 All ER 961 at 970, [1982] AC 341 at 358):

> 'In the absence of exculpatory factors, the defendant's state of mind is therefore all-important where recklessness is an element in the offence charged, and s 8 of the Criminal Justice Act 1967 has laid down that: "A court or jury, in determining whether a person has committed an offence,—(*a*) shall not be bound in law to infer that he intended *or foresaw* a result of his actions by reason only of its being a natural and probable consequence of those actions; but (*b*) shall decide whether he did intend *or foresee* that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances." (Emphasis added.)'

Lord Edmund-Davies differed from the majority on the relevance of evidence of self-induced intoxication: in his opinion ([1981] 1 All ER 961 at 972, [1982] AC 341 at 361) such evidence was relevant to a charge under s 1(2) whether the charge was based on intention or recklessness.

*R v LAWRENCE*

**[20]** Judgment was given by the House in *R v Lawrence* [1981] 1 All ER 974, [1982] AC 510 on the same day as *R v Caldwell*, although only two members (Lord Diplock and Lord Roskill) were party to both decisions. The defendant had ridden a motor cycle along an urban street after nightfall and had collided with and killed a pedestrian. He had been charged and convicted under s 1 of the Road Traffic Act 1972 which made it an offence to cause the death of another person by driving a motor vehicle on a road recklessly. His appeal had succeeded on the ground of an inadequate direction to the jury. The issue on appeal to the House concerned the mental element in a charge of reckless driving.

**[21]** Lord Hailsham of St Marylebone LC ([1981] 1 All ER 974 at 975, 978, [1982] AC 510 at 516, 520, 521), agreeing with Lord Diplock and with the majority in *R v Caldwell*, understood recklessness to evince 'a state of mind stopping short of deliberate intention, and going beyond mere inadvertence ...' Lord Diplock ([1981] 1 All ER 974 at 982, [1982] AC 510 at 526) rehearsed the history of motoring offences based on recklessness beginning with s 1 of the Motor Car Act 1903 and applied essentially the same test as laid down in *R v Caldwell*, by reference to the 'ordinary prudent individual'. He formulated an appropriate jury direction to the same effect, mutatis mutandis, as that in *R v Caldwell*. But he added ([1981] 1 All ER 974 at 982, [1982] AC 510 at 527):

> 'It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves. If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference.'

Lord Fraser of Tullybelton, Lord Roskill and Lord Bridge of Harwich agreed with Lord Hailsham of St Marylebone LC and Lord Diplock.

LATER CASES

[22] The decisions in *R v Caldwell* and *R v Lawrence* were applied by the House (Lord Diplock, Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Brightman) in *R v Miller* [1983] 1 All ER 978, [1983] 2 AC 161, although subject to a qualification germane to the facts of that case but not to the facts of the present case ([1983] 1 All ER 978 at 983, [1983] 2 AC 161 at 179).

[23] In *Elliott v C (a minor)* [1983] 2 All ER 1005, [1983] 1 WLR 939 the defendant was a 14-year-old girl of low intelligence who had entered a shed in the early morning, poured white spirit on the floor and set it alight. The resulting fire had flared up and she had left the shed, which had been destroyed. She was charged under s 1(1) of the 1971 Act and at her trial before justices the prosecution made plain that the charge was based not on intention but on recklessness. The justices sought to apply the test laid down in *R v Caldwell* [1981] 1 All ER 961, [1982] AC 341 but inferred that in his reference to 'an obvious risk' Lord Diplock had meant a risk which was obvious to the particular defendant. The justices acquitted the defendant because they found that the defendant had given no thought at the time to the possibility of there being a risk that the shed and contents would be destroyed, and this risk would not have been obvious to her or appreciated by her if she had thought about the matter ([1983] 2 All ER 1005 at 1007–1008, [1983] 1 WLR 939 at 945). The prosecutor's appeal was allowed. Glidewell J, giving the first judgment, accepted the submission that—

> 'if the risk is one which would have been obvious to a reasonably prudent person, once it has also been proved that the particular defendant gave no thought to the possibility of there being such a risk, it is not a defence that because of limited intelligence or exhaustion she would not have appreciated the risk even if she had thought about it.'

Robert Goff LJ felt constrained by the decisions of the House in *R v Caldwell*, *R v Lawrence* and *R v Miller* to agree, but he expressed his unhappiness in doing so and plainly did not consider the outcome to be just. A petition for leave to appeal against this decision was dismissed by an appeal committee.

[24] The defendant in *R v Stephen Malcolm R* (1984) 79 Cr App R 334 had thrown petrol bombs at the outside wall of the bedroom of a girl who he believed had informed on him in relation to a series of burglaries. He had admitted throwing the bombs but claimed he had done so to frighten the girl and without realising that if a bomb had gone through the window it might have killed her. He was charged with arson under s 1(2) of the 1971 Act, on the basis of recklessness. At trial, it was submitted on the defendant's behalf that when considering recklessness the jury could only convict him if he did an act which created a risk to life obvious to someone of his age and with such of his characteristics as would affect his appreciation of the risk (at 337). On the trial judge ruling against that submission the defendant changed his plea and the issue in the Court of Appeal (Ackner LJ, Bristow and Popplewell JJ) was whether the ruling had been correct. The court held that it had: if the House had wished to modify the *Caldwell* principle to take account of, for instance, the age of the defendant, the opportunity had existed in *Elliott*'s case and it had not been taken. Although concerned at the principle it was required to apply, the court had little doubt that on the facts of the case the answer would have been the same even if the jury had been able to draw a comparison with what a boy of the defendant's age would have appreciated.

[25] On his appeal to the House (Lord Keith of Kinkel, Lord Roskill, Lord Ackner, Lord Goff of Chieveley and Lord Browne-Wilkinson) in *R v Reid* [1992] 3 All ER 673, [1992] 1 WLR 793 the defendant, convicted of causing death by reckless driving contrary to s 1 of the Road Traffic Act 1972, later re-enacted in s 1 of the Road Traffic Act 1988, asked the House to reconsider its decision in *R v Lawrence* on which the trial judge's jury direction had been based. The House unanimously affirmed its earlier decision as correct in principle for essentially the reasons which Lord Diplock had given. Lord Keith, however, accepted ([1992] 3 All ER 673 at 675, [1992] 1 WLR 793 at 796) that Lord Diplock's suggested jury direction might call for modification or addition—

> 'where the driver acted under some understandable and excusable mistake or where his capacity to appreciate risks was adversely affected by some condition not involving fault on his part. There may also be cases where the driver acted as he did in a sudden dilemma created by the actions of others.'

Lord Ackner ([1992] 3 All ER 673 at 684, [1992] 1 WLR 793 at 806) drew attention to Lord Diplock's acceptance that 'regard must be given to any explanation [the defendant] gives as to his state of mind which may displace the inference' (see [21], above) and commented:

> 'I read this as no more than a cautionary instruction to the jury that, while it would be open to them at first sight to find that the accused was driving recklessly from the mere manner of his driving, if it shows a clear disregard for the lives or safety of others without any explanation for this conduct, yet before reaching any firm conclusions they must have regard to any explanation which accounts for his conduct. In short, they must have regard to all the available evidence.'

Lord Ackner, Lord Goff and my noble and learned friend Lord Browne-Wilkinson ([1992] 3 All ER 673 at 683, 685, 694, [1992] 1 WLR 793 at 805, 807, 816–817, respectively) all, with varying degrees of emphasis, made plain that their observations were directed to recklessness in the context of driving and not to recklessness in the context of s 1 of the 1971 Act or any other context.

[26] In *R v Coles* [1995] 1 Cr App R 157 a 15-year-old defendant convicted under s 1(2) of the 1971 Act on the basis of recklessness again challenged, unsuccessfully, the rule laid down by Lord Diplock in *R v Caldwell*. Since recklessness was to be judged by the standard of the reasonable, prudent man, it followed that expert evidence of the defendant's capacity to foresee the risks which would arise from his setting fire to hay in a barn had been rightly rejected.

[27] In the present case the Court of Appeal (Dyson LJ, Silber J and Judge Beaumont QC) reviewed the authorities ([2002] EWCA Crim 1992 at [18], [2003] 3 All ER 206 at [18]) but was in no doubt that the *Caldwell* test had been rightly applied. It acknowledged (at [23]) that the *Caldwell* test had been criticised and had not been applied in a number of Commonwealth jurisdictions and saw great force in these criticisms but held that it was not open to the Court of Appeal to depart from it.

CONCLUSIONS

[28] The task confronting the House in this appeal is, first of all, one of statutory construction: what did Parliament mean when it used the word 'reckless' in s 1(1) and (2) of the 1971 Act? In so expressing the question I mean to make it as plain as I can that I am not addressing the meaning of 'reckless' in any

other statutory or common law context. In particular, but perhaps needlessly since 'recklessly' has now been banished from the lexicon of driving offences, I would wish to throw no doubt on the decisions of the House in *R v Lawrence* and *R v Reid*.

**[29]** Since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change. So the starting point is to ascertain what Parliament meant by 'reckless' in 1971. As noted at [13], above, s 1 as enacted followed, subject to an immaterial addition, the draft proposed by the Law Commission. It cannot be supposed that by 'reckless' Parliament meant anything different from the Law Commission. The Law Commission's meaning was made plain both in its report (Law Com no 29) and in Working Paper No 23 which preceded it. These materials (not, it would seem, placed before the House in *R v Caldwell*) reveal a very plain intention to replace the old-fashioned and misleading expression 'maliciously' by the more familiar expression 'reckless' but to give the latter expression the meaning which *R v Cunningham* [1957] 2 All ER 412, [1957] 2 QB 396 and Professor Kenny had given to the former. In treating this authority as irrelevant to the construction of 'reckless' the majority fell into understandable but clearly demonstrable error. No relevant change in the mens rea necessary for proof of the offence was intended, and in holding otherwise the majority misconstrued s 1 of the Act.

**[30]** That conclusion is by no means determinative of this appeal. For the decision in *R v Caldwell* was made more than 20 years ago. Its essential reasoning was unanimously approved by the House in *R v Lawrence*. Invitations to reconsider that reasoning have been rejected. The principles laid down have been applied on many occasions, by Crown Court judges and, even more frequently, by justices. In the submission of the Crown, the ruling of the House works well and causes no injustice in practice. If Parliament had wished to give effect to the intention of the Law Commission it has had many opportunities, which it has not taken, to do so. Despite its power under *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234 to depart from its earlier decisions, the House should be very slow to do so, not least in a context such as this.

**[31]** These are formidable arguments, deployed by Mr Perry with his habitual skill and erudition. But I am persuaded by Mr Newman QC for the appellants that they should be rejected. I reach this conclusion for four reasons, taken together.

**[32]** First, it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule actus non facit reum nisi mens sit rea. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication (see *DPP v Majewski* [1976] 2 All ER 142, [1977] AC 443)) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

[33] Secondly, the present case shows, more clearly than any other reported case since *R v Caldwell* [1981] 1 All ER 961, [1982] AC 341, that the model direction formulated by Lord Diplock (see [18], above) is capable of leading to obvious unfairness. As the excerpts quoted at [6]–[7], above, reveal, the trial judge regretted the direction he (quite rightly) felt compelled to give, and it is evident that this direction offended the jury's sense of fairness. The sense of fairness of 12 representative citizens sitting as a jury (or of a smaller group of lay justices sitting as a bench of magistrates) is the bedrock on which the administration of criminal justice in this country is built. A law which runs counter to that sense must cause concern. Here, the appellants could have been charged under s 1(1) of the 1971 Act with recklessly damaging one or both of the wheelie-bins, and they would have had little defence. As it was, the jury might have inferred that boys of the appellants' age would have appreciated the risk to the building of what they did, but it seems clear that such was not their conclusion (nor, it would appear, the judge's either). On that basis the jury thought it unfair to convict them. I share their sense of unease. It is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension. Nor, the defendant having been convicted, is the problem cured by imposition of a nominal penalty.

[34] Thirdly, I do not think the criticism of *R v Caldwell* expressed by academics, judges and practitioners should be ignored. A decision is not, of course, to be overruled or departed from simply because it meets with disfavour in the learned journals. But a decision which attracts reasoned and outspoken criticism by the leading scholars of the day, respected as authorities in the field, must command attention. One need only cite (among many other examples) the observations of Professor John Smith [1981] Crim LR 392 at 393–396 and Professor Glanville Williams 'Recklessness Redefined' (1981) 40 CLJ 252. This criticism carries greater weight when voiced also by judges as authoritative as Lord Edmund-Davies and Lord Wilberforce in *R v Caldwell* itself, Robert Goff LJ in *Elliott v C (a minor)* [1983] 2 All ER 1005, [1983] 1 WLR 939 and Ackner LJ in *R v Stephen Malcolm R* (1984) 79 Cr App R 334. The reservations expressed by the trial judge in the present case are widely shared. The shop floor response to *R v Caldwell* may be gauged from the editors' commentary, to be found in *Archbold's Pleading, Evidence and Practice in Criminal Cases* (41st edn, 1982) pp 1009–1010 (para 17-25). The editors suggested that remedial legislation was urgently required.

[35] Fourthly, the majority's interpretation of 'reckless' in s 1 of the 1971 Act was, as already shown, a misinterpretation. If it were a misinterpretation that offended no principle and gave rise to no injustice there would be strong grounds for adhering to the misinterpretation and leaving Parliament to correct it if it chose. But this misinterpretation is offensive to principle and is apt to cause injustice. That being so, the need to correct the misinterpretation is compelling.

[36] It is perhaps unfortunate that the question at issue in this appeal fell to be answered in a case of self-induced intoxication. For one instinctively recoils from the notion that a defendant can escape the criminal consequences of his injurious conduct by drinking himself into a state where he is blind to the risk he is causing to others. In *R v Caldwell* it seems to have been assumed (see [18], above) that the risk would have been obvious to the defendant had he been sober. Further, the context did not require the House to give close consideration to the liability of those (such as the very young and the mentally handicapped) who were not normal,

reasonable adults. The overruling by the majority of *R v Stephenson* [1979] 2 All ER 1198, [1979] QB 695 does however make it questionable whether such consideration would have led to a different result.

**[37]** In the course of argument before the House it was suggested that the rule in *R v Caldwell* might be modified, in cases involving children, by requiring comparison not with normal, reasonable adults but with normal, reasonable children of the same age. This is a suggestion with some attractions but it is open to four compelling objections. First, even this modification would offend the principle that conviction should depend on proving the state of mind of the individual defendant to be culpable. Second, if the rule were modified in relation to children on grounds of their immaturity it would be anomalous if it were not also modified in relation to the mentally handicapped on grounds of their limited understanding. Third, any modification along these lines would open the door to difficult and contentious argument concerning the qualities and characteristics to be taken into account for purposes of the comparison. Fourth, to adopt this modification would be to substitute one misinterpretation of s 1 for another. There is no warrant in the Act or in the travaux préparatoires which preceded it for such an interpretation.

**[38]** A further refinement, advanced by Professor Glanville Williams (1981) 40 CLJ 252 at 270–271, adopted by the justices in *Elliott's* case and commented upon by Robert Goff LJ in that case is that a defendant should only be regarded as having acted recklessly by virtue of his failure to give any thought to an obvious risk that property would be destroyed or damaged, where such risk would have been obvious to him if he had given any thought to the matter. This refinement also has attractions, although it does not meet the objection of principle and does not represent a correct interpretation of the section. It is, in my opinion, open to the further objection of over-complicating the task of the jury (or bench of justices). It is one thing to decide whether a defendant can be believed when he says that the thought of a given risk never crossed his mind. It is another, and much more speculative, task to decide whether the risk would have been obvious to him if the thought had crossed his mind. The simpler the jury's task, the more likely is its verdict to be reliable. Robert Goff LJ's reason for rejecting this refinement ([1983] 2 All ER 1005 at 1011–1012, [1983] 1 WLR 939 at 950) was somewhat similar.

**[39]** I cannot accept that restoration of the law as understood before *R v Caldwell* would lead to the acquittal of those whom public policy would require to be convicted. There is nothing to suggest that this was seen as a problem before *R v Caldwell*, or (as noted at [12]–[13], above) before the 1971 Act. There is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time. Similarly with recklessness: it is not to be supposed that the tribunal of fact will accept a defendant's assertion that he never thought of a certain risk when all the circumstances and probabilities and evidence of what he did and said at the time show that he did or must have done.

**[40]** In his printed case, Mr Newman advanced the contention that the law as declared in *R v Caldwell* was incompatible with art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out

in Sch 1 to the Human Rights Act 1998). While making no concession, he forbore to address legal argument on the point. I need say no more about it.

**[41]** For the reasons I have given I would allow this appeal and quash the appellants' convictions. I would answer the certified question obliquely, basing myself on cl 18(c) of the Criminal Code Bill annexed by the Law Commission to its report *A Criminal Code for England and Wales* (1989) (Law Com no 177) vol 1, Report and Draft Criminal Code Bill):

> '[A] person acts ... "recklessly" [within the meaning of s 1 of the 1971 Act] with respect to—(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk ...'

**LORD BROWNE-WILKINSON.**

**[42]** My Lords, I agree with the reasons given by Lord Bingham of Cornhill. I would allow the appeal and answer the certified question as he proposes.

**LORD STEYN.**

**[43]** My Lords, this appeal raises an important question on the interpretation of s 1(1) of the Criminal Damage Act 1971. It provides:

> 'A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.'

The focus of the appeal is on the meaning of the words 'being reckless as to whether any such property would be destroyed or damaged'. In broad terms, the issue is whether 'reckless' in s 1(1) of the 1971 Act covers only advertent wrongdoing or is wide enough to include inadvertent wrongdoing. In *R v Caldwell* [1981] 1 All ER 961, [1982] AC 341 the House by a three to two majority held that the wider interpretation is the correct one. The House followed *R v Caldwell* in later decisions. The House is now asked to re-examine the question, to depart from *R v Caldwell*, and to rule that the narrower interpretation of s 1(1) is the correct one.

DEPARTING FROM A HOUSE OF LORDS DECISION

**[44]** The target of the appellants is an ambitious one. The relevant words in s 1(1), *taken by themselves*, are capable of bearing either the narrower or wider meaning. In these circumstances it could be said that there was in *R v Caldwell* a choice to be made, and that choice was made by the requisite majority in favour of the wide view. The conclusion of the House in *R v Caldwell* produced a clear rule expressed by Lord Diplock as follows ([1981] 1 All ER 961 at 967, [1982] AC 341 at 354):

> '... a person charged with an offence under s 1(1) of the 1971 Act is "reckless as to whether or not any property would be destroyed or damaged" if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has none the less gone on to do it. That would be a proper direction to the jury; cases in the Court of Appeal which held otherwise should be regarded as overruled.'

Lord Diplock also stated (and has always been so understood) ([1981] 1 All ER 961 at 966, [1982] AC 341 at 354) that the criterion is the mind of the ordinary, prudent adult individual. In accordance with *R v Caldwell* no allowance is to be made by a jury for the youth or lack of mental capacity of the defendant. The clarity of the decision is a factor weighing against departing from it. Moreover, a fair reading of the judgment of Lord Diplock reveals that the House was probably influenced by the consideration that the opposite view could leave beyond the reach of the criminal law wrongdoers who should be punished. If this perception was correct it would be a strong thing to depart from such a view. In combination these factors militate in favour of following *R v Caldwell*. A departure from *R v Caldwell* could only be justified if compelling legal considerations demand it.

CONCLUSIONS IN OUTLINE

**[45]** In my view the very high threshold for departing from a previous decision of the House has been satisfied in this particular case. In summary I would reduce my reasons to three propositions. First, in *R v Caldwell* the majority should have accepted without equivocation that before the passing of the 1971 Act foresight of consequences was an essential element in recklessness in the context of damage to property under s 51 of the Malicious Damage Act 1861. Secondly, the matrix of the immediately preceding Law Commission recommendations shows convincingly that the purpose of s 1 of the 1971 Act was to replace the out of date language of 'maliciously' causing damage by more modern language while not changing the substance of the mental element in any way. Foresight of consequences was to remain an ingredient of recklessness in regard to damage to property. Thirdly, experience has shown that by bringing within the reach of s 1(1) cases of inadvertent recklessness the decision in *R v Caldwell* became a source of serious potential injustice which cannot possibly be justified on policy grounds. These three propositions require some explanation.

THE PRE-EXISTING LAW

**[46]** In enacting s 1 of the 1971 Act Parliament must be presumed to have been aware of the relevant pre-existing law. The best evidence of the state of the law was the reserved judgment of the Court of Criminal Appeal in *R v Cunningham* [1957] 2 All ER 412, [1957] 2 QB 396. Giving the judgment of the Court of Appeal Byrne J said ([1957] 2 All ER 412 at 414, [1957] 2 QB 396 at 399–400):

> 'We have considered those cases, and we have also considered, in the light of those cases, the following principle which was propounded by the late Professor C. S. KENNY in the first edition of his OUTLINES OF CRIMINAL LAW published in 1902, and repeated in the sixteenth edition, edited by Mr. J. W. CECIL TURNER and published in 1952 (ibid., at p. 186): "... in any statutory definition of a crime, 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular *kind* [emphasis in original] of harm that in fact was done, or (ii) *recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it).* [My emphasis.] It is neither limited to, nor does it indeed require, any ill-will towards, the person injured." The same principle is repeated by Mr. TURNER in his tenth edition of RUSSELL ON CRIME [vol 2, p 1592].'

This was a clear statement that under s 51 of the 1861 Act foresight of the consequences of an act was necessary. It would without doubt have been the basis on which the parliamentary draftsman would have prepared the provision in the Bill which became s 1 of the 1971 Act. In substance the reference to Professor Kenny's views was correct. His explanation had then been the traditional view for at least 70 years. The pedigree and consistency of this interpretation would also have been known at the time of the drafting and enactment of the 1971 Act. As Lord Edmund-Davies pointed out in his powerful dissenting judgment in *R v Caldwell* (assented to by Lord Wilberforce) Lord Diplock was unnecessarily dismissive of the views of the distinguished author who contributed so much to the rational explanation of the criminal law. But the real basis of Lord Diplock's judgment in *R v Caldwell* [1981] 1 All ER 961 at 965, [1982] AC 341 at 351 was that the meaning of 'maliciously' under s 51 of the 1861 Act 'has no bearing on the meaning of the adjective "reckless" in s 1 of the Criminal Damage Act 1971'. This is the foundation of the view of the majority. It must now be examined in the light of the internal and external aids to the interpretation of s 1 of the 1971 Act.

THE PURPOSE OF SECTION 1 OF THE 1971 ACT

**[47]** Lord Diplock's formulation leaves no room, in the great majority of cases, for any inquiry into the defendant's state of mind. In a withering contemporary criticism Professor John Smith explained with precision what Lord Diplock's meaning of recklessness involved ([1981] Crim LR 393 at 394):

> '... it amounts to no more than this: "If there was an obvious risk of damage to property, the defendant is guilty: it makes no difference whether he realised there was a risk or not." It does not require the jury to inquire into the defendant's state of mind at all and is apparently inconsistent with his Lordship's view that "*mens rea* is a state of mind of the accused himself." Whether there is an "obvious" risk can be answered only by considering whether any ordinary, prudent person would have realised there was a risk; and, if he would, it makes no difference what the defendant thought, because he is guilty whether he realised there was a risk or not. Only very exceptionally will there be any room for any inquiry into the actual state of mind of the defendant. If he considered the question whether there was a risk and decided wrongly, that there was not, then he would not be reckless within the new definition. Such cases are likely to be extremely rare. In the absence of any evidence by the defendant that he had performed this mental operation, it seems the judge need not direct the jury about it.'

Unquestionably, *R v Caldwell* was a radical departure from the law as previously understood.

**[48]** The question is: on what grounds did the majority infer that it represented the meaning which Parliament intended? Lord Diplock ([1981] 1 All ER 961 at 964, [1982] AC 341 at 351) pointed out that, in accordance with the long title, the purpose of the 1971 Act was 'to *revise* the law' (he italicised the word 'revise'). Lord Diplock said ([1981] 1 All ER 961 at 965, [1982] AC 341 at 352) that he could 'see no reason why Parliament when it decided to revise the law ... should go out of its way to perpetuate fine and impracticable distinctions ...' This reasoning attributes to Parliament a remedial intent, viz to change the mental element of the offence by including cases of inadvertent wrongdoing.

**[49]** What are the grounds for this assumption? It is true that the 1971 Act revised the law in a number of respects. This is, however, a neutral fact. Apart

from replacing the word 'maliciously' by more modern language there is no indication in s 1, and in the rest of the 1971 Act, that Parliament intended to embark on a revision of the mental element of the offence. No reliance was placed in *R v Caldwell* on any external aids supporting the interpretation. There are none. In its own terms the majority reasoning in *R v Caldwell* rests on fragile foundations.

**[50]** The decisive factor is, however, that there was overwhelming evidence that Parliament did not intend to alter the existing meaning of recklessness in regard to damage to property. That follows from the fact that, as far as the mental element is concerned, Parliament was implementing the Law Commission reports. In plain terms the recommendation of the Law Commission was that subject to replacing 'maliciously' by more contemporary language the mental element of the offence should remain the same. This material was published and was therefore available to the House in *R v Caldwell*: Lord Edmund-Davies explained in outline the effect of it. In his already cited note Professor John Smith described in detail the Law Commission materials which show convincingly there was no intention to change the mental element of the offence. It is unnecessary for me to marshal these materials again. The evidence is all one way.

**[51]** The conclusion is inescapable: *R v Caldwell* adopted an interpretation of s 1 of the 1971 Act which was beyond the range of feasible meanings.

JUSTICE AND POLICY

**[52]** In the case before the House the two boys were 11 and 12 respectively. Their escapade of camping overnight without their parents' permission was something that many children have undertaken. But by throwing lit newspapers under a plastic wheelie-bin they caused £1m of damage to a shop. It is, however, an agreed fact on this appeal that the boys thought there was no risk of the fire spreading in the way it eventually did. What happened at trial is highly significant. The jury were perplexed by the *Caldwell* directions which compelled them to treat the boys as adults and to convict them. The judge plainly thought this approach was contrary to common sense but loyally applied the law as laid down in *R v Caldwell*. The view of the jurors and the judge would be widely shared by reasonable people who pause to consider the matter. The only answer of the Crown is that where unjust convictions occur the judge can impose a lenient sentence. This will not do in a modern criminal justice system. Parliament certainly did not authorise such a cynical strategy.

**[53]** Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society. In 1990 the United Kingdom ratified the United Nations Convention on the Rights of the Child (New York, 20 November 1989; TS 44 (1992); Cm 1976) (the UN convention) which entered into force on 15 January 1992. Article 40(1) provides:

> 'States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and *which takes into account the child's age* and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' (My emphasis.)

This provision imposes both procedural and substantive obligations on state parties to protect the special position of children in the criminal justice system.

For example, it would plainly be contrary to art 40(1) for a state to set the age of criminal responsibility of children at, say, five years. Similarly, it is contrary to art 40(1) to ignore in a crime punishable by life imprisonment, or detention during Her Majesty's pleasure, the age of a child in judging whether the mental element has been satisfied. It is true that the UN convention became binding on the United Kingdom after *R v Caldwell* was decided. But the House cannot ignore the norm created by the UN convention. This factor on its own justified a reappraisal of *R v Caldwell*.

**[54]** If it is wrong to ignore the special characteristics of children in the context of recklessness under s 1 of the 1971 Act, an adult who suffers from a lack of mental capacity or a relevant personality disorder may be entitled to the same standard of justice. Recognising the special characteristics of children and mentally disabled people goes some way towards reducing the scope of s 1 of the 1971 Act for producing unjust results which are inherent in the objective mould into which the *Caldwell* analysis forced recklessness. It does not, however, restore the correct interpretation of s 1 of the 1971 Act. The accepted meaning of recklessness involved foresight of consequences. This subjective state of mind is to be inferred 'by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances' (per Lord Edmund-Davies [1981] 1 All ER 961 at 970, [1982] AC 341 at 358, citing s 8 of the Criminal Justice Act 1967). That is what Parliament intended by implementing the Law Commission proposals.

**[55]** This interpretation of s 1 of the 1971 Act would fit in with the general tendency in modern times of our criminal law. The shift is towards adopting a subjective approach. It is generally necessary to look at the matter in the light of how it would have appeared to the defendant. Like Lord Edmund-Davies I regard s 8 of the 1967 Act, as of central importance. There is, however, also a congruence of analysis appearing from decisions of the House. In *Director of Public Prosecutions v Morgan* [1975] 2 All ER 347, [1976] AC 182 the House ruled that a defence of mistake must be honestly rather than reasonably held. In *Beckford v R* [1987] 3 All ER 425 at 432, [1988] AC 130 at 145 per Lord Griffiths, the House held that self-defence permits a defendant to use such force as is reasonable in the circumstances as he honestly believed them to be. *B (a minor) v Director of Public Prosecutions* [2000] 1 All ER 833, [2000] 2 AC 428 concerned the offence contrary to s 1(1) of the Children Act 1961 (inciting a girl under 14 to commit an act of gross indecency). The House held that the accused's *honest* belief that a girl was over 14 need not be based on reasonable grounds. Lord Nicholls of Birkenhead observed ([2000] 1 All ER 833 at 837, [2000] 2 AC 428 at 462):

> 'Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief.'

To same effect is *R v K* [2001] UKHL 41, [2001] 3 All ER 897, [2002] 1 AC 462 where it was held that while a girl under the age of 16 cannot in law consent to an indecent assault, it is a defence if the defendant honestly believed she was over 16. It is true that the general picture is not entirely harmonious. Duress requires *reasonable* belief (see Lord Lane CJ in *R v Graham* [1982] 1 All ER 801 at 806, [1982] 1 WLR 294 at 300, approved by the House of Lords in *R v Howe* [1987] 1 All ER 771, [1987] AC 417; *R v Martin* [1989] 1 All ER 652). Duress is a notoriously difficult corner of the law. However, in *R v Graham* [1982] 1 All ER 801 at 806,

[1982] 1 WLR 294 at 300 Lord Lane CJ stated that in judging the accused's response the test is:

> '... have the prosecution made the jury sure that a sober person of reasonable firmness, *sharing the characteristics of the defendant,* would not have responded to whatever he reasonably believed [the threatener] said or did by taking part in the [offence].' (My emphasis.)

The age and sex of the defendant (but possibly no other characteristics) are relevant to the cogency of the threat (see *R v Bowen* [1996] 4 All ER 837, [1997] 1 WLR 372). In regard to provocation a wider view of the impact on defendant has prevailed (see *R v Smith* [2000] 4 All ER 289, [2001] 1 AC 146 (by a three to two majority)).

**[56]** These developments show that what Lord Diplock described in *R v Caldwell* [1981] 1 All ER 961 at 966, [1982] AC 341 at 353 as an 'esoteric meaning' of recklessness was also consistent with the general trend of the criminal law.

CONCLUSION ON *CALDWELL*

**[57]** The surest test of a new legal rule is not whether it satisfies a team of logicians but how it performs in the real world. With the benefit of hindsight the verdict must be that the rule laid down by the majority in *R v Caldwell* failed this test. It was severely criticised by academic lawyers of distinction. It did not command respect among practitioners and judges. Jurors found it difficult to understand: it also sometimes offended their sense of justice. Experience suggests that in *R v Caldwell* the law took a wrong turn.

**[58]** That brings me to the question whether the subjective interpretation of recklessness might allow wrongdoers who ought to be convicted of serious crime to escape conviction. Experience before *R v Caldwell* did not warrant such a conclusion. In any event, as Lord Edmund-Davies explained ([1981] 1 All ER 961 at 970, [1982] AC 341 at 358), if a defendant closes his mind to a risk he must realise that there is a risk and, on the evidence, that will usually be decisive. One can trust the realism of trial judges, who direct juries, to guide juries to sensible verdicts and juries can in turn be relied on to apply robust common sense to the evaluation of ridiculous defences. Moreover, the endorsement by Parliament of the Law Commission proposals could not seriously have been regarded as a charter for the acquittal of wrongdoers.

**[59]** In my view the case for departing from *R v Caldwell* has been shown to be irresistible.

**[60]** I agree with the reasons given by Lord Bingham of Cornhill. I have nothing to add to his observations on self-induced intoxication.

DISPOSAL

**[61]** I would also make the orders proposed by Lord Bingham of Cornhill.

**LORD HUTTON.**

**[62]** My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I agree with them, and for the reasons which they give I too would allow this appeal.

**LORD RODGER OF EARLSFERRY.**

[63] My Lords, I have had the privilege of reading the speech of my noble and learned friend Lord Bingham of Cornhill in draft. As I explain below, I was initially doubtful whether it would be proper for your Lordships' House to overrule *R v Caldwell* [1981] 1 All ER 961, [1982] AC 341, especially when it had previously declined an express invitation to do so. In a very different context Scalia J formulated some of the kinds of issues I had in mind in part 1 of his characteristically forthright dissenting opinion in *Lawrence v Texas* 123 S Ct 2472 (2003). But I have reached the clear view that, whatever the intrinsic merits or demerits of the concept of recklessness which Lord Diplock espoused, Parliament did not intend the word 'reckless' in s 1 of the Criminal Damage Act 1971 to bear the meaning he gave it. Moreover, his speech has proved notoriously difficult to interpret and those difficulties would not have ended with any refinements which your Lordships might have made to the decision. Indeed those refinements themselves would almost inevitably have prompted further questions and appeals. In these circumstances the preferable course is to overrule *R v Caldwell*.

[64] There is nothing on the face of the 1971 Act—and Lord Diplock certainly points to nothing—to indicate that in enacting this particular statute Parliament intended to innovate upon the concept of recklessness as it had been understood to apply in English law immediately prior to 1971. So the natural assumption is that Parliament was using the term in its contemporary legal sense. Section 1(1) and (2) correspond precisely to provisions in the draft Bill attached to the Law Commission *Report on Offences of Damage to Property* (1970) (Law Com no 29). Nothing in that report suggests that the Commission had intended their draft Bill to incorporate a new notion of recklessness. Indeed, as Lord Bingham of Cornhill has shown, the indications are the other way. Although in *R v Caldwell* Lord Edmund-Davies referred to the Law Commission report, Lord Diplock did not—perhaps because it was not cited or else on the view that, at most, it would show the meaning that the Law Commission had attached to recklessness and it was up to the judges and no one else to decide what the words in the statute meant. I refer to his well-known speech in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, [1975] AC 591, especially at 834–835 and 636–637 respectively. None the less in this case the Law Commission report (Law Com no 29) at least indicates the scope of the legislative changes in contemplation and, in that way, tends to confirm the interpretation that I would be disposed to adopt in any event.

[65] It is no secret that, for a long time, many of the leading academic writers on English criminal law have been 'subjectivists'. By that I mean, at the risk of gross over-simplification, that they have believed that the criminal law should punish people only for those consequences of their acts which they foresaw at the relevant time. Those who subscribe to that philosophy will tend to approve the concept of recklessness in *R v Cunningham* [1957] 2 All ER 412, [1957] 2 QB 396. The late Professor Glanville Williams and the late Professor John Smith, who were members of the influential Criminal Law Revision Committee, were two of the most distinguished proponents of such views.

[66] Professor Glanville Williams (as well as Edmund-Davies LJ) was also a member of the working party set up by the Law Commission to examine the general principles of the criminal law. In June 1970 they produced *Codification of the Criminal Law: General Principles: The Mental Element in Crime* (Working Paper No 31). And, not surprisingly, on the matter of recklessness it espoused (pp 48–51) the subjectivist standpoint. Three of the five Law Commissioners also sat on the working party. A month after publishing that working paper, the Law

Commission published their report on property offences (Law Com no 29). In these circumstances it would have been surprising, to say the least, if they had intended their draft Bill to do other than incorporate the concept of recklessness that had been developed in *R v Cunningham* and subsequent cases. Sitting in *R v Caldwell* Lord Edmund-Davies was well placed to appreciate all these factors.

**[67]** The same view is reflected, of course, in the definition of recklessness in cl 18(c) of the draft code of criminal law published by the Law Commission in 1989 (*A Criminal Code for England and Wales* (Law Com no 177) vol 1, Report and Draft Criminal Code Bill)). Again this is scarcely surprising since much of the work was done by a team of academic lawyers that included Professor John Smith. It goes without saying that there are powerful arguments in favour of the view which the Law Commission favoured.

**[68]** On the other hand it is equally clear that other views are not only possible but have actually been adopted by English judges at different times over the centuries. Their judgments reveal many strands of thinking (see J Horder 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 113 LQR 95). There is therefore no reason to treat the concept of recklessness expounded in *R v Cunningham* either as being the quintessence of the historic English criminal law on the point or as necessarily providing the best solution in all circumstances. Indeed in *R v Stephenson* [1979] 2 All ER 1198, [1979] QB 695, a case on s 1(1) of the 1971 Act, Geoffrey Lane LJ recognised that the subjective approach was problematical in certain situations. Having made it quite clear that in his view the test of recklessness under the 1971 Act remained subjective and that the knowledge or appreciation of risk of some damage must have entered the defendant's mind, he commented ([1979] 2 All ER 1198 at 1204, [1979] QB 695 at 704):

> 'There is no doubt that the subjective definition of "recklessness" does produce difficulties. One of them which is particularly likely to occur in practice is the case of the person who by self-induced intoxication by drink or drugs deprives himself of the ability to foresee the risks involved in his actions. Assuming that by reason of his intoxication he is not proved to have foreseen the relevant risk, can he be said to have been "reckless"? Plainly not, unless cases of self-induced intoxication are an exception to the general rule. In our judgment the decision of the House of Lords in *Director of Public Prosecutions v Majewski* ([1976] 2 All ER 142, [1977] AC 443) makes it clear that they are such an exception.'

In *R v Caldwell* just the kind of problem envisaged by Geoffrey Lane LJ arose: the defendant said that he was so drunk that it did not occur to him that there might be people in the hotel whose lives might be endangered if he set fire to it. Part of what Lord Diplock did to confront the kind of difficulty identified by Geoffrey Lane LJ was to adopt a wider definition of recklessness that covered culpable inadvertence. In so doing, as the House now holds, he misconstrued the terms of the 1971 Act.

**[69]** It does not follow, however, that Lord Diplock's broader concept of recklessness was undesirable in terms of legal policy. On the contrary, there is much to be said for the view that, if the law is to operate with the concept of recklessness, then it may properly treat as reckless the man who acts without even troubling to give his mind to a risk that would have been obvious to him if he had thought about it. This approach may be better suited to some offences than to others. For example, in the context of reckless driving the House endorsed and re-endorsed a more stringent version (see *R v Lawrence* [1981] 1

All ER 974, [1982] AC 510; *R v Reid* [1992] 3 All ER 673, [1992] 1 WLR 793). I refer in particular to the discussion of the policy issues by Lord Goff of Chieveley in *R v Reid* [1992] 3 All ER 673 at 686–689, [1992] 1 WLR 793 at 808–812. Moreover, the opposing view, that only advertent risk-taking should ever be included within the concept of recklessness in criminal law, seems to be based, at least in part, on the kind of thinking that the late Professor Hart demolished in his classic essay, 'Negligence, *Mens Rea* and Criminal Responsibility' (1961), reprinted in HLA Hart *Punishment and Responsibility* (1968) pp 136–157.

**[70]** Because the decision in *R v Caldwell* involved this legitimate choice between two legal policies, I was initially doubtful whether it would be appropriate for the House to overrule it. An alternative way to allow the appeal by reanalysing Lord Diplock's speech and overruling *Elliott v C (a minor)* [1983] 2 All ER 1005, [1983] 1 WLR 939 might well have been found. But, for the reasons that I have already indicated, I have come to share your Lordships' view that we should indeed overrule *R v Caldwell* and set the law back on the track that Parliament originally intended it to follow. If Parliament now thinks it preferable for the 1971 Act to cover culpably inadvertent as well as advertent wrongdoers, it can so enact. The Law Commission recognised that, if codifying the law, Parliament might wish to adopt that approach (see *A Criminal Code for England and Wales* (1989) (Law Com no 177) vol 2, Commentary on Draft Criminal Code Bill, p 366 (para 8.21), pp 446–447 (para 17.6)).

**[71]** Subject to these comments, I respectfully agree with the speech of Lord Bingham of Cornhill and would allow the appeal and answer the certified question as he proposes.

*Appeal allowed.*

Kate O'Hanlon Barrister.

# D v East Berkshire Community Health NHS Trust

# K and another v Dewsbury Healthcare NHS Trust and another

# K and another v Oldham NHS Trust and another

[2003] EWCA Civ 1151

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, HALE AND LATHAM LJJ

19–21 MAY, 31 JULY 2003

*Practice – Preliminary point of law – Trial of preliminary issue determining no duty of care arising in performance by local authority of its statutory duties to children – Whether exclusion of existence of duty of care as preliminary issue constituting breach of right to fair trial – Human Rights Act 1998, Sch 1, Pt I, art 6.*

*Negligence – Duty to take care – Existence of duty – Children – Local authority – Accusations of child abuse made against parents – Accusations later proving unfounded – Whether duty of care owed to parents and children.*

Each of three appeals before the court involved accusations of abusing a child made against a parent by the professionals concerned for the welfare of that child. All the accusations proved to be unfounded. In each case a parent claimed damages from an NHS trust for psychiatric harm alleged to have been caused by the false accusations or their consequences and in the second case, where the local authority was also a defendant, the child also claimed. The events all took place before the Human Rights Act 1998 came into force. In each case the primary case was advanced in negligence, and preliminary issues were tried, including whether any duty of care was owed to the claimant or claimants. It was common ground that the test to be applied was whether it was 'fair, just and reasonable' to impose such a duty. In each case the court of first instance held that no duty was owed to the parents, applying the principles contained in a decision of the House of Lords in 1995 that a common law duty of care could not be imposed upon a statutory duty as the observance of the common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by a local authority of its statutory duties. In the second case the child was held to have an arguable claim for clinical negligence against the NHS trust but not against the local authority, whose personnel were held to be entitled to the protection of witness immunity. The claimants appealed to the Court of Appeal, and the issues on the appeal were (i) whether the decisions in the trials of preliminary issues violated their rights to a fair trial under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act), since to exclude any duty of care on the part of those involved in making decisions for the protection of children against suspected child abuse was to grant them immunity against liability in negligence,

thus denying the claimants the right to have their claims determined on the facts of the individual cases; (ii) whether subsequent decisions had varied the principles laid down in the 1995 authority relied upon; and (iii) whether the introduction of the 1998 Act had affected the common law principles of the law of negligence. The Convention rights considered included art 3[a], prohibiting torture and inhuman or degrading treatment, and art 8[b], providing the right to respect for private and family life.

**Held** – (1) No violation of art 6 of the convention was involved in the procedure of determining, by way of preliminary issues, whether the test of what was 'fair, just and reasonable', applied with the required respect for case precedent, precluded the existence of a duty of care (see [22], below); *Osman v UK* (1998) 5 BHRC 293, *Z v UK* [2001] 2 FCR 246 considered.

(2) The effect of the authority relied on in the judgments at first instance in each of the instant appeals was now restricted to the proposition that decisions by local authorities whether or not to take a child into care were not reviewable by way of a claim in negligence (see [49], below); *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 disapproved in part; *Barrett v Enfield London BC* [1999] 3 All ER 193, *S v Gloucestershire CC, L v Tower Hamlets London BC* [2000] 3 All ER 346 and *Phelps v Hillingdon London BC, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504 considered.

(3) The effect of the 1998 Act was that it was no longer legitimate to rule that, as a matter of law, no common duty of care was owed to a child in relation to the investigation of child abuse and the initiation and pursuit of care proceedings. Given the obligation of a local authority to respect a child's convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they performed their duties. In the context of suspected child abuse, breach of a duty of care in negligence would frequently also amount to a violation of arts 3 or 8 of the convention although those asserting that wrongful acts or omissions occurred before the 1998 Act came into force would have no claim under that Act. It was possible that there would be factual situations where it was not fair, just or reasonable to impose a duty of care, but each case would fall to be determined on its individual facts. The common law duty of care did not replicate the duty not to violate arts 3 and 8. Liability for breach of that duty and entitlement to compensation could arise in circumstances where the tort of negligence was not made out. However, there were cogent reasons of public policy for concluding that, where consideration was being given to whether the suspicion of child abuse justified taking proceedings to remove a child from the parents, while a duty of care could be owed to the child, no common law duty of care was owed to the parents (see [83]–[87], below).

(4) In the instant appeals a concurrent duty imposed in respect of the parent would conflict with the duties owed to the child. However, in the second appeal, the judge had erred in finding that witness immunity precluded any liability on the part of those employed by the local authority. Accordingly the first and third

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a Article 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

b Article 8, so far as material, provides: 'Everyone has the right to respect for his private and family life, his home and correspondence …'

appeals would be dismissed and the second appeal would be allowed in part (see [96], [99], [104], [109], [110], [116], [117], [124], [127], below); *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 applied; *Darker (suing as personal representative of Docker, decd) v Chief Constable of the West Midlands Police* [2000] 4 All ER 193 considered.

**Notes**

For the right to a fair trial, and for the test for determining a notional duty of care, see 8(2) *Halsbury's Laws* (4th edn reissue) para 134, and 33 *Halsbury's Laws* (4th edn reissue) para 604, respectively.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

**Cases referred to in judgments**

*A-G v Prince* [1998] 1 NZLR 262, NZ CA.
*Ashingdane v UK* (1985) 7 EHRR 528, [1985] ECHR 8225/78, ECt HR.
*B v A-G of New Zealand* [2003] UKPC 61, [2003] 4 All ER 833.
*Barrett v Enfield London BC* [1999] 3 All ER 193, [2001] 2 AC 550, [1999] 3 WLR 79, HL; *rvsg* [1997] 3 All ER 171, [1998] QB 367, [1997] 3 WLR 628, CA.
*Bronda v Italy* (2001) 33 EHRR 4, [1998] ECHR 22430/93, ECt HR.
*Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.
*Darker (suing as personal representative of Docker, decd) v Chief Constable of the West Midlands Police* [2000] 4 All ER 193, [2001] 1 AC 435, [2000] 3 WLR 747, HL.
*E v UK* [2002] 3 FCR 700, ECt HR.
*Elsholz v Germany* [2000] 3 FCR 385, ECt HR.
*Fayed v UK* (1994) 18 EHRR 393, [1994] ECHR 17101/90, ECt HR.
*Fogarty v UK* (2001) 12 BHRC 132, ECt HR.
*Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, [1989] AC 53, [1988] 2 WLR 1049, HL.
*Hokkanen v Finland* [1995] 2 FCR 320, ECt HR.
*Johansen v Norway* (1996) 23 EHRR 33, [1996] ECHR 17383/90, ECt HR.
*Kent v Griffiths* [2000] 2 All ER 474, [2001] QB 36, [2000] 2 WLR 1158, CA.
*Klass v Germany* (1978) 2 EHRR 214, [1978] ECHR 5029/71, ECt HR.
*McMichael v UK* [1995] 2 FCR 718, ECt HR.
*Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435.
*Osman v UK* (1998) 5 BHRC 293, ECt HR.
*P, C and S v UK* [2002] 3 FCR 1, ECt HR.
*Phelps v Hillingdon London BC, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504, [2001] 2 AC 619, [2000] 3 WLR 776, HL.
*Powell v Boladz* (1997) 39 BMLR 35, CA.
*S v Gloucestershire CC, L v Tower Hamlets London BC* [2000] 3 All ER 346, [2001] Fam 313, [2001] 2 WLR 909, CA.
*TP v UK* [2001] 2 FCR 289, ECt HR.
*Venema v Netherlands* [2003] 1 FCR 153, ECt HR.
*W v UK* (1988) 10 EHRR 29, [1987] ECHR 9749/82, ECt HR.
*X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL; *affg* sub nom *M (a minor) v Newham London BC, X and ors (minors) v Bedfordshire CC* [1994] 4 All ER 602, [1995] 2 AC 633, [1994] 2 WLR 554, CA.

*Yousef v Netherlands* [2002] 3 FCR 577, ECt HR.
*Z v UK* [2001] 2 FCR 246, ECt HR.

**Appeals**

*D v East Berkshire Community Health NHS Trust*

The claimant, JD, the mother of M (a child), appealed from the decision of Judge Hale on 6 September 2002 determining certain preliminary issues, summarised at [94], below, in proceedings between the claimant and East Berkshire Community Health NHS Trust. The facts are set out in the judgment of the court.

*K and another v Dewsbury Health Care NHS Trust and another*

The claimants, MAK and his daughter, R (a child), appealed from the decision of Judge Grenfell on 22 September 2002 determining certain preliminary issues, summarised at [107], below, in proceedings between the claimants and Dewsbury Health Care NHS Trust and Kirklees Metropolitan Council. The facts are set out in the judgment of the court.

*K and another v Oldham NHS Trust and another*

The claimants, RK and another, the mother and father of M (a child) appealed from the decision determining certain preliminary issues summarised at [121], below, in proceedings between the claimants and Oldham NHS Trust and Dr Blumenthal. The facts are set out in the judgment of the court.

*Allan Levy QC* and *Scott Donovan* (instructed by *Carter Hodge*) for M's mother.
*Robert Francis QC* and *Angus Moon* (instructed by *Hempsons*) for East Berkshire Community Health NHS Trust.
*Allan Levy QC* and *David Gripton* (instructed by *Levi & Co*) for R and R's father.
*Robert Francis QC* and *Angus Moon* (instructed by *Hempsons*) for Dewsbury Healthcare NHS Trust.
*Edward Faulks QC* and *Alastair Hammerton* (instructed by *Hill Dickinson*) for Kirklees Metropolitan Council.
*Allan Levy QC* and *Mary Ruck* (instructed by *Pannone & Partners*) for M's mother and father.
*Robert Francis QC* and *Angus Moon* (instructed by *Hempsons*) for Oldham NHS Trust and Dr Blumenthal.

*Cur adv vult*

31 July 2003. The following judgment of the court was delivered.

**LORD PHILLIPS OF WORTH MATRAVERS MR.**

INTRODUCTION

[1] These three appeals have been heard together because they have common features and raise common issues. Each involves accusations of abusing a child made against a parent by the professionals concerned for the welfare of that child. In each case the accusations proved to be unfounded. In each case a parent claims damages for psychiatric harm alleged to have been caused by the false accusations or their consequences. In one case the child also claims. In each case the primary case is advanced in negligence. In each case, preliminary issues have been tried,

including whether any duty of care was owed to the claimant or claimants. In each case it has been common ground that the test to be applied is that identified by the House of Lords in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605. In each case the court of first instance has held that no duty was owed, because it was not 'fair, just and reasonable' to impose such a duty, applying the principles laid down by the House of Lords in *X and ors (minors) v Bedfordshire CC* and *M (a minor) v Newham London BC*, so that each claim has been dismissed: see *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633 (*Bedfordshire*). The primary issue in each appeal is whether the decision in *Bedfordshire* is fatal to the claim. There are, however, a number of subsidiary issues.

**[2]** In the first appeal (*D v East Berkshire Community Health NHS Trust*) a mother claims in respect of acute anxiety and distress that she alleges she suffered as a result of being incorrectly accused of suffering from Munchausen Syndrome by Proxy. In her case she was not, in fact, separated from her child. In the second case (*K and another v Dewsbury Health Care NHS Trust and another*) a father and his daughter claim for psychiatric injury and financial loss resulting from unfounded allegations that the father might have sexually abused his daughter, which led to the father being denied access to his daughter for a short period. In the third appeal (*K and another v Oldham NHS Trust and another*), a mother and father claim in respect of psychological distress suffered as a result of unfounded allegations of having inflicted injuries on their daughter, which led to the child being separated from her parents for nearly a year.

THE ISSUES

**[3]** Mr Allan Levy QC, who has appeared for all the appellants, has contended that the decision in each case violates art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). This is the first general issue that we shall consider.

**[4]** Mr Levy contends that the law has developed since the decision in *Bedfordshire* and that we should hold, on the basis of recent authority, that it is 'fair, just and reasonable' to impose a duty of care on the defendants in the circumstances common to each appeal. Whether more recent authority has varied the principles laid down in *Bedfordshire* is the second general issue that we shall consider.

**[5]** Mr Levy submits that there was, in each case, a violation of art 8 of the convention and that the first instance decisions violate art 13. He urges that, in order to avoid these violations, each case should be permitted to go to trial and that the test of negligence that the court should apply is one that provides a remedy for the breach of art 8 that has occurred in each case. The effect of the impact of the convention is the third general issue that we shall consider.

**[6]** Mr Levy submits that, in each case, *Bedfordshire* can be distinguished on the facts. This issue we shall have to consider individually, having regard to the facts of each appeal.

**[7]** In each action, one or more NHS trusts have been sued as defendants. They have been represented by Mr Robert Francis QC. In the *Oldham* case Simon J held that the requirement of 'proximity' laid down by the *Caparo Industries* case was not satisfied. Any duty was owed to the child and there was no room for an additional duty owed to the parents. By a respondents' notice Mr Francis seeks a finding in the other two appeals that there was no proximity between the parent claimants and the NHS defendants. Whether there was a lack

of such proximity is a second issue that we shall have to consider on the facts of each individual case.

[8] In the *Dewsbury* case Judge Grenfell held that the second defendants, the council, were protected by witness immunity. Mr Levy challenges that finding. Mr Francis, for his part, seeks, by respondents' notice, a finding that all the NHS defendants were protected by witness immunity. Whether the defendants are protected by witness immunity is a third issue that we shall have to consider in each case.

THE FIRST GENERAL ISSUE

[9] In advancing his argument in relation to art 6 of the convention, Mr Levy explained that he was seeking to 'resurrect' *Osman v UK* (1998) 5 BHRC 293. His argument based on *Osman*'s case is, as we understand it, as follows. To exclude any duty of care on the part of those involved in making decisions for the protection of children against suspected child abuse is to grant them immunity against liability in negligence. To enable the defendants to invoke the protection of such immunity by way of preliminary issue is to deny the claimants the right to have their claims determined on the facts of the individual cases. This violates their right to a fair trial under art 6. The court should not adopt such an approach.

[10] It is convenient to consider these submissions in the context of the two *Bedfordshire* child abuse cases (*X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633). At this stage we can touch lightly on the facts and the decisions in those cases. In the *Bedfordshire* case five children claimed against a local authority damages for breach of statutory duty and negligence in failing to exercise statutory powers and duties to protect them from parental abuse and neglect. In the *Newham* case a child and her mother claimed damages for breach of statutory duty and negligence against a local authority, an area health authority and a consultant psychiatrist employed by the latter. The alleged negligence included failure competently to investigate the identity of a man who had sexually abused the child, with the result that the child was unnecessarily removed from the mother and both suffered psychiatric injury. Both actions were struck out on the basis that they disclosed no reasonable cause of action, and appeals were dismissed.

[11] The House of Lords held that both actions had properly been struck out. The relevant statutes imposed no duty in favour of the claimants. As for the claims in negligence, as a matter of public policy it was not just and reasonable to impose a common law duty of care, either to children or to their parents, on those entrusted with the difficult and delicate task of deciding whether action was necessary to protect children from suspected abuse.

[12] The decisions in *Bedfordshire* were followed by the decision of the European Court of Human Rights in *Osman*'s case. In that case also, a statement of claim had been struck out as disclosing no reasonable cause of action. In *Osman*'s case the applicants complained that their rights under art 6 of the convention had been infringed. They had brought an action in the United Kingdom against the police alleging negligence in the prevention and pursuit of crime. The Court of Appeal struck out the proceedings on the ground that they disclosed no reasonable cause of action. This was on the basis that it was a clearly established principle of the law of negligence that the police owed no duty of care to individual citizens in relation to the vigour with which they carried out their

duties of prevention and detection of crime: see *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, [1989] AC 53.

**[13]** The Strasbourg court upheld the applicants' claim. The reasoning of the court appears from its judgment (at 327 (para 139)):

> 'On that understanding the court considers that the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in *Hill v Chief Constable of West Yorkshire*. In the view of the court the assertion of that right by the applicants is in itself sufficient to ensure the applicability of art 6(1) of the convention.'

**[14]** This decision perplexed common law judges and jurists. In *Barrett v Enfield London BC* [1999] 3 All ER 193 at 199, [2001] 2 AC 550 at 559–560 Lord Browne-Wilkinson explained the difficulty that he had in following the reasoning of the court:

> 'Having so defined the ambit of art 6, the Strasbourg court held that there was in *Osman*'s case a breach of such right of access to the English court, such breach lying in the application of a blanket exclusionary rule which excludes all claims against the police for negligent failure to investigate or protect from crime. In the view of the Strasburg court, apparently, the applicability of such exclusionary rule has to be decided afresh in each individual case. If this is not done then it is impossible to determine whether the public interest in an efficient police force is or is not proportionate to the seriousness of the harm suffered by the plaintiff in the individual case (see 5 BHRC 293 at 329 (para 150)). On these grounds, the Strasbourg court held that the English court had breached art 6 by striking out the claim made by the Osmans against the police without hearing any evidence by reference to which the proportionality of the rule in that particular case could be judged. The court said that the police had been granted a "blanket immunity" which was disproportionate and therefore an unjustifiable restriction on the Osmans' right of access to the court. The Osmans were entitled to have their case against the police determined in deserving cases (see 5 BHRC 293 at 329–330 (paras 151, 152)). The problems in applying this reasoning to the English law of negligence are many and various. For example, the correct answer to the following points is not immediately apparent. (1) Although the word "immunity" is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence. (2) In a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, eg some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases. In all these cases and many others the view has been taken that the proper performance of the defendant's primary functions for the benefit of society

as a whole will be inhibited if they are required to look over their shoulder to avoid liability in negligence. In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered. (3) In English law, questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company (see *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605), that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case.'

**[15]** *Osman*'s case led to an understandable reluctance on the part of the English courts in *Barrett*'s case and other cases to use the striking out procedure, as we shall show when we come to address the second issue. Lord Woolf MR commented on this in *Kent v Griffiths* [2000] 2 All ER 474, [2001] QB 36. He went on to observe ([2000] 2 All ER 474 at 485, [2001] QB 36 at 51 (para 38)):

'In so far as *Osman*'s case underlined the dangers of a blanket approach so much the better. However, it would be wrong for the *Osman* decision to be taken as a signal that, even when the legal position is clear and an investigation of the facts would provide no assistance, the courts should be reluctant to dismiss cases which have no real prospect of success. Courts are now encouraged, where an issue or issues can be identified which will resolve or help resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. There is no question of any contravention of art 6 of the ECHR in so doing. Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although a strike-out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law.'

**[16]** Four of the five unsuccessful claimants in *Bedfordshire* took their case to Strasbourg: see *Z v UK* [2001] 2 FCR 246. They alleged violation of arts 3 and 13 but also, relying on *Osman*'s case, of art 6. The Commission expressed the view that there had been a breach of art 6, but the United Kingdom succeeded in persuading the court that this was not so. In reviewing the English law of negligence the court quoted from the passage in the speech of Lord Browne-Wilkinson in *Barrett*'s case that we have set out above, and commented (at 264 (para 68)):

'The striking out procedure, now contained in Pt 3.4(2) of the Civil Procedure Rules in force since 1999, is regarded as an important feature of English civil procedure, performing the function of securing speedy and effective justice, inter alia by allowing it to be decided promptly which issues need full investigation and trial and disposing summarily of the others. By

means of this procedure, it can be determined at an early stage, with minimal cost to the parties, whether the facts as pleaded reveal a claim existing in law.' a

[17] The court considered the alleged breach of art 6 at length and concluded that no violation had occurred. The most material passage in the lengthy reasoning of the court is to be found in the following paragraphs (at 271): b

'100. The applicants, and the Commission in its report, relied on *Osman*'s case as indicating that the exclusion of liability in negligence, in that case concerning the acts or omissions of the police in the investigation and prevention of crime, acted as a restriction on access to court. The Court considers that its reasoning in *Osman*'s case was based on an understanding c of the law of negligence (see, in particular, ((1998) 5 BHRC 293 at 327 (paras 138, 139)) which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably the House of Lords. The Court is satisfied that the law of negligence as developed in the domestic courts since the case of *Caparo Industries plc v Dickman* ([1990] 1 All ER 568, [1990] 2 AC 605) and as recently analysed in the case of *Barrett* includes the d fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case does not disclose the operation of an immunity. In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing e the substantive right of action in domestic law. There was no restriction on access to court of the kind contemplated in [*Ashingdane v UK* (1985) 7 EHRR 528].

101. The applicants may not therefore claim that they were deprived of any right to a determination on the merits of their negligence claims. Their f claims were properly and fairly examined in light of the applicable domestic legal principles concerning the tort of negligence. Once the House of Lords had ruled on the arguable legal issues that brought into play the applicability of art 6(1) of the Convention (see paras 87–89 above), the applicants could no longer claim any entitlement under art 6(1) to obtain any hearing concerning the facts. As pointed out above, such a hearing would have served no g purpose, unless a duty of care in negligence had been held to exist in their case. It is not for this Court to find that this should have been the outcome of the striking out proceedings since this would effectively involve substituting its own views as to the proper interpretation and content of domestic law. h

102. It is none the less the case that the interpretation of domestic law by the House of Lords resulted in the applicants' case being struck out. The tort of negligence was held not to impose a duty of care on the local authority in the exercise of its statutory powers. Their experiences were described as "horrific" by a psychiatrist (see para 40 above) and the Court has found that j they were victims of a violation of art 3 (see para 74 above). Yet the outcome of the domestic proceedings they brought is that they, and any children with complaints such as theirs, cannot sue the local authority in negligence for compensation, however foreseeable—and severe—the harm suffered and however unreasonable the conduct of the local authority in failing to take steps to prevent that harm. The applicants are correct in their assertions that

a the gap they have identified in domestic law is one that gives rise to an issue under the Convention, but in the Court's view it is an issue under art 13, not art 6(1).'

**[18]** The two claimants in *M (a minor) v Newham London BC* also made an application to the Strasbourg court: see *TP v UK* [2001] 2 FCR 289. They alleged breaches of arts 8 and 13 of the convention, and also of art 6. The court rejected b the claim of breach of art 6 for similar reasons to those advanced in *Z v UK*.

**[19]** On the face of it, these decisions of the European Court would seem fatal to the contention that the approach adopted by each court in the appeals before us infringed art 6. Mr Levy, however, in support of that contention, referred us to the analysis of the relevant Strasbourg jurisprudence made by Lord Walker of c Gestingthorpe in *Matthews v Ministry of Defence* [2003] UKHL 4 at [130]–[140], [2003] 1 All ER 689 at [130]–[140], [2003] 1 AC 1163.

**[20]** Lord Walker referred to the decision of the Strasbourg court in *Fayed v UK* (1994) 18 EHRR 393. In that case the Fayed brothers contended that the defence of qualified privilege, which defeated their claim in a libel action, was a violation d of art 6. The court observed (at 429 (para 65)):

> 'Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. e In the latter kind of case Article 6(1) may have a degree of applicability. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6(1) a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1)—namely that civil claims must be capable of being submitted to f a judge for adjudication—if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.'

The court added (at 430 (para 67)):

g

> 'It is not always an easy matter to trace the dividing line between procedural and substantive limitations of a given entitlement under domestic law. It may sometimes be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy.'

h

**[21]** The court repeated these observations in *Fogarty v UK* (2001) 12 BHRC 132. This led Lord Walker to remark ([2003] 1 All ER 689 at [140]): 'The uncertain shadow of *Osman v UK* still lies over this area of the law.'

**[22]** We do not consider that the shadow of *Osman v UK* (1998) 5 BHRC 293 stretches far enough to obscure the position in the appeals under consideration. j They do not concern an area where it is difficult to draw a line between procedural and substantive rules of law. They are concerned with the application of a fundamental principle of our common law of negligence. In performing their accepted function of tailoring the law of negligence to new factual situations, the courts will not recognise a duty of care unless it is 'fair, just and reasonable' that such a duty should exist: see *Caparo Industries plc v Dickman* [1990] 1 All ER 568,

[1990] 2 AC 605. The procedure that has given rise to these appeals involves determining, by way of preliminary issues, whether the test of what is 'fair, just and reasonable', applied with that respect for case precedent which our law requires, precludes the existence of a duty of care, even if all the facts alleged by the claimants are established. Those preliminary issues have reached the Court of Appeal and may well reach the House of Lords. No violation of art 6 is involved in this procedure, as the Strasbourg court expressly recognised in *Z v UK* and *TP v UK*.

**[23]** For these reasons Mr Levy does not succeed on the first issue. The judgments appealed against involve no violation of art 6.

THE SECOND ISSUE

**[24]** We now turn to consider whether, as Mr Levy submits, subsequent decisions have varied the principles laid down by *Bedfordshire*. It is necessary at the outset to identify what was decided in *Bedfordshire*.

*What did the Bedfordshire cases decide?*

**[25]** In the *Bedfordshire* cases (*X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633) no less than five appeals were heard together. It is convenient to consider them in two groups—the child abuse cases (the *Bedfordshire* case and the *Newham* case) and the educational cases (the *Dorset* case, the *Hampshire* case and the *Bromley* case).

The child abuse cases

**[26]** In the *Bedfordshire* case five children brought claims, which included claims for damages in negligence, against the council for failing to take action to prevent them from suffering parental abuse and neglect. In the *Newham* case a child and her mother brought claims, which included claims for damages in negligence against the local authority, the area health authority and a consultant psychiatrist employed by the latter. The relevant allegations were that the authority had failed to conduct with due care its statutory duty to investigate allegations of child abuse, with the result that the mother's cohabitee was wrongfully identified as the abuser. As a result of this the child was removed from the mother and placed in foster care. Both mother and daughter claimed that they had sustained psychiatric injury as a result of this.

**[27]** Lord Browne-Wilkinson gave the leading speech. The relevant part is that in which he considered whether, in the course of carrying out its statutory duties, the local authority had, through its employees, brought about such a relationship with the plaintiffs as to give rise to a duty of care at common law. In this context, he remarked ([1995] 3 All ER 353 at 371, [1995] 2 AC 633 at 739):

> '... the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done ... in my judgment, a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.'

[28] Having regard to this comment it may be helpful to refer to Lord Browne-Wilkinson's summary of the relevant statutory provisions of his speech ([1995] 3 All ER 353 at 376–377, [1995] 2 AC 633 at 744–746):

> 'Since 1932 there has been legislation designed by Parliament to provide protection for children in need of care and protection. The first statute directly relied upon in the abuse cases is the Children and Young Persons Act 1969. Section 1 provided that a court could make a care order in care proceedings if satisfied, inter alia, that the child was being neglected or ill treated. Under s 2(1) a duty was imposed on the local authority which received information "suggesting that there are grounds for bringing care proceedings" to cause inquiries to be made. Section 2(2) provided: "If it appears to a local authority that there are grounds for bringing care proceedings in respect of a child or young person who resides or is found in their area, it shall be the duty of the authority to exercise their power under the preceding section to bring care proceedings in respect of him ..." Sections 1 and 2 of the Child Care Act 1980 provided, so far as relevant:
>
> > "**1.**—(1) It shall be the duty of every local authority to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care under this Act or to bring children before a juvenile court ...
> >
> > **2.**—(1) Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen ... (b) that his parents ... are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing; and (c) in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child, it shall be the duty of the local authority to receive the child into their care under this section."
>
> Section 76(1)(a) gave the Secretary of State power to direct an inquiry in relation to the child care services. Those were the only directly relevant statutory duties in force during the events complained of in the *Newham* case. The Children Act 1989 came into force on 14 October 1991 and is therefore relevant in relation to the later stages of the *Bedfordshire* case. Part III of the Act includes s 17(1) and (2), which provide as follows:
>
> > "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—(a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.
> >
> > (2) For the purpose principally of facilitating the discharge of their duty under this section, every local authority shall have the specific duties and powers set out in Part I of Schedule 2."
>
> Paragraphs 1(1) and 4(1) of Pt 1 of Sch 2 provide:

"1.—(1) Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area.

4.—(1) Every local authority shall take reasonable steps, through the provision of services under Part III of this Act, to prevent children within their area suffering ill-treatment or neglect."

Part III of the Act includes s 20(1), which provides:

"(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of ... (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

In Pt V of the Act, s 47(1) and (8) provides:

"(1) Where a local authority ... (b) have reasonable cause to suspect a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such inquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

(8) Where, as a result of complying with this section, a local authority conclude that they should take action to safeguard or promote the child's welfare they shall take that action (so far as it is both within their power and reasonably practicable for them to do so)."

Amongst the steps the local authority can take to safeguard the child's welfare is to apply to the court for a care order under s 31. If a care order is made, the local authority is under a duty to receive the child into its care.'

**[29]** Lord Browne-Wilkinson went on to refer to statutory guidance in relation to the performance of these statutory duties which emphasised—

'the importance in this field of inter-disciplinary and inter-agency links and the need for a close working relationship between "social service departments, the police service, medical practitioners, community health workers, the education service and others who share a common aim to protect the child at risk".' (See [1995] 3 All ER 353 at 378, [1995] 2 AC 633 at 746–747.)

**[30]** Lord Browne-Wilkinson recorded ([1995] 3 All ER 353 at 380, [1995] 2 AC 633 at 749):

'The local authority accepts that they could foresee damage to the plaintiffs if they carried out their statutory duties negligently and that the relationship between the authority and the plaintiffs is sufficiently proximate [to give rise to a duty of care].'

He held, however, that there were special considerations for concluding that it was not just and reasonable to impose such a duty.

**[31]** Those reasons were summarised by May LJ in *S v Gloucestershire CC, L v Tower Hamlets London BC* [2000] 3 All ER 346 at 361, [2001] Fam 313 at 329–330 and we shall adopt his summary:

'(1) A common law duty of care would cut across the whole statutory system set up for the protection of children at risk. This is

inter-disciplinary, involving the participation of the police, educational bodies, doctors and others. It would be almost impossible to disentangle the respective liability of each for reaching a decision found to be negligent. (2) The task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. (3) If there were potential liability for damages, it might well mean that local authorities would adopt a more cautious and defensive approach to their duties. (4) The relationship between the social worker and the child's parents is often one of conflict. This would be likely to breed ill feeling and often hopeless litigation which would divert money and resources away from the performance of the social service for which they were provided. (5) There were other remedies for maladministration of the statutory system for the protection of children in statutory complaints procedures and the power of the local authorities ombudsman to investigate cases. (6) The development of novel categories of negligence should proceed incrementally and by analogy with decided categories. There were no close such analogies. The court should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrong doings of others.'

[32] Lord Browne-Wilkinson went on to consider whether the individual social workers and psychiatrists involved owed individual duties of care to the claimants. He concluded that they did not. His reasoning appears in the following passages of his speech ([1995] 3 All ER 353 at 383, 384, [1995] 2 AC 633 at 752, 753, 754):

'The social workers and the psychiatrists were retained by the local authority to advise the local authority, not the plaintiffs. The subject matter of the advice and activities of the professionals is the child. Moreover, the tendering of any advice will in many cases involve interviewing and, in the case of doctors, examining the child. But the fact that the carrying out of the retainer involves contact with and a relationship with the child cannot alter the extent of the duty owed by the professionals under the retainer from the local authority ... In my judgment in the present cases, the social workers and the psychiatrist did not, by accepting the instructions of the local authority, assume any general professional duty of care to the plaintiff children. The professionals were employed or retained to advise the local authority in relation to the well-being of the plaintiffs but not to advise or treat the plaintiffs ... Even if, contrary to my view, the social workers and psychiatrist would otherwise have come under a duty of care to the plaintiffs, the same considerations which have led me to the view that there is no direct duty of care owed by the local authorities apply with at least equal force to the question whether it would be just and reasonable to impose such a duty of care on the individual social workers and the psychiatrist.'

The educational cases

[33] The educational cases involved claims against local authorities for negligently failing to identify that children had special educational needs. Lord Browne-Wilkinson held that the education authorities owed no relevant duty of care to children in the performance of their duties under the Education Acts 1944–1981, but that individual employees of the authorities might be in such a

relationship with a child as to owe a common law duty of care, breach of which would render the authority vicariously liable.

*Subsequent decisions*

[34] A number of relevant decisions have been given since *Bedfordshire*, including two in the House of Lords. In neither of these did the House of Lords purport to depart from the decision in *Bedfordshire*, and this puts difficulties in Mr Levy's way when seeking to persuade us that 'the law has moved on' since *Bedfordshire*. At the same time, it is always possible for the House of Lords to reduce the impact of a previous decision by distinguishing it or confining it narrowly to its particular facts, and it is necessary to consider whether this has occurred in relation to the approach to child abuse cases.

[35] In *Barrett v Enfield London BC* [1999] 3 All ER 193, [2001] 2 AC 550 the claimant, who had been in the care of the defendant local authority under a care order between the ages of ten months and 17 years claimed to have been caused psychological and psychiatric problems as a result of the negligent way that the authority had cared for him. It was alleged that both the local authority and the social workers employed by it, for whom it was vicariously liable, had been in breach of the common law duty of care to the plaintiff in the exercise of the local authority's functions under the Children Act 1948, the Children and Young Persons Act 1969 and the Child Care Act 1980. The claim had been struck out as disclosing no reasonable cause of action, and this decision had been upheld by the Court of Appeal, purporting to apply *Bedfordshire*. The House of Lords reversed the decision.

[36] *Barrett*'s case was exhaustively analysed by May LJ in *S*'s case and we do not propose to repeat that exercise. We shall simply summarise the reasoning of the House of Lords. There are two strands to this. In the first place, the House of Lords held that the factual situation in *Barrett*'s case was significantly different from that in *Bedfordshire*. This was indeed the submission in that case of Mr Levy, who appeared for the claimant (see [2001] 2 AC 550). Lord Slynn of Hadley, who gave the leading speech, considered the factors that had led the House in *Bedfordshire* to conclude that it was not just and reasonable to impose on the local authority a duty of care. He commented ([1999] 3 All ER 193 at 208, [2001] 2 AC 550 at 568–569):

> 'Whilst not casting doubt on the validity of these factors in the context of the investigations, or the steps which it was said should have been taken, in those cases of child abuse and neglect of educational needs, it does not seem to me that they necessarily have the same force separately or cumulatively in the present case. Thus, although once a child is in care, there may well be co-operation between different social welfare bodies, the responsibility is that of the local authority and its social and other professional staff. The decision to remove the child from its home is already taken and the authority has statutory powers in relation to the child which do not necessarily involve the exercise of the kind of discretion involved in taking a child from its family into care. As to the likelihood of an authority being over-cautious, I am of the same opinion as Evans LJ in the Court of Appeal in this case: "I would agree that what is said to be a 'policy' consideration, namely that imposing a duty of care might lead to defensive conduct on the part of the person concerned and might require him to spend time or resources on keeping full records or otherwise

providing for self-justification, if called upon to do so, should normally be a factor of little, if any, weight. If the conduct in question is of a kind which can be measured against the standards of the reasonable man, placed as the defendant was, then I do not see why the law in the public interest should not require those standards to be observed." (See [1997] 3 All ER 171 at 181, [1998] QB 367 at 380.) Nor do I think that the remedies accepted to be available in *X and ors (minors) v Bedfordshire CC* are likely to be as efficacious as the recognition by the court that a duty of care is or may be owed at common law. I agree with Bingham MR in his dissenting judgment in the Court of Appeal in *X and ors (minors) v Bedfordshire CC* [1994] 4 All ER 602 at 619, [1995] 2 AC 633 at 662: "I cannot accept, as a general proposition, that the imposition of a duty of care makes no contribution to the maintenance of high standards." In summary *X and ors (minors) v Bedfordshire CC* establishes that decisions by local authorities whether or not to take a child into care with all the difficult aspects that involves and all the disruption which may come about are not ones which the courts will review by way of a claim for damages in negligence, though there may be other remedies by way of judicial review or through extra judicial routes such as the ombudsman. The question in the present case is different, since the child was taken into care; it is therefore necessary to consider whether any acts or omissions and if so what kind of acts or omissions can ground a claim in negligence. The fact that no completely analogous claim has been accepted by the courts previously points to the need for caution and the need to proceed "incrementally and "by analogy with decided cases".'

**[37]** The speech of Lord Hutton had a passage to like effect ([1999] 3 All ER 193 at 227–229, [2001] 2 AC 550 at 588–590).

**[38]** The second strand in the reasoning was that it was only in the clearest case in the type of matter under consideration that a claim should be struck out as disclosing no cause of action without considering the material facts: see [1999] 3 All ER 193 at 213, [2001] 2 AC 550 at 574 per Lord Slynn. Lord Browne-Wilkinson referred expressly to *Osman v UK* (1998) 5 BHRC 293 in the passage that we cited earlier. Lord Slynn did not, but we have no doubt that he had the effect of that decision in mind.

**[39]** The effect of *Barrett*'s case was considered by the Court of Appeal in *S*'s case. Two appeals were heard together. Each was by a claimant who alleged that a local authority had been negligent in leaving them in the care of foster parents who were sexually abusing them. At first instance each case had been struck out as disclosing no cause of action. The Court of Appeal reversed this result in one case. In the other they gave summary judgment in favour of the defendant under CPR 24.2 on the ground that the claim had no real prospect of success.

**[40]** In the leading judgment, May LJ set out the strands of the law to be derived from *Barrett*'s case (see [2000] 3 All ER 346 at 369–370, [2001] Fam 313 at 338–339). The following passage of his judgment is particularly relevant:

> 'It is clear from these principles that in an ordinary case a local authority defendant is unlikely to establish a defence which relies on a blanket immunity. There would be a blanket immunity for this purpose if it were decided without reference to particular facts that all cases which have certain basic characteristics were not justiciable; or that in every case with certain

characteristics it was not just or reasonable to impose a duty of care. Thus it seems to me that it would be incorrect to say, as counsel for the local authorities were inclined to submit in appeals before this court, that cases which may be labelled as child abuse cases are bound to fail as a class. The "child abuse cases" was no more than a convenient label under which *X and ors (minors) v Bedfordshire CC* and *M (a minor) v Newham London BC* travelled. Remembering always that the critical question is a composite one which embraces the alleged duty of care and its breach in the context of the damage alleged to have been caused, the court has to consider the nature of the actions and decisions of the local authority which are said to have been negligent. From this it may be seen that a decision whether or not to take a child said to have been abused away from its natural parents and into care may often be acutely difficult. But many of the decisions about care and upbringing of a child once he or she has been taken into care, difficult though they may be, may not have the acute complications, strains and conflicts identified in *X and ors (minors) v Bedfordshire CC*.'

**[41]** While in this passage, May LJ distinguished *Bedfordshire*, he did so in a way which came close to suggesting that its effect should be confined to its own particular facts. May LJ then referred to the fact that the Commission in *Z v UK* [2001] 2 FCR 246 had concluded that there had been, in that case, a violation of art 6. He commented ([2000] 3 All ER 346 at 371, [2001] Fam 313 at 340):

'This reinforces my reading of *Barrett*'s case to the effect that it is unlikely that claims of the kind presently before this court will be seen as non-justiciable or ones where it is not just and reasonable to impose a duty of care without a proper examination of the individual facts.'

**[42]** In *Phelps v Hillingdon London BC, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504, [2001] 2 AC 619 four appeals were heard together by a Committee of seven members of the House of Lords. In each the complainant contended that the local education authority had negligently failed to make proper provision for his or her special educational needs. The cases were advanced both on the basis that the education authority was vicariously liable for breaches of a duty of care owed by the individual teachers or other professionals and on the basis that the education authority was in breach of a duty of care owed directly by the authority.

**[43]** It is of interest that counsel for the claimants argued that the decision in *Bedfordshire* that local education authorities could be under no duty of care should be departed from in that it had the effect of conferring a blanket immunity and was therefore inconsistent with *Osman*'s case as interpreted in *Barrett*'s case.

**[44]** Speeches were delivered by Lord Slynn, Lord Nicholls of Birkenhead and Lord Clyde. Lord Jauncey of Tullichettle agreed with all of these and Lord Lloyd of Berwick, Lord Hutton and Lord Millett agreed with the speeches of Lord Slynn and Lord Clyde.

**[45]** Lord Slynn held that it was arguable that the individual professionals concerned with the claimants owed them a duty of care, for breach of which the authorities were vicariously liable. He observed ([2000] 4 All ER 504 at 517, [2001] 2 AC 619 at 653):

> 'I accept that, as was said in *X (minors) v Bedfordshire CC*, there may be cases where to recognise such a vicarious liability on the part of the authority may so interfere with the performance of the local education authority's duties that it would be wrong to recognise any liability on the part of the authority. It must, however, be for the local authority to establish that: it is not to be presumed and I anticipate that the circumstances where it could be established would be exceptional.'

He added ([2000] 4 All ER 504 at 518, [2001] 2 AC 619 at 654):

> 'But where an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that the parents acting for the child and the teachers will follow that advice, prima facie a duty of care arises.'

**[46]** So far as a direct claim in negligence against the education authority was concerned, Lord Slynn differed from *Bedfordshire* in that he saw no reason of principle why such a claim should never be possible. He held ([2000] 4 All ER 504 at 522, [2001] 2 AC 619 at 658):

> 'Since the authority can only act through its employees or agents, and if they are negligent vicarious liability will arise, it may rarely be necessary to invoke a claim for direct liability. After the argument in these cases, I do not, however, accept the absolute statement that an education authority "owe[s] no common law duty of care in the exercise of the powers ... relating to children with special educational needs" (see [1995] 3 All ER 353 at 392, [1995] 2 AC 633 at 762) under the 1981 Act. That issue, however, as I have said does not fall for decision in Pamela's case. I would accordingly allow the appeal and restore the order of Garland J.'

**[47]** Lord Nicholls left open the question of whether Lord Browne-Wilkinson had been correct in *Bedfordshire* to hold that an education authority owes no common law duty of care in the exercise of powers and discretions relating to children with special educational needs conferred on it by the Education Act 1981 (see [2000] 4 All ER 504 at 531, [2001] 2 AC 619 at 668).

**[48]** Lord Clyde also found that there were strong grounds for arguing that the individual professionals involved owed the children a duty of care, breach of which would result in the education authorities becoming vicariously liable. He too left open the question of whether education authorities could owe a direct duty of care to the children. He made the following comment in relation to one of the factors that had led Lord Browne-Wilkinson to hold that it was not just and reasonable to impose a duty of care in the child abuse cases ([2000] 4 All ER 504 at 537, [2001] 2 AC 619 at 674):

> 'Another circumstance which may give rise to difficulty in the present context is that there may be a multi-disciplinary unit concerned in the giving of the advice. But that is a practical problem which cannot constitute a legal bar on a claim. Even where such a situation exists it should be possible to disentangle the relevant parts played by particular individuals and identify where the alleged negligence occurred.'

A little later, however, he commented:

'The distinction noted by Lord Browne-Wilkinson in *X (minors) v Bedfordshire CC* [1995] 3 All ER 353 at 393, [1995] 2 AC 633 at 763–764 is drawn between education cases and child abuse cases. In the former case it may more readily be concluded that the involvement of the parents is both consistent with and supports the conclusion that a duty of care existed through them to the child. In the latter, despite the general intention that all the interested parties should work together, the opportunity for conflict between the parents and the professional advisers may be far greater than in the educational context.'

*The effect of the decisions*

**[49]** These decisions significantly restrict the effect of *Bedfordshire*. So far as the education authority cases are concerned, doubt was cast in *Phelps'* case on the proposition that an education authority owes no duty of care to children when exercising powers and discretions under the 1981 Act. So far as child abuse cases are concerned, much of the reasoning advanced by Lord Browne-Wilkinson to justify holding that there was no duty of care was called into question. Lord Slynn in *Barrett's* case stated that *Bedfordshire* established that decisions by local authorities whether or not to take a child into care were not reviewable by way of a claim in negligence. We consider that the effect of *Barrett's* case and the other decisions that we have considered above is to restrict the effect of *Bedfordshire* to that core proposition.

*New Zealand decisions*

**[50]** In *A-G v Prince* [1998] 1 NZLR 262 a child and his mother brought claims in negligence against the Crown in relation to the manner in which a child welfare officer had prepared reports which had led to the adoption of the child by unsatisfactory adoptive parents. Proximity was conceded but the Crown sought to have the claim struck out on the grounds that it disclosed no cause of action in that, for reasons of policy, no duty of care was owed. The decision in *Bedfordshire* was relied upon.

**[51]** The New Zealand Court of Appeal declined to strike out the claim. In the following passage the majority of the court distinguished *Bedfordshire* (at 284–285):

'In the *Bedfordshire* case Lord Browne-Wilkinson ([1995] 3 All ER 353 at 371, [1995] 2 AC 633 at 739) emphasised that the question whether there is a common law duty, and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. In the various respects we have been discussing the Children and Young Persons Act 1974 is clearly distinguishable from the statutes before the House of Lords in the *Bedfordshire* case and the statutes under consideration in the large number of cases (but few in the child protection field) canvassed in argument. Little is to be gained from a point-by-point comparison. Also, the rescue cases are not comparable because in those cases any statutory framework was very different from the 1974 Act. There are other policy considerations to be considered although we would not weigh them as heavily in this case as the scheme and policy of the 1974 Act. First, the difficulty and delicacy of the social worker's task and its judgmental nature are relevant. Intrusion into the family has been handled with tact in the interests of the child or young person. The social worker must also have

regard to the advantages of not disrupting the family environment and to the advantages and disadvantages of other options for the care of the young person. Clearly a plaintiff would have difficulty in establishing that an assessment made by a social worker fell outside the bounds sanctioned by professional opinion. Nevertheless considerations of that kind cannot absolve the department and social workers from the responsibility of considering and responding to specific complaints with professional skill and care. Next, the Solicitor-General submitted that the imposition of a duty would or could cause the department and social workers to adopt a more cautious and defensive approach to their duties. He drew our attention to a considerable body of professional literature on that point and to the recognition of it in the *Bedfordshire* case (see also *Barrett v Enfield London BC* ([1997] 3 All ER 171 at 178–179, 181, [1998] QB 367 at 377, 380)). But like lawyers and doctors, social workers are professionals. At that triggering step (and at other steps) they should be expected to have shouldered willingly a standard of reasonable skill and care that their private sector counterparts were expected to discharge. And in the absence of any data as to potential claims based on the roles and responsibilities of the department and social workers under the 1974 Act, which was replaced eight years ago by a very different legislative scheme, it would be unwise to give any particular weight to the resource implications of allowing for a common law duty of care. Finally, and as pointing against the imposition of a duty, there are the obvious difficulties of reaching conclusions as to causation and damages. Clearly any such claims would be very difficult to establish. That in itself cannot, we think, be adequate justification for ruling out the possibility of any claim for negligence whatever the circumstances. For these reasons, on the pleadings as they stand, we would not strike out the cause of action in negligence.'

**[52]** It is apparent that, while there were grounds for distinguishing *Bedfordshire*, some of the policy considerations which weighed with Lord Browne-Wilkinson did not carry the same weight with the Court of Appeal.

**[53]** The decision in *Prince*'s case lay at the heart of an appeal to the Privy Council in *B v A-G of New Zealand* [2003] UKPC 61, [2003] 4 All ER 833. The Court of Appeal had struck out a claim by a father and his two daughters against a social worker, a clinical psychologist, and the Attorney General, sued on behalf of the Minister of Social Welfare and the Department of Social Welfare. The claim was for negligence in the investigation of the suspected abuse of the daughters by their father, with the consequence that the daughters were removed from their father and placed with foster parents. The decision of the Court of Appeal preceded that in *Prince*'s case, and the Court of Appeal was much influenced by *Bedfordshire*. Before the Privy Council *Prince*'s case was not challenged. The issue was whether it could be distinguished.

**[54]** The Privy Council concluded that, as far as the daughters were concerned, there was no basis upon which *Prince*'s case could validly be distinguished. Their claims were permitted to proceed. Different considerations applied in the case of the father. The court said ([2003] UKPC 61 at [30], [2003] 4 All ER 833 at [30]):

'... their Lordships consider no common law duty of care was owed to the father. He stands in a very different position. He was the alleged perpetrator

> of the abuse. In an inquiry into an abuse allegation the interests of the alleged perpetrator and of the children as the alleged victims are poles apart. Those conducting the inquiry must act in good faith throughout. But to impose a common law duty of care on the department and the individual professionals in favour of the alleged victims or potential victims and, at one and the same time, in favour of the alleged perpetrator would not be satisfactory. Moreover, a duty of care in favour of the alleged perpetrator would lack the juridical basis on which the existence of a common law duty of care was largely founded in *Prince*'s case. The decision in *Prince*'s case rests heavily on the feature that the duty imposed on the Director-General by s 5(2)(a) of the 1974 Act is for the benefit of the particular child. Self-evidently this statutory duty was not imposed for the benefit of alleged perpetrators of abuse. To utilise the existence of this statutory duty as the foundation of a common law duty in favour of perpetrators would be to travel far outside the rationale in *Prince*'s case.'

The distinction between the position of children and the position of their parents is a matter to which we shall revert.

*The impact of the Human Rights Act 1998*

**[55]** The facts that have given rise to the cases with which we are concerned predate October 2000, when the 1998 Act came into force. It follows that no claim can be brought under the 1998 Act. It is none the less necessary to consider whether the introduction of the 1998 Act has affected the common law principles of the law of negligence. As that law develops all who have outstanding claims are in a position to profit from the development and in this area of the law, where children are victims, claims may be brought many years after the events to which they relate.

**[56]** We have referred to *Z v UK* [2001] 2 FCR 246 and *TP v UK* [2001] 2 FCR 289 in relation to art 6 of the convention. It is now necessary to consider the effect of these decisions of the Strasbourg court in relation to the claims that were based on art 3 and art 8.

**[57]** In *Z v UK* the Commission had found that there was a positive obligation on the government to protect children from treatment contrary to art 3. The authorities had been aware of the serious ill-treatment and neglect suffered by the four applicants over a period of years at the hands of their parents and had failed to take effective steps to bring this to an end. The treatment reached the level of severity prohibited by art 3. It followed that the state had failed in its positive obligation to provide the applicants with adequate protection against inhuman and degrading treatment. The government did not challenge these findings, and the court indorsed them.

**[58]** It would have been open to the government to argue that the statutory scheme in place satisfied the government's positive obligation and that it was in the interest of the effective operation of the scheme that neither public authorities nor their employees should be subject to liability for shortcomings in relation to the decision of whether or not to take a child into care. Instead counsel for the government submitted that after October 2000, when the 1998 Act had come into force, a victim would be able to bring proceedings in the courts against a public authority for a breach of a substantive right and the courts would be empowered to award damages.

**[59]** The court held ([2001] 2 FCR 246 at 273 (para 109)):

> 'There should however be available to the victim or the victim's family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of arts 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress.'

The United Kingdom was held to have been in breach of both arts 3 and 13.

**[60]** In order to understand the decision in *TP v UK* [2001] 2 FCR 289 it is necessary to say a little more about the facts. The applicants were respectively mother and daughter. The local authority (Newham) had reason to suspect that KM had been sexually abused. In the course of their investigations KM was interviewed by a consultant child psychiatrist employed by the health authority. A social worker was present, but TP was not. The interview was video-recorded. KM disclosed that she had been abused by a man and gave his first name. This happened to be the first name of the boyfriend of TP, who was living with her. KM was, however, referring to another man with the same first name and some of her answers should have disclosed that this might be the case. Newham obtained a place of safety order from the magistrates' court, identifying the boyfriend as the abuser. At this stage TP was denied access to the video recording. After about a year of separation, Newham allowed KM to be rehabilitated with TP. This coincided with the release of the video recording to the mother.

**[61]** The applicants contended that there had been a breach of their rights under arts 6, 8 and 13. As we have already explained, the court dismissed the claim under art 6.

**[62]** So far as art 8 was concerned, it was common ground that the removal of KM from her mother constituted an interference with respect for family life. The issue was whether this had been justified in accordance with art 8(2), which provides:

> 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

**[63]** The government submitted that the removal of KM was in accordance with the law and pursued the legitimate aim of protecting her welfare. The applicants contended that there were insufficient reasons to justify the removal, as the investigation had not been competently carried out. They further complained of the procedure that had been adopted and, in particular, of the failure to permit the mother to see the video recording.

**[64]** The court held that the removal of KM was 'in accordance with the law' and in pursuit of a 'legitimate aim'. As to whether the removal of KM had been 'necessary in a democratic society' the court set out the following general principles (at 310–311):

> '70. In determining whether the impugned measures were "necessary in a democratic society", the Court will consider whether, in the light of the case

as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of art 8(2) of the Convention. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation (see *Hokkanen v Finland* ([1995] 2 FCR 320 at 330–331 (para 55)), and, mutatis mutandis, *Bronda v Italy* ((2001) 33 EHRR 81 at 102 (para 59)) ...

71. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed (see, amongst other authorities, *Johansen v Norway* (1996) 23 EHRR 33 at 67–68 (para 64)).

72. The Court further recalls that whilst art 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by art 8: "[W]hat therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8." (See *W v UK* (1987) 10 EHRR 29 at 50 (para 64)).

73. It has previously found that the failure to disclose relevant documents to parents during the procedures instituted by the authorities in placing and maintaining a child in care meant that the decision-making process determining the custody and access arrangements did not afford the requisite protection of the parents' interests as safeguarded by art 8 (see *McMichael v UK* ([1995] 2 FCR 718 at 740 (para 92)).'

**[65]** Applying those principles to the facts, the court first dealt with the decision to seek a place of safety order ([2001] 2 FCR 289 at 311–312):

'74. As concerns the measure taken to remove the second applicant into care, the Court considers that this was supported by relevant and sufficient reasons, namely, the strong suspicions that she had been abused and the doubts which existed as to the first applicant's ability to protect her (see paras 10 to 16 above). In that latter context, it may be noted that the abuse

had taken place in the first applicant's home without her apparently being aware and that the first applicant's reaction, however natural in the circumstances, tended towards a denial of the allegations. It also appears from the interview that while at one point the second applicant had described the abuser as having been thrown out of the house, at another point she referred to X as coming to the house the next day (see para 14 above).

75. The Court is not persuaded however that the mistake made by Dr V and Mr P in assuming that the second applicant was referring to the first applicant's boyfriend XY was of such a nature as to deprive the decision to remove the second applicant into care of a legitimate basis. The second applicant was less than five-years-old at the time of the interview and the process of questioning her was a sensitive and delicate one, as was interpreting the sense of her responses, verbally and with regard to her body language. The second applicant frequently did not speak in grammatical sentences and appeared to contradict herself on several occasions. The fact that the second applicant shook her head would not necessarily indicate an unequivocal denial of the question put. Dr B, the consultant psychiatrist instructed by the first applicant, commented positively on the way in which Dr V handled the interview and agreed with her conclusions as to the existence of the abuse and the identity of the abuser (see para 23 above).

76. The Court finds therefore that the use of the emergency procedure to take the second applicant into care may be regarded as a proportionate measure and "necessary in a democratic society" for protecting the second applicant's health and rights.'

**[66]** We observe that the test applied by the court approximates to that which would be appropriate when considering whether there had been a breach of a duty of care. It is implicit that, had the court accepted the criticisms made by the applicants of the conduct of Dr B and Dr V, a breach of art 8 would have been established.

**[67]** The court went on to find that there were shortcomings in the procedure that had been adopted, which constituted a breach of art 8 (at 313 (para 83)):

'The Court concludes that the question whether to disclose the video of the interview and its transcript should have been determined promptly to allow the first applicant an effective opportunity to deal with the allegations that her daughter could not be returned safely to her care. The local authority's failure to submit the issue to the court for determination deprived her of an adequate involvement in the decision-making process concerning the care of her daughter and thereby of the requisite protection of their interests. There was in this respect a failure to respect their family life and a breach of art 8 of the Convention.'

**[68]** The applicants contended that the decision of the House of Lords that they were owed no duty of care had the effect that they were denied an effective remedy, contrary to art 13. The court accepted this submission (at 320 (para 109)):

'The Court considers that the applicants should have had available to them a means of claiming that the local authority's handling of the procedures was

responsible for the damage which they suffered and obtaining compensation for that damage. It does not agree with the government that pecuniary compensation would not provide redress. If, as is alleged, psychiatric damage occurred, there may have been elements of medical costs as well as significant pain and suffering to be addressed. The Court does not consider it appropriate in this case to make any findings as to whether only court proceedings could have furnished effective redress, though judicial remedies indeed furnish strong guarantees of independence, access to the victim and family and enforceability of awards in compliance with the requirements of art 13 (see, mutatis mutandis, *Klass v Germany* (1978) 2 EHRR 214 at 239 (para 67)). The possibility of applying to the Ombudsman and to the Secretary of State did not however provide the applicants with any enforceable right to compensation.'

[69] In relation to damages, the court recorded that the government disputed that there was any clear case of negligence or evidence that the applicants had required physical or psychiatric treatment. The court then proceeded to award damages on the following basis ([2001] 2 FCR 289 at 321 (para 115)):

'The Court recalls that the applicants were reunited after a year's separation (see para 29 above). Though it cannot be asserted that they would have been reunited earlier if the video had been available at the initial stage of the procedure, it cannot be excluded either that it might have reduced the duration of their separation. They thereby suffered a loss of opportunity. In addition, the applicants certainly suffered non-pecuniary damage through distress and anxiety and in the case of the first applicant through feelings of frustration and injustice.'

[70] There have been a number of other recent decisions of the Strasbourg court in relation to child abuse. We shall refer first to an art 3 case. In *E v UK* [2002] 3 FCR 700 four children complained that their local authority in Scotland had been in breach of its statutory duties in failing to protect them from sexual abuse by their stepfather. They had not pursued a domestic claim to damages, having been advised that, in the light of the decision in *Bedfordshire*, their claim was doomed to failure. The court held that there had been breaches of their art 3 and art 13 rights. The court found that their treatment by their stepfather constituted inhuman and degrading treatment that fell within the scope of art 3. Indeed, this was not contested. The court then asked the question (at 722 (para 92))—

'whether the local authority (acting through its social work department) was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse.'

[71] Once again, we observe, that this question raised issues that were very similar to those that would be raised in a claim based on common law negligence. The court found the conduct of the local authority deficient in a large number of respects and awarded substantial sums of compensation, even taking into account that the applicants had recovered compensation from the Criminal Injuries Compensation Board.

[72] It is notable that, in the context of the claim for breach of art 13, the government argued (at 726) that the applicants had abandoned civil claims which

were potentially viable in that they 'arguably raised operational matters not affected by the ruling in *X (minors) v Bedfordshire CC*'.

[73] We now turn to two art 8 cases. In *P, C and S v UK* [2002] 3 FCR 1 the applicants were a husband and wife and their daughter. The wife had been convicted in the United States of administering laxatives to her young son, thereby endangering his health. She was also adjudged to suffer from Munchausen Syndrome by Proxy. She moved to England and married. Her daughter was then born. The local authority brought proceedings which resulted in the daughter being removed from her mother at birth and being freed for adoption.

[74] The court found that there had been a breach of art 6, in that the mother had not been provided with legal representation at the proceedings. The court also found that there had been breaches of art 8. It made the following comments (at 29–30):

> '116. ... While the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care, in particular where an emergency situation arises, the court must still be satisfied in the circumstances of the case that there existed circumstances justifying the removal of the child, and it is for the respondent state to establish that a careful assessment of the impact of the proposed care measure on the parents and the child, as well as of the possible alternatives to taking the child into public care, was carried out prior to implementation of a care measure ...
>
> 117. ... The taking into care of a child should normally be regarded as a temporary measure to be discontinued as soon as the circumstances permit, and any measure of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child ... In this regard a fair balance has to be struck between the interests of the child remaining in care and those of the parent in being reunited with the child ... In carrying out this balancing exercise, the court will attach particular importance to the best interests of the child which, depending on their nature and seriousness, may override those of the parent ...'

[75] Detailed individual criticisms were advanced as to the conduct of the local authority in relation to the care proceedings. The manner in which the court dealt with these (at 35 (para 136)) is of interest:

> 'The court does not propose to attempt to untangle these opposed considerations, which raise difficult and sensitive issues concerning S's welfare. It considers rather that the complexity of the case, and the fine balance which had to be struck between the interests of S and her parents, required that particular importance be attached to the procedural obligations inherent in art 8 of the Convention. It was crucial for the parents in this case to be able to put forward their case as favourably as possible, emphasising for example whatever factors militated in favour of a further assessment of a possible rehabilitation, and for their viewpoints on the possible alternatives to adoption and the continuation of contact even after adoption to be put forward at the appropriate time for consideration by the court.'

[76] When dealing with damages the court found that it could not be asserted that S would not have been adopted but for the flaws in the procedure that the

court had identified. Damages of €12,000 were awarded to each parent in respect of a 'loss of opportunity'.

**[77]** In *Venema v Netherlands* [2003] 1 FCR 153 the applicants were a married couple and their young daughter. The mother was suspected of suffering from Munchausen Syndrome by Proxy and of harming her daughter. A report was made by medical and child welfare professionals to the Child Welfare Board. The board sought and obtained a provisional order under which the daughter was removed from her parents. After further hearings, and five months of separation, this order was rescinded. Plainly there had been an interference with the enjoyment of respect for family life; the issue was whether this could be justified under art 8(2). The court held that it could not in that the procedure had not been fair. The parents should have been more involved in the decision-making process, and at an earlier stage. €15,000 was awarded to the applicants jointly in respect of 'distress and anxiety as a result of feelings of frustration and injustice' (at 173).

**[78]** Finally we refer to a recent case in which the Strasbourg court gave consideration to the potential conflict between the interests of the parent and the interests of the child. In *Yousef v Netherlands* [2002] 3 FCR 577 a father who had been absent for two-and-a-half years complained that, in breach of his art 8 rights, he had been denied the contact that he sought with his child, whose mother had died and who was settled in the family of her brother. The court rejected his application, observing (at 590 (para 73)):

> 'The court reiterates that in judicial decisions where the rights under art 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail (see *Elsholz v Germany* [2000] 3 FCR 385 at 397–398 (para 52) and *TP v UK* [2001] 2 FCR 289 at 311 (para 72)).'

*The effect of these decisions*

**[79]** Section 2(1) of the Human Rights Act 1998 requires the court to have regard to the jurisprudence of the Strasbourg court where relevant to proceedings under the Act. Thus any English court, when dealing with a claim under the 1998 Act in relation to action or inaction after October 2000 on the part of a local authority in relation to suspected child abuse, must take into account the decisions to which we have just referred. Where a claim alleges breach of art 3, in circumstances such as those in *Z v UK* and *E v UK*, the court is likely to have to consider whether the local authority knew, or should have known, that positive action was called for. This will necessarily involve consideration of the conduct of the individuals involved. A claim of this nature will, so it seems to us, necessarily be a claim by a child rather than a parent.

**[80]** Where a claim alleges breach of art 8, on the ground that a child has been removed from a parent without justification, this will also require examination of the conduct of the individuals involved to see whether, on the particular facts, the action was 'necessary in a democratic society'.

**[81]** Thus litigation involving factual inquiries of the nature considered above is now a potential consequence of the conduct of those involved in taking decisions in child abuse cases. In these circumstances the reasons of policy that led the House of Lords to hold that no duty of care towards a child arises, in so far as those reasons have not already been discredited by the subsequent decisions

of the House of Lords, will largely cease to apply. Substantial damages will be available on proof of individual shortcomings, which will be relevant alike to a claim based on breach of s 6 of the 1998 Act and a claim based on breach of a common law duty of care.

[82] Can there, in these circumstances, be any justification for preserving a rule that no duty of care is owed in negligence because it is not fair, just and reasonable to impose such a duty? It is true that a claim under the 1998 Act will only lie against public authorities and not against the individuals employed by them. But the reality is that claims in negligence are brought primarily to establish liability on the part of the local authorities and individuals are unlikely to be personally at risk. In so far as the risk of legal proceedings will inhibit individuals from boldly taking what they believe to be the right course of action in the delicate situation of a case where child abuse is suspected, we think that this factor will henceforth be present, whether the anticipated litigation is founded on the 1998 Act or on the common law duty of care.

[83] In so far as the position of a child is concerned, we have reached the firm conclusion that the decision in *Bedfordshire* cannot survive the 1998 Act. Where child abuse is suspected the interests of the child are paramount: see s 1 of the Children Act 1989. Given the obligation of the local authority to respect a child's convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties. In the context of suspected child abuse, breach of a duty of care in negligence will frequently also amount to a violation of arts 3 or 8. The difference, of course, is that those asserting that wrongful acts or omissions occurred before October 2000 will have no claim under the 1998 Act. This cannot, however, constitute a valid reason of policy for preserving a limitation of the common law duty of care which is not otherwise justified. On the contrary, the absence of an alternative remedy for children who were victims of abuse before October 2000 militates in favour of the recognition of a common law duty of care once the public policy reasons against this have lost their force.

[84] It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings. It is possible that there will be factual situations where it is not fair, just or reasonable to impose a duty of care, but each case will fall to be determined on its individual facts.

[85] In reaching this decision we do not suggest that the common law duty of care will replicate the duty not to violate arts 3 and 8. Liability for breach of the latter duty and entitlement to compensation can arise in circumstances where the tort of negligence is not made out. The area of factual inquiry where breaches of the two duties are alleged are, however likely to be the same.

[86] The position in relation to the parent is very different. Where the issue is whether a child should be removed from the parents, the best interests of the child may lead to the answer Yes or No. The Strasbourg cases demonstrate that failure to remove a child from the parents can as readily give rise to a valid claim by the child as a decision to remove the child. The same is not true of the parents' position. It will always be in the parents' interests that the child should not be removed. Thus the child's interests are in potential conflict with the interests of the parents. In view of this, we consider that there are cogent reasons of public policy for concluding that, where child care decisions are being taken, no

common law duty of care should be owed to the parents. Our reasoning in reaching this conclusion is supported by that of the Privy Council in *B v A-G of New Zealand* [2003] 4 All ER 833.

**[87]** For the above reasons, where consideration is being given to whether the suspicion of child abuse justifies taking proceedings to remove a child from the parents, while a duty of care can be owed to the child, no common law duty of care is owed to the parents.

**[88]** We now turn to consider the individual appeals in order to resolve the further issues that arise in each. It is necessary in each case to outline the facts.

*D v EAST BERKSHIRE COMMUNITY HEALTH NHS TRUST*

**[89]** The claimant is the mother of M who was born on 18 November 1988. From birth, he presented with allergic symptoms which Dr Connell, a consultant paediatrician at the Wexham Park Hospital diagnosed as an allergy. In 1990 he was referred to Professor Strobel, consultant paediatric immunologist at the Great Ormond Street Hospital who diagnosed atopy and food allergic disease. Between 1990 and 1994 he was admitted on at least nine occasions because of allergic reactions of one sort or another. In particular he suffered from asthma attacks and had trouble breathing at night, as a result of which he slept in the same room as his mother. He was therefore referred to Professor Southall at the North Staffordshire Hospital for an assessment as to whether or not it would be possible to provide a monitor for his breathing so that he could sleep in his own room.

**[90]** He was admitted to the North Staffordshire Hospital between 12 and 15 December 1994. In a telephone conversation with Professor Strobel, Professor Southall said he considered that the appellant was exaggerating symptoms, that his condition was an example of fabricated illness and that a social services strategy meeting was required. He then referred M to Professor Warner, an expert in allergic conditions at Southampton General Hospital. Unfortunately Professor Warner was not given the opportunity to examine M until September 1997. Between 1995 and 1997, it is clear that many treating M, including Professor Strobel believed that his condition could be an example of exaggerated or fabricated illness as Professor Southall had said, and indeed a discharge summary on 15 December 1996 from the Wexham Park Hospital referred to possible 'Munchausen by Proxy'.

**[91]** Up until the end of 1996 the consultant community paediatrician responsible for M was Dr Lessing. She clearly did not share the concerns which had been expressed by others; and the social services were not at that stage involved. However in December 1996, Dr Whiting took over from Dr Lessing and took the view that M might be at risk from his mother. After a number of discussions between doctors a meeting took place on 13 March 1997 at which M's parents, Professor Strobel, Dr Whiting and three social workers were present. Although it is clear that both Professor Strobel and Dr Whiting remained of the view that, as Professor Strobel said in a letter 'False reporting remains a distinct possibility', that was not disclosed to the appellant. However, some days later the appellant by chance had an opportunity to read the notes and discovered what the view of the doctors was. She sought a second opinion.

**[92]** Between March 1997 and June 1997 there was substantial discussion between the doctors and the social services which resulted in a case conference on 2 June 1997, at which the appellant, the doctors and the social workers were present. It was determined that M should be included on the 'At Risk Register'.

He was also then referred once again to Professor Warner who was at last able to examine M and concluded, after investigations, that M was indeed suffering from extensive and severe allergies. After this opinion was reported to the social services, he was removed from the at-risk register on 29 September 1997.

[93] The claim is brought against NHS trusts, who are alleged to be vicariously liable for the negligence of the doctors employed by them. In her particulars of claim, the appellant asserts that she suffered a reaction of acute anxiety and depression as a result of the stress of dealing with the accusations against her and the investigations of her and M, and consequential financial loss. The relevant allegations of negligence against the doctors are that they negligently misdiagnosed her as suffering from Munchausen Syndrome by Proxy and negligently maintained that diagnosis until September 1997. It was submitted on her behalf that it was foreseeable that this negligent misdiagnosis could cause her psychological damage and that it would result in the intervention of the social services, with the stress that that would inevitably cause her.

[94] Three preliminary issues were ordered to be tried: firstly whether the claimant was owed a duty of care by any of the defendants, and if so the extent of that duty; secondly whether the injury complained of by the claimant was recognised by law as being compensatable; and thirdly whether the claimant's cause of action against any of the defendants was statute-barred. The judge, Judge Hale, in his judgment of 6 September 2002, found in favour of the appellant on the second and third issues, but held that the doctors owed no duty of care to the claimant and accordingly dismissed her claim. He did so on the basis that although it was arguable that the appellant could foreseeably suffer the kind of injury and damage which occurred, it was not just and reasonable to impose a duty of care in the circumstances; he relied on the speeches in the House of Lords in *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633 and in particular the speech of Lord Browne-Wilkinson. He considered that public policy considerations militated strongly against any duty of care towards the appellant on the facts of the case.

*Can Bedfordshire be distinguished?*

[95] Mr Levy submitted that the policy considerations that led the House of Lords to conclude that there was no duty of care in *Bedfordshire* did not apply to the facts of this case. He identified as the critical distinction the fact that M was referred in the first instance to Professor Southall by his general practitioner at the request of his mother herself. He submitted that in these circumstances Professor Southall owed the duty of care of a medical practitioner to both mother and child. Both should be considered as patients. The case should be approached simply as one of clinical negligence. Professor Southall and, subsequently, Dr Whiting were negligent in their diagnosis of the mother. This negligence predated any involvement on the part of the social services, against whom no claim was made. It was the negligent diagnosis which led to the involvement of the social services.

[96] We do not accept this analysis. M, and not his mother, was the patient. The moment that it was suspected that his injuries might be deliberately exaggerated by his mother, the duty owed to M was in potential conflict with the interests of his mother. It was essential that the professionals should not be inhibited in acting in the best interests of M by concern that they might be held in breach of a duty owed to his mother.

[97] The judge accepted as correct submissions advanced on the part of the defence, which he summarised as follows:

> '... I should be slow to impose any duty that could cut across public policy considerations relating to the care of children. The son, M, was a patient; to impose a concurrent duty in whatever terms in respect of the mother would lead to conflict with their duties towards her son. The conflict here is identical with sex abuse cases. The possibility that somebody who may be subject to Munchausen's by Proxy endangering her son is one which the doctor must concern himself about in the context of his care for the patient, the son. Once a suspicion arises about someone who was the mother of a patient, there was a clear duty to investigate in the interests of M, even if initiating the process might damage the mother. In fact they could be negligent in certain circumstances to the child if they did not do so. The defendants add that the interests of the child are paramount and the questions of child protection override the possibility of the duty that the claimant asserts, however it is expressed.'

[98] The judge observed that these submissions received powerful support from *Bedfordshire*.

[99] We consider that the judge was correct to accept these submissions. The reasoning in *Bedfordshire* plainly applies to the facts of this case and does so in a manner which, for the reasons that we have given, remains valid. The judge was correct to rule that no duty of care was owed to the claimant.

*Proximity*

[100] The judge recited arguments addressed to him on the issue of proximity, but concluded that the issue was a difficult one which he did not need to resolve. In so far as there is difficulty, we think it arises out of the unusual facts of this case and the problem of identifying the cause of action to which, arguably, they give rise. The claim was advanced as one for clinical negligence leading to a false diagnosis, which gave rise to stress-related psychiatric injury. Such a claim is intelligible where the diagnosis is of a serious illness and the patient believes the diagnosis. In this case, however, the claimant discovered the suggestion that she suffered from Munchausen Syndrome by Proxy because she chanced to see medical records relating to her son two years after the suggestion was first made. It has not been alleged that she believed that there was any truth in the suggestion. She was subsequently present at a case conference at which it was decided to place M on the at-risk register, from which he was removed three months later. No other action was taken in relation to the suspicion of the mother's condition. She claims, however, that it and its consequences caused her psychiatric illness.

[101] Every aspect of this claim gives rise to problems, including foreseeability and recoverability in respect of the damage alleged to have been sustained. The judge was not called upon to resolve these issues, but to decide whether they were arguable. He concluded that the issue of foreseeability and recoverability was sufficiently arguable to go to trial and these conclusions have not been challenged. In these circumstances, we would not have thought it right to refuse to permit this action to go to trial had the sole challenge been that there was no proximity.

[102] We would add one reflection which occurred to us after the hearing had been concluded. On one view of the facts this claim has the elements of a claim for defamation. There are statutory defences to such a claim, including that of qualified privilege. It cannot be open to a claimant to by-pass these defences by advancing a claim for defamation in the guise of a claim for negligence.

*Witness immunity*

[103] No plea of witness immunity was advanced before the judge. We shall consider this matter in the appeal in *K and another v Dewsbury Health Care NHS Trust and another*, where it is a live issue. The problems in relation to the cause of action make consideration of witness immunity an unrealistic and hypothetical exercise. It is certainly far from clear that it would be open to Professor Southall to invoke witness immunity in relation to the view he expressed at the end of 1994 and we would not have been prepared to rule that the action was bound to fail because of the protection afforded by witness immunity.

[104] For the reasons that we have given the appeal in the *East Berkshire* case will be dismissed.

*K AND ANOTHER v DEWSBURY HEALTHCARE NHS TRUST AND ANOTHER*

[105] The appellants are R, who was nine years old at the relevant time and her father. R suffered from a disease known as Schamberg's disease which produces discoloured patches on the skin. Her mother had taken her to her general practitioner in September 1997 about what she described as bruising to R's legs. The marks disappeared after treatment, and no diagnosis of Schamberg's disease was made at the time. On 15 March 1998, R hurt herself in the genital area whilst riding her bicycle. On 17 March her swimming teacher expressed concern about the marks on her legs, so R's mother again took her to the general practitioner who referred her to Dr Wilson a consultant paediatrician at the Dewsbury District Hospital. Her father took R there that same day. Dr Wilson's provisional diagnosis was that the marks did not appear to be the result of skin disease but were suggestive of abuse. She informed social services. R was examined at the hospital and Dr Wilson concluded that she had been sexually abused. Her mother was informed of this. As a result the father and his son, R's elder brother, were told that they should not sleep at home when R was released from hospital. The father and mother were stopped from seeing R in the hospital that evening in front of other patients and visitors who included members of the Gujarati community. R remained in the hospital until 27 March 1998. The father was unable to visit her at all during that period. All of these matters became known in the family's local community. By 27 March, the diagnosis of Schamberg's disease was made and no further steps were taken by the social services. It was accepted that there was no evidence of abuse.

[106] The claims are brought against both the NHS trust responsible for the hospital and the local authority responsible for the social services. The father claims in negligence damages for psychiatric injury and financial loss resulting from the misdiagnosis and the steps taken by the social services which, he submits, were the foreseeable result, particularly within his community, of an allegation of sexual abuse. R also claims damages for psychiatric injury resulting from the misdiagnosis. The respondents applied to strike out the claims under CPR 3.4, alternatively for summary judgment under Pt 24.

[107] In his judgment dated 22 September 2002, Judge Grenfell held that R had an arguable claim for clinical negligence against Dr Wilson, and thus against

the first respondent NHS trust, which claim should be permitted to proceed. The trust has not appealed against that finding. So far as the father is concerned, the judge found that it would not be fair, just and reasonable to impose a duty of care towards him on the part of the trust. The father appeals against that finding. The judge held that the local authority was protected from liability by witness immunity. He further held that it would not be fair, just and reasonable to impose on the local authority a duty of care towards either the father or R.

*R's claim against the local authority*

**[108]** Judge Grenfell applied the decision in *Bedfordshire* in the following manner. Once the possibility of child abuse had been identified and the social services were involved public policy precluded the finding of a duty of care. This did not, however, preclude a claim based on negligence of Dr Wilson in making the prior diagnosis of abuse that initiated the child protection investigation. Thus there was an arguable claim against the NHS trust by R. So far as her father was concerned, any psychiatric consequences that he suffered could only be attributed to the child protection investigation itself. At that stage, his claim, and equally his daughter's claim, was precluded by *Bedfordshire*.

**[109]** For the reasons that we have given, we do not consider that *Bedfordshire* stands in the way of a claim by R against the local authority for negligence in the manner in which their employees contributed to the child protection investigation and we reverse the judge's decision to give judgment in favour of the local authority on that point.

*Can Bedfordshire be distinguished?*

**[110]** Mr Levy argued that the reasoning in *Bedfordshire* did not apply to the facts of this case and that we should approach it as a case in clinical negligence where the false diagnosis was foreseeably likely to cause physical harm to third parties. We consider that the judge's careful application of *Bedfordshire* was correct. The reasons of public policy that we have identified preclude any finding of a duty of care to R's father.

*Proximity*

**[111]** Proximity does not seem to have been in issue in the court below. Before us it was taken in relation to the father's claim and not, of course, R's. Once again it is necessary to consider the nature of the father's claim. The psychiatric injury in respect of which he claims is said, as we understand it, to result from the stress of being wrongly accused, to the knowledge of his local community, of sexually abusing his daughter. Given an arguable case on foreseeability and causation, we would not rule that there was insufficient proximity between Dr Wilson and the other professionals involved and R's father to give rise to a duty of care.

**[112]** We would add that it is a difficult and artificial exercise to distinguish between proximity and the question of whether it is fair, just and reasonable to impose a duty of care. The reason why we have held that no duty of care is owed to the father is, essentially, that it would conflict with a duty owed to a person more proximate than he, namely his daughter. To this extent it could, perhaps, be said that the father's relationship is insufficiently proximate.

*Witness immunity*

**[113]** Judge Grenfell held that the local authority personnel were entitled to the protection of witness immunity. He held that because the social workers were potential witnesses in criminal or child protection proceedings that might result from their investigations, they could not be subject to a claim for negligence in relation to those investigations. As we read his judgment, he left open the question of whether witness immunity provided a defence to the doctors employed by the trust.

**[114]** In so finding Judge Grenfell followed the approach of Lord Browne-Wilkinson in relation to the interview conducted by the child psychiatrist in the *Newham* case. Lord Browne-Wilkinson first referred to the basis upon which witness immunity is accorded to the preparation of statements for the purpose of a criminal prosecution. He then held that the same principle applies to protect investigations by a local authority as to whether to bring proceedings for the protection of a child from abuse. He held ([1995] 3 All ER 353 at 386, [1995] 2 AC 633 at 755):

> 'In the present case, the psychiatrist was instructed to carry out the examination of the child for the specific purpose of discovering whether the child had been sexually abused and (if possible) the identity of the abuser. The psychiatrist must have known that, if such abuse were discovered, proceedings by the local authority for the protection of the child would ensue and that her findings would be the evidence on which those proceedings would be based. It follows in my judgment that such investigations having such an immediate link with possible proceedings in pursuance of a statutory duty cannot be made the basis of subsequent claims.'

**[115]** Witness immunity has recently received more detailed consideration by the House of Lords than that which it received in *Bedfordshire*. In *Darker (suing as personal representative of Docker, decd) v Chief Constable of the West Midlands Police* [2000] 4 All ER 193, [2001] 1 AC 435 the claimants sought damages from the police for conspiracy to injure and misfeasance in public office on the ground that they had fabricated evidence against them for use in a criminal trial. The judge struck out the claim on the ground that the police were covered by an immunity or absolute privilege. The Court of Appeal upheld the judgment, but the House of Lords reversed the decision. Lord Hope of Craighead drew a distinction between carrying out an investigation and preparing evidence to be given as a witness at a trial. He said ([2000] 4 All ER 193 at 197, [2001] 1 AC 435 at 448):

> 'But there is a crucial difference between statements made by police officers prior to giving evidence and things said or done in the ordinary course of preparing reports for use in evidence, where the functions that they are performing can be said to be those of witnesses or potential witnesses as they are related directly to what requires to be done to enable them to give evidence, and their conduct at earlier stages in the case, when they are performing their functions as enforcers of the law or as investigators. The actions which the police take as law enforcers or as investigators may, of course, *become* the subject of evidence. It may then be necessary for the police officers concerned to assume the functions of witnesses at the trial to describe what they did or what they heard or what they saw. But there is no good reason on grounds of public policy to extend the immunity which

attaches to things said or done by them when they are describing these matters to things done by them which cannot fairly be said to form part of their participation in the judicial process as witnesses. The purpose of the immunity is to protect witnesses against claims made against them for something said or done in the course of giving or preparing to give evidence. It is not to be used to shield the police from action for things done while they are acting as law enforcers or investigators.'

[116] It may not be easy in some cases to draw the line between investigation and preparation of evidence in the case of suspected child abuse, but in the *Newham* case it seems to us that the activities of the social workers probably fell into the category of investigations. We say 'probably' because the findings of fact as to the precise role that they played are sparse. At all events we have reached the conclusion that the judge, who did not have the benefit of having *Darker's* case cited to him, erred in making a firm finding that witness immunity precluded any liability on the part of those employed by the local authority.

[117] It follows, for the reasons that we have given, that the appeal by R will be allowed, so that her claim against the local authority can proceed, but that her father's appeal will be dismissed.

*K AND ANOTHER v OLDHAM NHS TRUST AND ANOTHER*

[118] The appellants are the mother and father of M who was born on 24 July 1998. On 26 September 1998 whilst M was in the care of her grandmother she started to scream and appeared to be in pain. She was taken to the Royal Oldham Hospital where she was seen in the Accident and Emergency Department. An X-ray of her left thigh showed an oblique displaced fracture. The second respondent who was the consultant paediatrician, attended the casualty department, interviewed the parents and the grandmother and concluded that it was an 'inflicted injury'. He recorded this, underlined, in the clinical notes. The police and social services were informed.

[119] Between 27 September 1998 and 16 October 1998, the position was considered by the social services; and a child protection case conference was held. The second respondent maintained his opinion that the injury was non-accidental. Accordingly an application was made for an interim care order, which was made on 16 October 1998 granting the local authority parental responsibility of M. She was ultimately discharged from hospital on 23 October 1998 into the care of her aunt.

[120] The matter came back to court on 23 December 1998 when Judge Wilkinson, having heard evidence, determined that the injuries were not accidental. Care of M was then given to the aunt. In March 1999 M suffered bilateral femoral fractures whilst in the care of her aunt. Detailed examinations then followed from which it became plain that M had osteogenesis imperfecta, a bone condition rendering M particularly susceptible to fracture. Accordingly, an application was made for the interim care order to be discharged which was granted on 17 June 1999.

[121] The appellants claim damages for the psychological distress resulting from their separation from M until 17 June 1999, on the grounds that the diagnosis of non-accidental injury was both made and maintained negligently. Two preliminary issues relevant to this appeal were ordered to be tried: firstly whether there was a duty of care owed by either of the respondents to the appellants; secondly whether they had a valid claim under the convention

justiciable in the English courts. There was a third preliminary issue relating to a claim brought on behalf of M which was whether the medical evidence put forward to support her claim disclosed an injury for which the law recognised a remedy. As far as this latter issue was concerned, the judge concluded that it did not; and there is no appeal from his finding. As far as the first issue is concerned, he concluded that for the reasons given by Lord Browne-Wilkinson in *Bedfordshire* there was no duty owed to the appellants. As to the second, he concluded that they did not. Accordingly he dismissed the appellant's claims.

*Can Bedfordshire be distinguished?*

[122] Once again Mr Levy argued that the reasoning in *Bedfordshire* did not apply to the facts of this case. He submitted that at the start of the story there was a duty of care owed by Dr Blumenthal both to M and M's parents. He emphasised that M was taken to the hospital by her parents. At that point there was no question of Dr Blumenthal's duty to the child conflicting with his duty to the parents. Conflict only arose after he had negligently involved the social services and the police. It was not open to Dr Blumenthal to argue that the consequences of his negligence absolved him from any duty of care.

[123] This argument was advanced before Simon J and rejected by him. He held:

> 'In my view this approach is unrealistic since inevitably the initial diagnosis will be refined as further information becomes available. Indeed, the claimants themselves allege that there was an obligation to refine and develop an initial diagnosis. Furthermore, the diagnosis that was reached necessarily involved an obligation owed to the child and to the OMBC [Oldham] and there is no room for an additional duty owed to the parents: see *Powell v Boladz* (1997) 39 BMLR 35 at 45, and *X v Bedfordshire* (the *Newham* case): the observations of Bingham MR [1994] 4 All ER 602 at 621–622, [1995] 2 AC 633 at 665: "... the mother was not in any meaningful sense the psychiatrist's patient. The psychiatrist's duty was to act in the interests of the child, and that might very well mean acting in a way that would be adverse to the ... interests of the mother ..." Once there is material on which the doctor can properly initiate the multi-disciplinary investigation, the doctor cannot owe a duty to the parents in relation to the diagnosis which commences the process. In the present case the claimants do not contend that there was no material upon which the doctor could act; and there is no point which they can identify when a special relationship with the parents can be said to exist, which is not in conflict with the duty to the child and the OMBC. By setting in motion the multi-disciplinary process, the doctor acts in the interests of his patient, and begins a process, which is designed to ensure that recognition is given to a number of conflicting factors, including the interests of the parents, and which is ultimately resolved by the court.'

[124] We agree with this analysis. The moment that Dr Blumenthal suspected that M had been abused, and before he took any action in consequence of this suspicion, his duty to M was in potential conflict with the interests of her parents. The judge was right to find that the case was covered by *Bedfordshire* and that no duty of care was owed to the parents.

*Proximity*

[125] The judge held that, because the defendants' duty of care was owed exclusively to M, the relationship between the parents and the defendants was too remote to give rise to a duty of care upon the latter. We refer to our discussion on this point at [112], above. We have some difficulty with the proposition that there is insufficient proximity between doctors and care workers, who are responsible for the removal of a child from her parents, and those parents. We prefer to hold that the reason why no duty of care is owed to the parents is because it would not be fair, just and reasonable and not because of lack of proximity.

*Witness immunity*

[126] At the case management conference Judge Holman determined that the issue of witness immunity was one which required evidence. For this reason it was not one of the preliminary issues considered by the judge below. In these circumstances it would not be appropriate for us to consider this issue on the material before us. In the light of our other findings, this issue is, in any event, academic.

[127] For the reasons that we have given this appeal will be dismissed.

*Appeals in East Berkshire and Oldham cases dismissed. Appeal in Dewsbury case allowed in part.*

Kate O'Hanlon Barrister.

# B and others v Attorney General of New Zealand

[2003] UKPC 61

PRIVY COUNCIL

LORD NICHOLLS OF BIRKENHEAD, LORD HUTTON, LORD HOBHOUSE OF WOODBOROUGH, LORD RODGER OF EARLSFERRY AND LORD WALKER OF GESTINGTHORPE

5 JUNE, 16 JULY 2003

*Negligence – Duty to take care – Existence of duty – Children – Department of Social Welfare, New Zealand – Complaint of sexual abuse of child made against parent – Parent and children bringing proceedings in respect of alleged failure to investigate complaint of sexual abuse properly – Whether duty of care owed to parents and children.*

A social worker made a complaint under the Children and Young Persons Act (New Zealand) 1974 that the father of two daughters aged seven and five had sexually abused his younger daughter. That Act imposed on the Director General of Social Welfare the duty of inquiry where he knew or had reason to suspect that any child or young person was suffering or likely to suffer from ill-treatment. The father and the daughters subsequently claimed damages in respect of the allegedly negligent way in which the complaint had been investigated by the professionals involved. At first instance the judge struck out the proceedings summarily on interlocutory application as proceedings which were bound to fail. That decision was upheld by the Court of Appeal of New Zealand. The father and the daughters appealed. The question raised on the appeal was whether the case was distinguishable from a decision of the New Zealand Court of Appeal where the court declined to strike out a claim in negligence brought by a child in respect of an alleged failure by social workers to investigate a complaint that his adoptive parents were neglecting him, holding that the statutory framework within which the social welfare department and its social workers acted was consistent with the imposition of a common law duty of care.

**Held** – The common law duty of care was owed by the Director-General of Social Welfare and individual social workers to the child or young person in respect of whom the statutory duty to arrange for a prompt inquiry existed in a particular case. The common law duty was temporally co-extensive with the statutory duty. In the instant case the duty was owed to the elder daughter as much as the younger daughter since if the younger daughter's abuse allegation had been well founded the elder daughter would also have been at risk. No common law duty was owed to the father. It would not be satisfactory to impose a common law duty on the department and the individual professionals in favour of the alleged victims or potential victims and, at the same time, in favour of the alleged perpetrator. Moreover, a duty of care in favour of the alleged perpetrator would lack the juridical basis on which the existence of a common law duty of care was largely founded. Accordingly the daughters' appeal would be allowed and the father's appeal dismissed (see [24], [29], [30], [33], below).

**Notes**

For public services implementing statutory duties, see 33 *Halsbury's Laws* (4th edn reissue) para 617.

**Cases referred to in judgment**

*A-G v Prince* [1998] 1 NZLR 262, NZ CA.

*B v A-G* [1999] 2 NZLR 296, CA; *affg* [1997] NZFLR 550

*Simpson v A-G* [1994] 3 NZLR 667, NZ CA.

*X and ors (minors) v Bedfordshire CC, M (a minor) v Newham LBC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

**Appeal**

The plaintiffs, B and his two daughters, appealed from the decision of the New Zealand Court of Appeal (Keith, Blanchard and Tipping JJ) on 18 March 1999 ([1999] 2 NZLR 296) dismissing the plaintiffs' appeal from the decision of Gallen J ([1997] NZFLR 550) allowing the application of the defendants, the Attorney General of New Zealand on behalf of the Minister and Department of Social Welfare, a social worker and a registered clinical psychologist, to strike out proceedings brought by the plaintiffs against the defendants claiming damages for negligence on the grounds that they disclosed no reasonable cause of action. The facts are set out in the judgment of Lord Nicholls of Birkenhead.

*John Gibson QC* and *Christopher Sygrove* (both of the New Zealand bar) (instructed by *Radcliffes LeBrasseur*) for the plaintiffs.

*Terence Arnold QC* and *Christopher Mathieson* (both of the New Zealand bar) (instructed by *Moon Beever*) for the first and third defendants.

*Kristy McDonald QC* (of the New Zealand bar) (instructed by *Moon Beever*) for the second defendant.

The Board took time for consideration.

16 July 2003. The following judgments were delivered.

**LORD NICHOLLS OF BIRKENHEAD.**

[1] In *A-G v Prince* [1998] 1 NZLR 262 a five-judge Court of Appeal, by a majority of four to one, declined to strike out a claim in negligence brought by a child in respect of an alleged failure by social workers to investigate a complaint that his adoptive parents were neglecting him. In the present case a father and his two daughters (D1 and D2) claim damages in respect of the allegedly negligent way a social worker and a clinical psychologist investigated a complaint that the father had sexually abused D2. In *Prince*'s case the claim was founded on an alleged failure to investigate at all. In the present case the claim is founded on an alleged failure to investigate properly. The question raised by this appeal is whether the present case is distinguishable from the decision in *Prince*'s case. In addition to the social worker and the psychologist, the Attorney General is a defendant. He is sued on behalf of the Minister of Social Welfare and the Department of Social Welfare.

THE HISTORY

[2] As in *Prince*'s case, the present case comes before the court on interlocutory applications by the defendants to strike out the proceedings

summarily as proceedings which are bound to fail. No trial has yet taken place. Thus, in accordance with well-established principles, these applications are to be approached on the footing that at the trial, if one takes place, the plaintiffs may succeed in proving the facts they allege in their statement of claim. It is right to record, however, that all the defendants deny the alleged negligence. At first instance Gallen J struck out the proceedings: *B v A-G* [1997] NZFLR 550. The Court of Appeal, comprising Keith, Blanchard and Tipping JJ, dismissed an appeal: [1999] 2 NZLR 296.

[3] The incidents of which the plaintiffs complain took place as long ago as July 1988. D1 was then aged seven. Her sister, D2, was five years old. The father was a widower. D2 told a friend at school that her father had sexually abused her. The friend told her mother who, in turn, informed the Department of Social Welfare. The department began an investigation on 18 July 1988. On the following day at the request of the department the second defendant, a registered clinical psychologist, separately interviewed the two girls at their school in the presence of a senior teacher and the third defendant, a social worker employed by the department. The second defendant had considerable experience in the field of child sex abuse and was a member of the sexual abuse team at Wellington.

[4] Later on the same day, 19 July, the social worker laid a complaint under s 27 of the Children and Young Persons Act 1974 on the ground that she reasonably believed the children were in need of care, protection or control because their physical or mental health or emotional state was being avoidably impaired or neglected (sub-s (2)(b)) or the children were being, or were likely to be, neglected or ill-treated (sub-s (2)(c)). As a result a warrant was obtained for the removal of the children from the care of their father pursuant to s 28 of the 1974 Act. The deputy registrar of the district court was satisfied there was reasonable ground for suspecting the children were likely to be ill-treated, as provided in s 28(1). The children were then taken from their home and placed in foster care.

[5] At the time the father knew nothing of the allegations, the interviews or their results. The first he knew of any of these matters was when, later on the same day, he was interviewed by the police. He was told the children had been taken away and that he was not to attempt to find them or get in touch with them. He was not told where the children were. At all times the father denied the allegations against him. No charges were ever laid by the police.

[6] The father then made arrangements to leave the family home and for the children to return there in the care of an employee. He also made arrangements for his parents to return to New Zealand from England. They had earlier helped him with the care of the children following the death of his wife.

[7] Two days after the interviews, on 21 July, the social worker arranged for the children to be examined by a doctor. The doctor concluded there was no evidence to suggest full penile penetration in respect of either child, but her examination did not rule out lesser degrees of penetration or other forms of sexual molestation.

[8] The statement of claim alleges respects in which, it is said, the interview carried out by the psychologist, and the investigation carried out by the social worker, were conducted negligently. For instance, it is said the psychologist failed to note or evaluate important factual errors. D2 gave a detailed description of an attic in her home although the psychologist knew D2's home was a single storey building. D2 said both she and her elder sister, D1, had been sexually abused by their father. But the psychologist ignored answers given by D1

denying sexual abuse of either her or her sister. The social worker failed to follow up a report made to her by the doctor that at the outset of the doctor's examination D2 said to the doctor that sometimes she, D2, told lies. Within two weeks of the issue of the warrant D2 told a friend of the father that the allegations were untrue, and that she had told this untruth to the ladies who had come to see her and her sister at the school because she was allowed to tell lies at school. This information was passed to the department by telephone but, it is said, this was not acted upon by any of the defendants.

**[9]** The complaint made by the social worker came before AB Beatson DCJ for hearing on 5 December 1988, together with an application by the father's parents for custody of the children. The hearing occupied nine weeks of court sitting time. On 13 April 1989, before the hearing had been completed, the complaint was amended to add s 27(2)(e) as an additional ground on which the children were in need of care, protection or control: that the children were exhibiting behaviour beyond the control of their father. The father admitted this amended ground of complaint under s 27(2)(e) but not the original 'abuse' complaints under s 27(2)(b) and (c). With the consent of all concerned, including the father, the court made a supervision order and an order giving shared custody of the children to the father's parents and the father. The father's parents and the father were also appointed joint guardians of the children.

**[10]** Following this hearing the father's parents went back to the United Kingdom with D1 and D2. The girls returned to New Zealand with their grandmother in late January 1990 and were reunited with their father. The supervision ended by order of the court in April 1991.

**[11]** These proceedings were started in 1993. The children claim general damages of $50,000 and exemplary damages of $500,000 for upset to their lives and the trauma of being removed from their father. Their father claims a like amount of general damages and exemplary damages, together with special damages in respect of matters such as child minding expenses, medical expenses and legal costs, and his parents' air fares and other expenses.

*PRINCE'S* CASE

**[12]** Before their Lordships' Board none of the parties challenged the correctness of the decision of the Court of Appeal in *Prince's* case or the reasoning of the majority. Their Lordships are content to proceed on this basis. The relevant legislation is not now in force and has not been so for some years. Accordingly, as already noted, the sole issue before the Board is whether the present case falls within the principle enunciated by the Court of Appeal in *Prince's* case regarding what was there referred to as 'the 1983 complaint'. This was a complaint that although the Department of Social Welfare knew the adoptive parents were not looking after their adopted child the department 'did nothing': it failed to investigate the complaint 'adequately or at all'.

**[13]** Whether the manner of discharge of a statutory function admits of a concurrent common law duty of care depends primarily upon the scheme and policy of the relevant legislation. As noted by Lord Browne-Wilkinson in *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham LBC, E (a minor) v Dorset CC* [1995] 3 All ER 353 at 371, [1995] 2 AC 633 at 739, the statutory framework within which the act or omission took place is a profoundly influential factor when deciding the existence and ambit of a common law duty. For this reason the Court of Appeal in *Prince's* case left on one side the current New Zealand legislation, the Children, Young Persons and Their Families Act 1989, describing

this as a very different legislative scheme. The Court of Appeal also considered that the 1974 Act was 'clearly distinguishable' from the statutes before the House of Lords in *X and ors (minors) v Bedfordshire CC*. The court focused its attention on the 1974 Act itself.

**[14]** Section of the 1974 Act set out its objects. These included promotion of the welfare of children by assisting individuals and families to overcome social problems confronting them, promotion of the welfare of the family, and assisting parents in the discharge of their parental responsibilities. Section 4 provided that any person exercising powers conferred by the Act shall treat the interests of the child as the first and paramount consideration. Section 5 imposed positive duties on the Director-General of Social Welfare to undertake preventive work:

> '(1) It shall be the duty of the Director-General to take positive action and such steps under this Act as in his opinion may assist in preventing children or young persons from being exposed to unnecessary suffering or deprivation ...
>
> (2) In pursuance of the duty imposed on him by subsection (1) of this section the Director-General shall arrange—(a) for prompt inquiry where he knows or has reason to suspect that any child or young person is—(i) Suffering or likely to suffer from ill-treatment or from inadequate care or control ...'

**[15]** Against this background Richardson P, in a judgment of himself, Thomas and Keith JJ, *A-G v Prince* [1998] 1 NZLR 263 at 282 explained why he considered there was sufficient proximity to found a duty of care:

> 'The 1974 Act is directed to the care and protection of children and young persons. The class of persons for whom the statutory protection was enacted is clear. The discharge of the particular function calls for the exercise of special social work skills and responsibilities. There is a professional relationship between social worker and client child or young person. Children and young persons are seen as vulnerable. Because of their youth and immaturity they cannot assert their own rights and needs. Others must do it for them. Just as it is right that the department and its professionals have a generalised duty under the statute to promote the well-being of children and young persons (s 3), so, too, when exercising their statutory duties in respect of a particular child or young person they assume a responsibility to that child or young person (s 4). And the duty to consider a complaint of neglect is specific to the particular child or young person, the subject of the complaint (s 5). While a deprived child or young person may have no particular expectation that the department will seek to assist him or her, given general community expectations reflected in the statute it is not unreasonable to conclude that a child or young person is to be regarded as implicitly relying on the department and its officers to consider complaints that they are in need. Finally, it is readily foreseeable that inadequate consideration of complaints that a young person is neglected might cause harm ... the department is not in a position to say that the imposition of a duty of care would expose the officer and the department to a burden out of proportion to their own moral culpability.'

**[16]** On wider policy considerations, Richardson P observed (at 284):

'That statutory scheme does not lead inevitably to a conclusion that there was a common law duty of care to take proper steps to investigate allegations of neglect and thereafter to take such further and successive steps as the circumstances required. The question is whether it is just and reasonable to superimpose a common law duty of care on the department in relation to the performance of its statutory responsibilities for the protection and care of children and young persons. But, given the conclusion that proximity is satisfied, the statutory framework within which the department and its social workers act is consistent with the imposition of a common law duty of care. The narrow argument is that liability may arise where the person charged with the responsibility either unreasonably fails to carry out the duty to consider the matter or reaches a conclusion so unreasonable as to show its failure to do its duty ... it cannot be said that a common law duty in these terms would cut across the whole statutory scheme. At that early triggering step a specific positive duty rests on the Director-General. At that step it does not require participation with other agencies. The duty suggested does not conflict with any other duty by the department and its officers. On the contrary it enhances it.'

**[17]** Richardson P rejected a contrary argument based on the difficulty and delicacy of the social worker's task and its judgmental nature. A plaintiff will have difficulty in proving that an assessment made by a social worker fell outside the bounds sanctioned by professional opinion. But considerations of this kind cannot absolve the department and social workers from the responsibility of considering and responding to specific complaints with professional skill and care. Richardson P also rejected a submission that the imposition of a duty would or might cause the department and social workers to adopt a more cautious and defensive approach to their duties. Like lawyers and doctors, social workers are professionals. At that triggering step, and at other steps, they should be expected to have shouldered willingly a standard of reasonable skill and care that their private sector counterparts were expected to discharge. Difficulties of reaching conclusions on causation and damages, although making claims very difficult to establish, are not adequate justification for ruling out the possibility of any claim for negligence whatever the circumstances.

**[18]** Tipping J (at 292) delivered a concurring judgment. The statutory framework supports a common law duty to investigate with reasonable care a complaint that a child was not being looked after properly. To the extent possible the law should reflect the reasonable expectations of the society it serves. To hold that the Director-General owed no duty in the circumstances would not only fail to meet society's reasonable expectations. It would cause legitimate concern why the breach of an express public duty afforded no private remedy to a person for whose benefit the public duty existed in the first place.

**[19]** Henry J disagreed. Failure of an alleged duty to inquire would, on its own, be insufficient to establish an entitlement to damages. There would need to be a duty to protect, by taking reasonable consequential follow-up action. But under the 1974 Act the avoidance of harmful consequences involves a carefully constructed and integrated process, including the possible involvement of police, teachers, doctors and others, resulting ultimately in the court taking the final necessary steps in the exercise of a discretion. It is not just or reasonable to impose such a duty.

THE DECISIONS OF GALLEN J AND THE COURT OF APPEAL

[20] In the present case Gallen J delivered his judgment after the decision of the House of Lords in *X and ors (minors) v Bedfordshire CC*, but before the decision of the Court of Appeal in *Prince*'s case. In reaching his decision to strike out the proceedings Gallen J was clearly much influenced by the decision of the House of Lords.

[21] In the Court of Appeal all members of the court seem to have envisaged that the common law duty of care enunciated in *Prince*'s case would not subsist in the present case once the social worker had applied to the court for a warrant under s 28 on 19 July 1988. The joint judgment of Keith and Blanchard JJ was delivered by Keith J. He held ([1999] 2 NZLR 296 at 304 (para 26)) that the duty of care recognised in *Prince*'s case is 'limited in time to the triggering and closely-related steps':

> '[The duty of care] is to be tied to the "positive duty" stated by Parliament relating to that initial stage of deciding whether to arrange a 'prompt inquiry' and when appropriate arranging it.'

[22] Keith J gave the reason for this temporal limit on the scope of the duty of care (para 27):

> '... the statutory scheme cuts across a common law duty of care once the triggering step of the "prompt inquiry" is completed and the officials are moving beyond that initial obligation and are assembling relevant information before considering whether to exercise their statutory powers.'

He then noted (at para 28) that the breaches of duty alleged in the present case 'fall outside that initial period of positive statutory obligations during which, in accordance with *Prince*'s case, a common law duty of care may also arise'.

[23] In a separate judgment Tipping J (at para 39) drew the same distinction. There is no duty of care beyond 'the triggering step'. This step encompasses 'the whole process of investigation up until steps were taken to obviate the perceived harm to the child'. This is for policy reasons, largely of the kind identified by Lord Browne-Wilkinson in *X and ors (minors) v Bedfordshire CC*. Here, it was obtaining and executing the warrant that caused the father and the children the harm and loss for which they claim compensatory damages.

THE DUTY TO INQUIRE

[24] Their Lordships confess to having difficulty with the decision of the Court of Appeal. They respectfully consider it emasculates the scope of the common law duty of care recognised in *Prince*'s case. Their Lordships can see nothing in *Prince*'s case to suggest that the concurrent common law duty is less extensive temporally than the statutory duty imposed on the Director-General by s 5(2)(a) of the 1974 Act.

[25] What, then, is the ambit of this statutory duty? Under s 5(2)(a) of the 1974 Act the Director-General is under a duty to 'arrange for prompt inquiry' where he knows or has reason to suspect a child is suffering, or likely to suffer, ill-treatment. This obligation to arrange a prompt inquiry comprehends a duty to arrange and conduct an adequate inquiry. The Director-General would not discharge his statutory obligation under s 5(2)(a) by merely 'arranging' for an inquiry, whatever precisely that may mean. He must conduct whatever inquiry is necessary. A duty to set an inquiry by his own officials in motion, but no duty

to take reasonable steps to see the inquiry duly proceeded, would be a poor sort of statutory duty. That cannot be the proper interpretation of s 5.

**[26]** Take the facts in the present case. On being told of what D2 had said at school the Director-General had reason to suspect that D2, and consequently D1 also, were at risk. He had reason to suspect they were suffering or likely to suffer from ill-treatment. So he was under a duty to arrange an inquiry, and under a duty to do so promptly. The psychologist's visit to the school, along with the social worker, was a first step in discharge of this duty. The social worker then proceeded to apply to the court, on the same day, for a warrant for the removal of the two girls from their home. The warrant was obtained and executed. That did not end the inquiry or the Director-General's duty in that regard. The grant of urgent interlocutory relief by the court did not mean that the department's obligation to conduct an adequate inquiry was satisfied. Understandably and properly, the department next arranged for D1 and D2 to be examined by a doctor. But that also cannot be regarded as the end of the inquiry. Why should it, especially when the outcome was inconclusive? If, as alleged, material further information thereafter came to hand the Director-General's s 5(2) duty required him to follow up that information. This was so irrespective of whether the information tended to support or undermine the abuse allegation. It cannot be that the department was under a duty to investigate further only if the further information tended to support the allegation.

**[27]** Given that the Director-General's statutory duty under s 5, as distinct from the exercise by him of his discretionary powers, extends thus far, there seems to their Lordships to be no basis on which the concurrent common law duty of care recognised in *Prince*'s case should have a less extensive temporal scope. Substantially the same considerations apply to the conduct of the inquiry at the later stage as at the earlier stage. At the later stage, if not at the outset, other agencies, including the police, would be involved. They were in the present case, more or less from the very beginning. At that time inquiry into sexual offences against children was carried out by a multi-disciplinary sexual abuse team procedure. The police interviewed the father on the same day as the children were first interviewed. But this multi-disciplinary procedure is not inconsistent with the Director-General having a continuing positive statutory duty to inquire, that is, to investigate. That being so, the concurrent common law duty he owed the children continued to exist, reinforcing his statutory duty. Such an investigatory obligation is of course quite distinct from making decisions and assessments on what should be done in the light of what is revealed by the investigation.

**[28]** For these reasons their Lordships respectfully part company with Keith and Blanchard JJ when they express the view that the common law duty of care enunciated in *Prince*'s case is to be limited to the 'initial stage of deciding whether to arrange a 'prompt inquiry' and when appropriate arranging it' (para 26) and with Tipping J when he confined the duty of care to the period ending when steps were taken to obviate the perceived harm (para 39).

THE DUTY OF CARE

**[29]** It is clear from *Prince*'s case that the Court of Appeal in that case envisaged that the common law duty of care was owed by the Director-General. Further, it is reasonably clear that the Court of Appeal also envisaged that such a duty would be owed by the individual social worker: see [1998] 1 NZLR 262 at 285. Some support for this view, although of limited weight, is to be found in s 41(8)

of the 1974 Act. This provision exempted a social worker who furnished a report under that section from civil and criminal liability unless he acted 'in bad faith or without reasonable care'. If a social worker owes a common law duty of care to the child, so must a clinical psychologist, another professional, who undertakes an assessment of the child. There can be nothing surprising in holding that a psychologist owes to a child whom she is examining a duty to exercise due professional skill and care.

**[30]** To whom is the duty of care owed? Clearly the duty is owed to the child or young person in respect of whom the statutory duty to arrange for a prompt inquiry exists in the particular case. In the present case that is D1 as much as D2. If D2's abuse allegation was well founded D1 also was at risk. But their Lordships consider no common law duty of care was owed to the father. He stands in a very different position. He was the alleged perpetrator of the abuse. In an inquiry into an abuse allegation the interests of the alleged perpetrator and of the children as the alleged victims are poles apart. Those conducting the inquiry must act in good faith throughout. But to impose a common law duty of care on the department and the individual professionals in favour of the alleged victims or potential victims and, at one and the same time, in favour of the alleged perpetrator would not be satisfactory. Moreover, a duty of care in favour of the alleged perpetrator would lack the juridical basis on which the existence of a common law duty of care was largely founded in *Prince*'s case. The decision in *Prince*'s case rests heavily on the feature that the duty imposed on the Director-General by s 5(2)(a) of the 1974 Act is for the benefit of the particular child. Self-evidently this statutory duty was not imposed for the benefit of alleged perpetrators of abuse. To utilise the existence of this statutory duty as the foundation of a common law duty in favour of perpetrators would be to travel far outside the rationale in *Prince*'s case.

WITNESS PRIVILEGE

**[31]** Miss McDonald QC, representing the psychologist, developed a further ground on which, so she submitted, the proceedings should be struck out. In substance, she submitted, the claim in the present proceedings is that the defendants were negligent in deciding to set the law in motion and in inflicting upon the father and children the proceedings which followed. It is settled law that damages are recoverable for setting the law in motion, if at all, only where malice and absence of reasonable and proper cause can be proved: see *Simpson v A-G* [1994] 3 NZLR 667 at 673 per Cooke P. There are no such allegations in the present case. From the outset the purpose of the investigation in which the psychologist was involved was to decide whether to bring proceedings to remove the children from their father's care. The conclusion of the psychologist was that the children had been abused and it was this conclusion which led to the decision to seek the warrant. The case is on all fours with that of the psychologist in the *Newham* case in *X and ors (minors) v Bedfordshire CC* regarding whom Lord Browne-Wilkinson said ([1995] 3 All ER 353 at 386, [1995] 2 AC 633 at 755) that her investigations had such an immediate link with possible proceedings in pursuance of a statutory duty that they could not be made the basis of subsequent claims.

**[32]** This submission gives rise to a difficulty which not infrequently arises in striking out applications. Their Lordships do not have sufficient factual information to reach a firm decision on this issue. Their Lordships lack background information about how the sexual abuse team procedure worked in

practice and the role of the psychologist. Further information would also be desirable on the detailed sequence of events in the present case, including full details of all aspects of the psychologist's involvement, together with a copy of her report or reports. Without this evidence too much is left to conjecture. This is not a satisfactory basis for attempting to form a view on whether the link between the psychologist's report and the court proceedings was sufficiently close to attract witness privilege. This is an issue on which the facts should be investigated and found at trial before a decision can properly be made.

CONCLUSION

**[33]** For these reasons their Lordships will humbly advise Her Majesty that the appeal by the two children should be allowed but the appeal by their father should be dismissed. So far as the claims by the children are concerned the proceeding should not be struck out but should be allowed to proceed to trial. To that extent the orders of Gallen J and the Court of Appeal will be varied. In permitting the children's claims to proceed their Lordships are mindful of the formidable difficulties in establishing negligence. But, on the basis of the decision in *Prince*'s case, it cannot be said that in law there is no cause of action.

*Appeal allowed in part.*

Celia Fox Barrister.

# P v P (ancillary relief: proceeds of crime)

[2003] EWHC Fam 2260

FAMILY DIVISION

DAME ELIZABETH BUTLER-SLOSS P

15–17 JULY, 8 OCTOBER 2003

*Practice – Family Division – Ancillary relief – Arrangement involving acquisition, retention, use or control of criminal property – Guidance – Proceeds of Crime Act 2002, ss 328, 333, 335, 338, 342.*

A petitioner in divorce proceedings (the wife) applied for ancillary relief including financial provision. On receiving certain information about the husband's financial position the wife's legal advisers became suspicious that part of the matrimonial assets might be 'criminal property' within the meaning of the Proceeds of Crime Act 2002 and were therefore concerned that in acting for the wife they might be entering into or becoming concerned in an 'arrangement' which facilitated the acquisition, retention, use or control of criminal property by or on behalf of another person contrary to s 328(1)[a] of the 2002 Act, thereby committing an offence. Accordingly, they sought the protection offered by s 328(2) under which an offence was not committed if an authorised disclosure under s 338[b] was made and appropriate consent under s 335[c] was obtained, by making a disclosure to the National Criminal Intelligence Service (NCIS). Under s 335 a person who had made an authorised disclosure was treated as having the appropriate consent to do an otherwise prohibited act if he did not receive notice that consent was refused before the end of a period of seven working days. If consent was refused a moratorium period of 31 days came into force. The NCIS advised the wife's legal advisers, incorrectly, that they could not tell either the husband, his solicitors or their own client that the disclosure had been made without contravening s 333[d] of the 2002 Act which made it a criminal offence inter alia for a person who knew that a disclosure within s 338 had been made to make a disclosure which was likely to prejudice any investigation which might be conducted (the offence of 'tipping off') and/or s 342[e] under which it was a criminal offence for a person who inter alia suspected that an investigation was being conducted to make a disclosure which was likely to prejudice that investigation. Both sections contained exemptions for the actions of professional legal advisers for disclosures by such advisers to a client or a client's representative in connection with the giving by the adviser of legal advice to the client or to any person in connection with legal proceedings or contemplated legal proceedings. The legal professional exemptions did not apply to disclosures 'made with the intention of furthering a criminal purpose'. Three days before a financial dispute resolution appointment, the wife's legal advisers, who had been unable to obtain further clarification of their position from the NCIS, applied to the court without notice for directions in respect of their obligations under the 2002 Act. As a result

a Section 328, so far as material, is set out at [12], below
b Section 338, so far as material, is set out at [16], below
c Section 335, so far as material, is set out at [15], below
d Section 333, so far as material, is set at [18], [19], below
e Section 342, so far as material, is set out at [21], [22], below

of that application the financial dispute resolution date was vacated and the hearing adjourned for two days to afford the NCIS and other interested bodies the opportunity to be heard. The husband's legal advisers obtained a transcript of the adjourned hearing and applied to attend the substantive hearing. They were permitted to do so on the condition that they did not inform the husband. The court gave guidance on two issues in the context of family proceedings: (i) whether and in what circumstances it was permitted to act in relation to an 'arrangement', and (ii) whether and in what circumstances a legal adviser, having made an authorised disclosure, was permitted to inform others that he had done so.

**Held** – (1) The duties of a barrister or solicitor engaged in family litigation under s 328 of the 2002 Act were straightforward. Nothing in that section prevented a solicitor or a barrister from taking instructions from a client. If, having taken instructions, the solicitor or barrister knew or suspected that their client would become involved in an 'arrangement' that might involve the acquisition, retention, use or control of criminal property, then an authorised disclosure should be made and the appropriate consent sought under s 335. The effect of s 335 was that a person could make a disclosure to the NCIS seeking consent to continue taking steps in relation to an arrangement. That person could not take further steps until they had received notice of consent within the notice period of seven working days, or received deemed consent by hearing nothing within the notice period, or received notice of refusal within the notice period. If they received such notice of refusal they could not act in relation to the arrangement for a period of 31 days. It was important to take into account that the 2002 Act made no distinction between degrees of criminal property; an illegally obtained sum of £10 was no less susceptible to the definition of 'criminal property' than a sum of £1m (see [49], [51], [56], below).

(2) There was an enhanced duty of full and frank disclosure upon legal professionals acting in family proceedings and particularly in ancillary relief proceedings. In accordance with that duty, details of the size and description of family assets and actual or potential debts were crucial to the attempts of the legal advisers to settle these cases and to the financial dispute resolution process. The discovery and investigation of financial irregularities might diminish the value of the assets which were the subject of ancillary relief proceedings. The purpose of the financial dispute resolution process would be frustrated if the judge did not have the true facts and the parties were unable to negotiate a genuine settlement in the absence of the requisite knowledge as to the true value of the assets. In general terms the professional duties in family proceedings attracted the protection of ss 333(3) and 342(4) in order to permit a legal adviser to inform, for instance, the other side that a disclosure had been, or would be, made to the NCIS. Those sections specifically recognised a legal adviser's duty, in ordinary circumstances, to make the relevant disclosures, even where the result would be to tip off their client, where to do so would fall within the ambit of being in connection with the giving of legal advice, or with actual or contemplated proceedings. The legal professional exemptions in ss 333(3) and 342(5) would be lost if a disclosure to a client were made 'with the intention of furthering a criminal purpose'. The intention of a legal adviser in choosing to make a disclosure belonged to the adviser alone. The time lines set out in ss 328, 335, and 338 were independent from the provisions of ss 333 and 342. Having complied

with the obligations under s 328, there was nothing in the statute to require a solicitor to delay in informing his client forthwith if he were entitled to do so by virtue of the s 333(3) exemption (see [60], [62], [66], below); *Francis & Francis (a firm) v Central Criminal Court* [1988] 3 All ER 775 considered.

(3) As a matter of good practice, as opposed to statutory obligation, the investigation authorities should be permitted time to do their job without frustration. In most cases a delay of, at most, seven working days before informing a client of an authorised disclosure will not generally cause particular difficulty to a solicitor's obligations to his client or his opponent. Where appropriate consent is refused and a 31-day moratorium is imposed, best practice would suggest that the legal adviser and the NCIS, or other relevant investigating body, try to agree on the degree of information which can be disclosed during the moratorium period without harming the investigation. In the absence of agreement or other urgent circumstances where even a short delay would be unacceptable, such as where a hearing or financial dispute resolution is imminent, or orders for discovery require immediate compliance, the guidance of the court may be sought. It would be appropriate for the legal advisers to make the application without notice to the other side, making the NCIS, or other relevant investigating body, the respondent to the application. The application would be within the ambit of existing court proceedings and there would be no difficulty in the court making any appropriate order. The application would be heard in private and the court should direct that any mechanical recording of the proceedings should not be disclosed or transcribed without the leave of the judge (see [67], [68], below).

(4) It is not necessary for legal advisers to make repeated disclosures on the same facts, unless it is proposed to enter into a new arrangement or variation of the same arrangement. Each time a further disclosure is made, time will start running again for seven days, or possibly seven plus 31 days (see [69], below).

**Notes**

For offences in connection with money laundering, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 408C.

For the Proceeds of Crime Act 2002, ss 328, 333, 335, 338, 342, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 2673, 2677, 2679, 2681, 2685.

**Cases referred to in judgment**

*Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 WLR 751.

*C v S* [1999] 2 All ER 343, [1999] 1 WLR 1551, CA.

*Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261, [2002] 2 WLR 1511.

*Francis & Francis (a firm) v Central Criminal Court* [1988] 3 All ER 775, [1989] AC 346, [1988] 3 WLR 989, HL.

*Livesey (formerly Jenkins) v Jenkins* [1985] 1 All ER 106, [1985] AC 424, [1985] 2 WLR 47, HL.

*R v Cox* (1884) 14 QBD 153, [1881–5] All ER Rep 68, CCR.

**Application**

Solicitors and counsel acting for P (the wife) made a disclosure to the National Criminal Intelligence Service (NCIS) under s 338 of the Proceeds of Crime Act without the knowledge of their client and applied, without notice, on 15 July

2003, to Butler-Sloss P for the ruling of the court as to the effect of the 2002 Act on the wife's application for ancillary relief in divorce proceedings. The application was adjourned until 17 July to afford the opportunity to be heard to the NCIS, the Inland Revenue, the Law Society and the Bar Council. The husband's solicitors applied on 16 July to attend the hearing on 17 July and Butler-Sloss P granted permission on condition that their client not be informed. The facts are set out in the judgment.

*Nicholas Mostyn QC* and *Christopher Pocock* (instructed by *Manches*) for the applicant.

*Florence Baron QC* and *Deborah Bangay* (instructed by *Mishcon De Reya*) for the respondent.

*Andrew Mitchell QC* (instructed by *Winckworth Sherwood*) for the National Criminal Intelligence Service.

*Andrew Tidbury* and *Kennedy Talbot* (instructed by the *Solicitor of Inland Revenue*) for the Inland Revenue.

*Nicholas Elliott QC* for the Law Society.

*Phillip Moor QC* for the Bar Council.

*Cur adv vult*

8 October 2003. The following judgment was delivered.

**DAME ELIZABETH BUTLER-SLOSS P.**

[1] An application was made to me on 15 July 2003 by Mr Mostyn QC, on behalf of the wife to seek the ruling of the court as to the effect of the Proceeds of Crime Act 2002 on his client's application for ancillary relief in divorce proceedings. Counsel and solicitors acting for the wife sought urgent directions from the court in respect of their obligations under the 2002 Act. Exceptionally they did so without giving notice to the respondent (the husband), his solicitors or counsel. The genesis of these extraordinary events is apparent from the history of the wife's correspondence with the National Criminal Intelligence Service (NCIS) to which I shall refer later.

THE FAMILY BACKGROUND

[2] The husband and wife were married in April 1979. He is now 50 years old, and she is 52 years old. In January 2002, the wife filed her divorce petition. This court has not been asked to make any findings as to the parties' assets, but it is suggested by the wife that they are substantial and may exceed £19m. The wife made her application for financial relief, and a financial dispute resolution appointment (FDR) was listed for 18 July 2003 before a High Court judge.

[3] The accountants' forensic reports were first made available in October 2002. The husband's accountant's reply to the wife's additional questions was supplied on 2 May 2003. It was not until a conference was held with leading and junior counsel for the wife on 16 June that the wife's legal advisers became sufficiently concerned about the husband's financial position to consider that issues under Pt 7 of the 2002 Act might arise. In particular, her legal team was concerned about the possibility of committing an offence under s 328 of the Act. Based on the financial information they had seen and the advice of their forensic accountant, the wife and her legal team became suspicious that part of the matrimonial assets might be 'criminal property' within the meaning of the Act.

The wife's solicitors and counsel were worried that, in acting for the wife in the litigation and/or settlement of a financial dispute, they might fall foul of the s 328 prohibition and might become concerned in an arrangement which might facilitate 'the acquisition, retention, use or control of criminal property' by the wife. Accordingly, they sought to protect themselves and their client by invoking the protection offered by s 328(2)(a) and on 18 June 2003 the wife's solicitors wrote to the NCIS making disclosure of the following information: (a) that the wife and the husband were involved in ancillary relief proceedings listed for trial in December 2003; (b) certain identifying information about the husband's business interests; (c) that the wife and her solicitors had suspicions that the assets might comprise criminal property; (d) that the wife would be seeking a substantial sum from the husband in the ancillary relief proceedings; and (e) that the disclosure was being made on behalf of the wife, her solicitors and counsel.

[4] The solicitors' letter stated that an answer would be expected within seven days as to whether the solicitors 'should continue to take steps in the proceedings'. Further, the letter sought advice as to whether in light of the 'tipping off' rules, the letter could be disclosed to the husband's solicitors. The NCIS did not respond in writing to that letter. A number of telephone calls were made by the wife's solicitors to the duty officer at NCIS, whose advice (which NCIS now accepts was misleading) was that the decision to continue to act was purely a 'business decision' for the solicitors. The officer advised that a report was only required if money were actually about to change hands. He also thought, however, that if the money were not to pass through the solicitors' hands that a report might not be necessary at all. This advice was wrong. Crucially, the NCIS officer also advised that the wife's solicitors were not permitted to tell either the other side, or their own client, that the disclosure report had been made, as it would contravene the tipping off provisions and/or the prohibition against prejudicing an investigation.

[5] Having been instructed not to disclose the fact of their report to either the husband or the wife, nor to the husband's solicitors, the wife's solicitors felt that they were left in an extremely difficult position. Further attempts to seek clarification from the NCIS proved unsuccessful. Letters were sent on 25 June and 9 July, but by 15 July a response had not been received.

[6] On 15 July I first heard this application on an urgent ex parte basis. Mr Mostyn, on behalf of himself and the wife's solicitors, submitted that they had been placed in an untenable position. It was impossible, he said, to reconcile the NCIS's instructions to them not to disclose the fact of the report, with their professional obligations to the court, his client, and the respondent. He could not see how they could proceed with the financial dispute resolution on 18 July whilst prevented from disclosing the full facts to either of the parties, the opposing solicitors or the court.

[7] Given the complexity of the issues and the proximity of the FDR appointment, I saw no alternative but to vacate the listed FDR date. I also adjourned the ex parte application until 17 July so as to afford the NCIS, the Inland Revenue, the Law Society and the Bar Council the opportunity to be heard. In light of the extremely unusual nature of the case I ordered that neither the husband nor his legal representatives were to be given a copy of any order other than my order to vacate the date of the FDR.

[8] As it happened, on receipt of the order to vacate the FDR, the husband's representatives obtained from the mechanical recording department, as they

were quite entitled to do in the absence of any specific order of the court, a copy of the transcript of 15 July hearing and immediately made an urgent application before me on 16 July to attend 17 July hearing. I gave them permission to do so, on the condition that they were not to tell their client. That order was of a type rarely made in this court, and whilst clearly necessary at the time in the extremely unusual circumstances of this case, I hope that it will seldom be necessary in the future. In the result, the order endured for not more than 24 hours and I am satisfied that the temporary interference with the husband's art 6 rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) was necessary and proportionate in all the circumstances.

**[9]** The wife's solicitors finally received a letter from NCIS, dated 15 July and received on 16 July, clarifying their response to the request for consent to act. In the letter the NCIS advised that—

> 'On this occasion NCIS consents to you proceeding with the transaction specified in [the] Disclosure Report [of 9 July].
>
> This is an "appropriate consent" within s 335 of the Proceeds of Crime Act 2002, with the result that if you do proceed with that transaction you will not be committing an offence under s 327, 328 or 329 of that Act ...'

**[10]** On 17 July I heard submissions from the wife, the husband, the NCIS, the Inland Revenue, the Law Society and the Bar Council. I am particularly grateful to Mr Mitchell QC on behalf of NCIS, whose submissions have been most helpful in illuminating the workings of the Act. By agreement, I received further written submissions from all the parties, other than the Inland Revenue who supported the final submissions of NCIS.

THE PROCEEDS OF CRIME ACT 2002

**[11]** The 2002 Act came into force on 24 February 2003. Part 7 is headed 'Money Laundering'; Pt 8 is headed 'Investigations'. Within Pts 7 and 8, there are three key aspects of relevance to the present case: (i) acting in relation to an arrangement; (ii) tipping off; and (iii) prejudicing an investigation.

(i) *Section 328—an arrangement*

**[12]** Section 328 makes it an offence to enter into or become concerned in a relevant arrangement. Section 328 reads as follows:

> '**328.** *Arrangements.*—(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.
>
> (2) But a person does not commit such an offence if—(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent; (b) he intended to make such a disclosure but had a reasonable excuse for not doing so; (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.'

**[13]** 'Criminal property' is defined in s 340(3):

'Property is criminal property if—(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.'

**[14]** 'Criminal conduct' is defined in s 340(2):

'Criminal conduct is conduct which—(a) constitutes an offence in any part of the United Kingdom, or (b) would constitute an offence in any part of the United Kingdom if it occurred there.'

**[15]** Consequently, a person is protected from potential liability under s 328(1) if before acting he makes an 'authorised disclosure' and obtains the 'appropriate consent', as defined in ss 338 and 335 respectively. Section 335 reads, inter alia, as follows:

'**335.** *Appropriate consent.*—(1) The appropriate consent is—(a) the consent of a nominated officer to do a prohibited act if an authorised disclosure is made to the nominated officer; (b) the consent of a constable to do a prohibited act if an authorised disclosure is made to a constable; (c) the consent of a customs officer to do a prohibited act if an authorised disclosure is made to a customs officer.

(2) A person must be treated as having the appropriate consent if—(a) he makes an authorised disclosure to a constable or a customs officer, and (b) the condition in subsection (3) or the condition in subsection (4) is satisfied.

(3) The condition is that before the end of the notice period he does not receive notice from a constable or customs officer that consent to the doing of the act is refused.

(4) The condition is that—(a) before the end of the notice period he receives notice from a constable or customs officer that consent to the doing of the act is refused, and (b) the moratorium period has expired.

(5) The notice period is the period of seven working days starting with the first working day after the person makes the disclosure.

(6) The moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused ...

(9) A nominated officer is a person nominated to receive disclosures under section 338.'

**[16]** Section 338 provides for 'authorised disclosures' which may be made to a constable, a customs officer or a nominated officer (authorised by the Director General of NCIS) and made in the form and manner prescribed in s 339. The disclosure is authorised only upon the satisfaction of one or other or the two conditions set out in s 338:

'(2) The first condition is that the disclosure is made before the alleged offender does the prohibited act.

(3) The second condition is that—(a) the disclosure is made after the alleged offender does the prohibited act, (b) there is good reason for his failure to make the disclosure before he did the act, and (c) the disclosure is made on his own initiative and as soon as it is practicable for him to make it.'

[17] Failure to comply with the requirements of Pt 7 is a criminal offence and the penalties are set out in s 334. As I understand, the Secretary of State for the Home Office has not yet provided regulations under the provisions of s 339.

(ii) *Section 333—Tipping off*

[18] Under s 333 of the Act:

> 'A person commits an offence if—(a) he knows or suspects that a disclosure falling within sections 337 or 338 has been made, and (b) he makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to in paragraph (a).'

[19] An important exception, however, is contained in sub-ss (2) and (3) which state:

> '(2) But a person does not commit an offence under subsection (1) if—(a) he did not know or suspect that the disclosure was likely to be prejudicial as mentioned in subsection (1); (b) the disclosure is made in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct; (c) he is a professional legal adviser and the disclosure falls within subsection (3).
>
> (3) A disclosure falls within this subsection if it is a disclosure—(a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or (b) to any person in connection with legal proceedings or contemplated legal proceedings.
>
> (4) But a disclosure does not fall within subsection (3) if it is made with the intention of furthering a criminal purpose.'

[20] The act of informing the client or any other person that a disclosure has been made to NCIS would itself appear to be a 'disclosure' within the meaning of s 333(1).

(iii) *Section 342—Prejudicing an investigation*

[21] In addition to the 'tipping off' offences, s 342 of the Act makes it an offence to prejudice an investigation. It states:

> '**342.** *Offences of prejudicing investigation.*—(1) This section applies if a person knows or suspects that an appropriate officer or (in Scotland) a proper person is acting (or proposing to act) in connection with a confiscation investigation, a civil recovery investigation or a money laundering investigation which is being or is about to be conducted.
>
> (2) The person commits an offence if—(a) he makes a disclosure which is likely to prejudice the investigation, or (b) he falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which are relevant to the investigation.'

[22] As in s 333, s 342 contains the legal professional exemption:

> '(3) A person does not commit an offence under subsection (2)(a) if—(a) he does not know or suspect that the disclosure is likely to prejudice the investigation, (b) the disclosure is made in the exercise of a function under

this Act or any other enactment relating to criminal conduct or benefit from criminal conduct or in compliance with a requirement imposed under or by virtue of this Act, or (c) he is a professional legal adviser and the disclosure falls within subsection (4).

(4) A disclosure falls within this subsection if it is a disclosure—(a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or (b) to any person in connection with legal proceedings or contemplated legal proceedings.'

(5) But a disclosure does not fall within subsection (4) if it is made with the intention of furthering a criminal purpose.'

**[23]** The act of informing the client or any other person that a disclosure is about to be made to NCIS would appear to be a 'disclosure' within the meaning of s 342(2).

THE ISSUES

**[24]** From the above provisions two main issues arise in the context of family proceedings and the application by the wife in the present proceedings: (a) whether and in what circumstances it is permitted to act in relation to an arrangement; and (b) whether and in what circumstances a legal adviser, having made an authorised disclosure, is permitted to tell others of the fact that s/he has done so.

**[25]** It is not appropriate for this judgment to range more widely since the issues which may arise in the future would be more appropriately considered within the factual matrix giving rise to those problems.

THE SUBMISSIONS

*NCIS*

**[26]** Mr Mitchell QC, on behalf of NCIS, recognised that the advice given by the desk officer to the wife's solicitors was wrong and misleading. This arose from a misunderstanding of the questions asked. The solicitors were correct to bring the matter to the attention of the NCIS when they did. At that stage the NCIS should have advised the solicitor whether consent was appropriate and was wrong to have advised the solicitor that it was not an appropriate case to seek consent. The NCIS did later give advice as to consent by a letter of 15 July and consent was given so that the legal adviser would be able to conclude a financial settlement with disclosure made. It was not necessary, in order for there to be a disclosure, that funds actually passed through solicitors' client's account. The test for the legal adviser would be whether s/he had become concerned in an arrangement.

**[27]** In a later written submission in response to the submissions of the husband and the wife, Mr Mitchell pointed out that the requirement under s 328 was to disclose 'suspicion' not 'belief'. The purpose of the legislation was to stop the movement of criminal property and the obligation on a legal adviser was to make sure that s/he did not become involved at any stage with such an arrangement and to make the appropriate disclosure. There was no legal professional privilege protection in s 328. In written submissions he said:

'It is and remains the view of the NCIS that any common law obligation to make full and frank disclosure during the statutory waiting period of seven days and then the subsequently triggered 31 days is overridden by the statute. There is plainly room for an exception to this where the lawyer seeks the permission of the NCIS or makes application to the court in the absence of agreement. No obligation to be full and frank about the affairs and circumstances of a person in private law proceedings can override the statutory waiting period which permits for inquiries and then investigation. There can be no matrimonial exception to this position.'

**[28]** He pointed out that when the money laundering regulations came into force, probably in January 2004, then the legal advisers would be regulated and obligations under s 330 would arise, albeit with the legal professional privilege exception.

**[29]** In relation to tipping off, he said that no offence was committed by a legal adviser who informed his client or the other side of a future intention to disclose a suspicion. But he questioned whether there would ever be any legitimate purpose for a solicitor to make such a disclosure. To inform the client or the other side of the actual intention to disclose his suspicions would have the effect of warning the client and would be tantamount to becoming concerned in an arrangement, since if such a suspicion was well founded the client was bound to try and avoid detection. To inform the client before or after making a disclosure might also come within the provisions of s 342 by prejudicing an investigation.

**[30]** Mr Mitchell submitted that the intention of 'furthering a criminal purpose' in ss 333(4) and 342(5) need not belong to the discloser. He referred me to the decision of *Francis & Francis (a firm) v Central Criminal Court* [1988] 3 All ER 775, [1989] AC 346, in which the House of Lords was considering s 27 of the Drug Trafficking Offences Act 1986. The police had obtained an ex parte order for the production of files from a firm of solicitors relating to financial transactions of one of their clients. The police believed that the client had been provided with money to purchase property by an alleged drug trafficker. The solicitors relied on the exemption in s 27(4)(ii) that the material to which the order related included 'items subject to legal privilege'. The definition of 'items subject to legal privilege' was to be found in s 10(1) of the Police and Criminal Evidence Act 1984 which states:

'**10.** *Meaning of "items subject to legal privilege".*—(1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means—(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client; (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and (c) items enclosed with or referred to in such communications and made—(i) in connection with the giving of legal advice; or (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them.'

**[31]** It will be seen that this definition was subject to s 10(2) which stated: 'Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.'

[32] The House of Lords took the view that on a purposive construction of s 10(2), the relevant 'intention' did not have to belong to the particular person holding the items; rather, if the intention of furthering a criminal purpose were held by anyone, the items would lose their privilege. A drug trafficker with criminal intent could not protect himself by placing his documents in the hands of a solicitor. Privilege belonged to the client, not the solicitor, and a criminal intent disentitled the client to privilege. This was simply the statutory form of the established principle in common law since *R v Cox* (1884) 14 QBD 153, [1881–5] All ER Rep 68, that legal privilege did not attach where the advice sought was being obtained for the purpose of committing a crime. The alternative construction of s 10(2) could only lead to, in the words of Lord Goff of Chieveley ([1988] 3 All ER 775 at 796, [1989] AC 346 at 391), 'absurd consequences'.

[33] Mr Mitchell submitted that, by analogy, the *Francis* case would apply to the passing of information by a legal adviser, who might therefore not be protected under the legal professional exemption. He submitted that the statute overrode the private law right of full and frank disclosure. The purpose of the 2002 Act was to place an obligation on anyone who became suspicious about money laundering, to report their concerns if received in pursuit of a regulated business and or, whoever was concerned, not to enter into an arrangement in relation to criminal property.

*The wife*

[34] Mr Mostyn believed that it was clearly necessary for the wife's legal advisers to make the disclosure under s 328 since they had a strong suspicion that part of the husband's assets might have been derived from untaxed income. They had been placed in a very difficult position by the advice given by NCIS and the requirements of the NCIS after the disclosure had been made. NCIS had never withdrawn its requirement that they should not tell the other side about the disclosure. They therefore felt it necessary to seek directions from the court.

[35] In a later written submission Mr Mostyn expressed his concern about the 'clash' between the requirements under ss 333 and 342 not to 'tip off' nor to 'prejudice an investigation' and the clear obligation in ancillary relief applications to make full and frank disclosure. The protection afforded by s 333(2)(c) and (3)(a) or s 342(3)(c) and (4)(a) would be ineffective in the light of Mr Mitchell's submission that to disclose to the client or to the other party would bring counsel and/or solicitors within s 333(4) or s 342(5) that is to say a disclosure made with the intention of furthering a criminal purpose.

*The husband*

[36] Miss Baron QC, on behalf of the husband, made it clear that the husband's legal team was, of course, equally bound by the provisions of the 2002 Act. They did not, however, consider that there was anything to report to NCIS. They could well understand why the wife's legal team felt it necessary to make disclosure but had themselves carefully considered the facts available to them and were satisfied that disclosure under the 2002 Act was not necessary.

[37] Miss Baron pointed out that, since the NCIS had not responded to the letter of 18 June from the wife's solicitors, there was no necessity to write a further letter on 25 June, the seven-day period having elapsed. The further disclosure of 9 July was unnecessary since no new issue had arisen and time did not run again. She also submitted that s 333 stood alone and was not tied to or part of the time periods imposed by the 2002 Act.

[38] In a later written submission on behalf of the husband, it was argued that, contrary to the submission of Mr Mitchell, the 2002 Act made considerable changes to the pre-existing legislation although it borrowed heavily from parts of it. In particular there was now, in general, no distinction between drug trafficking offences and other offences. There were two significant changes made by the 2002 Act which affected the role and duties of professionals. Firstly the definition of 'criminal conduct' was far wider than before and secondly there was now a positive duty to report criminal conduct in cases involving no attempt to conceal or launder the proceeds of crime.

*The Law Society and the Bar Council*

[39] The provisions of Pt 7 and s 342 of the 2002 Act have become of increasing concern to the legal profession practising civil litigation and, more particularly, in the field of family law. The Bar and solicitors dealing with financial relief disputes of clients with substantial assets or making ancillary relief claims in such cases have been unsure as to their obligations under the 2002 Act and the extent to which the provisions of the 2002 Act might be a barrier to the resolution of financial disputes. When the present application was made, the Law Society and the Bar Council made it clear that each wished to be heard on the wider aspects of the impact of the 2002 Act on the legal profession.

[40] The Law Society and the Bar Council, in written submissions, welcomed the opportunity to intervene and pointed out that the present case was not exceptional. The issues raised by the application reflected wider problems faced by barristers and solicitors, particularly those handling matrimonial matters.

The Law Society

[41] The main concern of the Law Society related to the effect of s 328 which was drafted widely and appeared to cover non-transactional matters. One crucial problem in ancillary relief applications arising from divorce was the requirement of full disclosure of the assets of the spouses under the Family Proceedings Rules 1991, SI 1991/1247 as amended. Tax evasion by one of the parties might well be disclosed or revealed in the family proceedings, often in cases in which the assets were not substantial. This information might become available at any stage of the proceedings and would come within s 328. The Law Society was most concerned that there should be no uncertainty as to the exact extent of a solicitor's duties in relation to potential money-laundering offences. It submitted that the ambit of s 328 was potentially wider than the NCIS had suggested and therefore the appropriate consent would be required in a greater number of cases than had been envisaged. The application of s 328 to disclosures made before the 'prohibited act' was causing practical difficulties but s 328 did apply to less specific activity and, in the view of the Law Society, it was necessary to make a request for consent in such cases to 'becoming concerned in an arrangement'.

[42] In a further written submission the Law Society referred to the ethical difficulties experienced by solicitors arising from s 333, 'tipping off' and s 342, 'prejudicing investigations', in acting for and communicating openly with clients. The Law Society suggested that it should be an acceptable form of compliance with s 328 if, in the case of a wife applicant, there was one joint authorised disclosure by the barrister, solicitor and client. The proposals put forward by NCIS in its position statement represented a sensible and practical way forward in cases similar to the present application. In other more complicated cases, particularly those in which the solicitor may have to make an authorised

disclosure to NCIS about his own client, the position of the solicitor was more uncertain and placed solicitors in the impossible position of withholding material matters from their clients. There was urgent need for guidance about circumstances where a solicitor could tell a client or third party about an authorised disclosure of which the client's activities were the subject.

[43] Mr Elliott QC, on behalf of the Law Society, stressed the concerns of individual solicitors around the country and the volume of inquiries made to the Law Society by solicitors seeking guidance in quite small cases. It was an everyday problem.

The Bar Council

[44] Mr Moor QC on behalf of the Bar Council expressed similar concerns to those of the Law Society. The Bar Council had issued guidance to barristers in respect of money laundering. In a written submission it pointed out that the inclusion of suspicion in s 342(1) broadened the scope of the offence and might include those representing clients. The suggestion in the NCIS written submission that 'the solicitor should not tell the other side that a report has been made unless not to do so would breach an obligation to make disclosure in the context of the particular financial settlement proceedings' was not realistic in the context of family law. All ancillary relief cases required full and frank disclosure. If there was anything relevant in the report to the NCIS it might well affect the value of the assets. It followed therefore that, when a report was made, the other side and the clients on both sides would have to be informed. One particular problem might arise on disclosures made at the door of the court.

*The Inland Revenue*

[45] In matrimonial financial proceedings the Inland Revenue is the most likely agency to be involved. In its submissions the Inland Revenue accepted that the wife's solicitors needed to make an authorised disclosure pursuant to s 338 and that the interpretation of the law as expressed by the NCIS to the wife's solicitors was not correct. The statute did not state that it is only when funds pass through the hands of solicitors that consent is required. The wording of ss 327, 328, 329 and 330 was much broader. Repeated consent was not required for the same facts. Where an authorised disclosure has been made and the facts have not materially changed there is no need for further consent even if a further letter is written and no need for a further time delay for consent or refusal of consent.

[46] The Inland Revenue was not however able to give the appropriate consent under s 335 which had to be given by NCIS. Equally the Inland Revenue was not in a position to sanction the disclosure by the wife's solicitors to the husband that an authorised disclosure had been made to NCIS. The Inland Revenue had no objection to consent being given to the wife's solicitors.

CONCLUSIONS

[47] The Law Society, the Bar Council and family law practitioners in particular are understandably concerned about the implications for the legal profession of Pt 7 and s 342 of the 2002 Act. Although Mr Mitchell pointed out that similar legislation has been in force for over ten years, without entering into a careful comparison of the earlier legislation and the 2002 Act, I agree with Miss Baron that the 2002 Act appears to be broader in its ambit with the result that there is a greater potential effect on members of the legal profession engaged in particular in family financial applications.

(a) *Whether and in what circumstances it is permitted to act in relation to an arrangement*

[48] There is a range of ways in which a legal professional might become 'concerned in' an arrangement. It was not submitted to me, nor do I believe it could be the case, that the offence under s 328 can only be committed at the point of execution of the arrangement. None of the parties before me disagreed with the submission of Mr Mitchell that the act of negotiating an arrangement would equally amount to being 'concerned in' the arrangement.

[49] In my view, the duties under s 328 of a barrister or solicitor engaged in family litigation are straightforward. There is nothing in that section to prevent a solicitor or barrister from taking instructions from a client. However, if having taken instructions the solicitor or barrister knows or suspects s/he or his/her client will become involved in an arrangement that might involve the acquisition, retention, use or control of criminal property, then an authorised disclosure should be made and the appropriate consent sought under s 335. Therefore, if it seems to the solicitor or barrister that there are grounds for suspicion that any arrangement being sought from the court or negotiated between the parties is contrary to the requirements of s 328(1), then authorisation should be sought. Whilst the provisions under ss 327 and 329 were not raised before me in this case, it would seem that the position as set out above would apply equally to both of those sections.

[50] Issues of legal professional privilege do not seem to me to arise under ss 327, 328 or 329 and there is no professional privilege exemption in these sections.

[51] The effect of s 335 is that a person may make a disclosure, generally but not necessarily, to NCIS seeking consent to continue taking steps in relation to an arrangement. The person must not take any further steps in relation to the arrangement, until the person either: (i) receives from NCIS notice of consent within seven working days from the next working day after the disclosure is made ('the notice period'—s 335(5)), in which case the person may resume acting in relation to the arrangement (by virtue of s 335(3)); or (ii) hears nothing from NCIS within the notice period, in which case the person is treated as having deemed consent to resume acting in relation to the arrangement (by virtue of s 335(3)); or (iii) receives from NCIS notice of refusal of consent within the notice period, in which case the person must not act in relation to the arrangement for the duration of the moratorium period of 31 days starting with the day on which the person receives the refusal notice (by virtue of s 335(4)). Once the moratorium period has expired the person may resume acting in relation to the arrangement.

[52] In practice then, the longest possible time for which a person could be prevented from taking steps in relation to an arrangement, after sending a notice to the NCIS, will be 31 days plus seven working days.

[53] The statutory purpose behind s 335(4) is clearly to allow the relevant investigating authority time to take any action it deems necessary in relation to the disclosure where it has decided that consent should be refused.

[54] In most cases in the family courts, the criminal property will have been acquired by some form of tax evasion or possibly social security fraud and I would be surprised if there were to be refusal of consent within the notice period in the majority of cases.

[55] The consent procedures in ss 335 and 338 apply to those persons who make the authorised disclosure. So, for example, if a solicitor makes an

authorised joint disclosure on behalf of himself, counsel and his client, then all three will be protected from prosecution. Indeed where the solicitor acts for the innocent party, it would be sensible as a matter of practice for solicitors to do so. If a solicitor is disclosing suspicions about his own client, it may, of course, be a different matter.

**[56]** It is important for the legal profession to take into account, as Mr Mitchell reminded us, that the Act makes no distinction between degrees of criminal property. An illegally obtained sum of £10 is no less susceptible to the definition of 'criminal property' than a sum of £1m. Parliament clearly intended this to be the case. Whatever may be the resource implications, the legal profession would appear to be bound by the provisions of the Act in all cases, however big or small. If this approach is scrupulously followed by the legal advisers, the result is likely to have a considerable and potentially adverse impact upon the NCIS and would create serious consequential delays in listing and hearing family cases, including child cases.

(b) *Whether and in what circumstances a legal adviser, having made an authorised disclosure, is permitted to tell others of the fact that s/he has done so*

**[57]** Of much greater concern to the legal profession are the implications of ss 333 and 342, which prevent a person from 'tipping off', or prejudicing an investigation. Section 93D of the Criminal Justice Act 1988 (now repealed) contained a prohibition against tipping off in relation to criminal investigations of money laundering. In *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 WLR 751, the Court of Appeal considered the meaning of the legal professional exemption contained in s 93D(4) of the Criminal Justice Act 1988, a provision dealing with 'tipping off' in almost identical terms to s 333. In that case the bank suspected that the moneys held in a client's account had been obtained by fraud. Lord Woolf CJ said (at [7]):

> 'During argument there was discussion as to the extent of the defence provided by s 93D(4). Mr Crow helpfully drew our attention to the similarity between the language of s 93D(4) and the scope of legal professional privilege. Based on this assistance, we conclude that the subsection broadly protects a legal adviser when that adviser is engaged in activities which attract legal professional privilege.'

**[58]** That passage would appear to support the protection given to members of the legal profession in carrying out their duties to their clients, and that was the joint view of Mr Tidbury and Mr Talbot, for the Inland Revenue, who submitted in their skeleton argument that the natural meaning of s 333 was such as to permit a solicitor or barrister to carry out his duties to the court and to his client without fear of committing the tipping off offence.

**[59]** There were no submissions made to me about the nature of the duties of a legal professional, whether solicitor or barrister, to the court, his client and his opponent, but the relevant principles are widely known and accepted. In general terms, of course, all legal professionals are bound by professional ethics which require openness and disclosure of relevant information to both the client and the opponent. (See generally 44(1) *Halsbury's Laws* (4th edn reissue) paras 148–149.)

**[60]** In addition, there is an enhanced duty of full and frank disclosure upon legal professionals acting in family proceedings, and particularly in ancillary relief proceedings. (See *Livesey (formerly Jenkins) v Jenkins* [1985] 1 All ER 106, [1985] AC

424; *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261.) In accordance with this duty of full and frank disclosure in financial disputes between spouses, details of the size and description of family assets and actual or potential debts are crucial to the attempts of the legal advisers to settle these cases and to the FDR process, see the Family Proceedings Rules 1991, SI 1991/1247 (as amended) r 2.61A-E. If financial irregularities are discovered and investigated, it may diminish the value of the assets, the subject of the ancillary relief proceedings. The purpose of the FDR would be frustrated if the judge or district judge did not have the true facts and the parties were unable to negotiate a genuine settlement in the absence of the requisite knowledge as to the true value of the assets. In general terms the professional duties in family proceedings do, in my view, appear to attract the protection of s 333(3) and 342(4) in order to permit a legal adviser to inform, for instance, the other side that a disclosure either will be, or has been, made to the NCIS.

**[61]** I see the force of the contrary submission of Mr Mitchell that the full effect of the legislation may be impeded by the passing of information of those who may seek to take advantage of it. I am not however convinced that the words of the statute support the interpretation which Mr Mitchell suggested. In the *Francis* case the court was concerned with the attachment, and loss, of legal professional privilege to items held on a client's behalf. The decision of the House of Lords in that case reflected the historical position and genesis of s 10(2) by confirming that clients with a criminal purpose cannot hide behind privilege. However, the present case does not appear to me to be analogous. This case raises the issue of the right of a solicitor to make a disclosure to a client, or another, such as an opponent. The question of privilege does not arise.

**[62]** Sections 333 and 342 specifically recognise a legal adviser's duty in ordinary circumstances to make the relevant disclosures, even where the result would be to tip off their client, where to do so would fall within the ambit of being in connection with the giving of legal advice or with legal proceedings actual or contemplated. A central element of advising and representing a client must be, in my view, the duty to keep one's client informed and not to withhold information from him/her. (See *Halsbury's Laws*, above.) Since the function of the Act is to regulate the proceeds of criminal behaviour, it is clear that in every circumstance where a solicitor believes an authorised disclosure to the NCIS is necessary there will be at least a suspicion of criminal purpose. If, as the NCIS suggests, ss 333(4) and 342(5) bite every time a party who is suspected of holding a criminal purpose is given notice that a disclosure has been or will be made to the NCIS (ie, is 'tipped off'), then the legal professional exemptions in ss 333(3) and 342(4) would be rendered meaningless. Sections 333(4) and 342(5) must have some purpose and the interpretation suggested by the NCIS cannot in my view be correct. The exemption is lost if a disclosure to a client is made 'with the intention of furthering a criminal purpose'. The natural meaning of those words would seem to be clear. The approach which the House of Lords took to the construction of the word 'held' in the *Francis* case should not be transposed into this context in relation to the word 'made', nor would it be necessary or proper to attempt to do so. Whereas the purpose of holding documents can be tainted by the intention of any number of people (including client and third parties), the intention of a legal adviser in choosing to make a disclosure would seem to belong to the adviser alone. The context and purpose of this particular section of

the 2002 Act is distinguishable from that in the *Francis* case, not least because the 2002 Act has specifically underlined the duty of disclosure by legal advisers.

**[63]** The speech of Lord Griffiths in the *Francis* case indeed recognises the distinction between loss of privilege on the one hand, and the right to discuss matters with a client on the other hand. In dealing with a submission that the solicitors could not consult their client about the appeal for fear of breaching the equivalent tipping off provisions, Lord Griffiths said ([1988] 3 All ER 775 at 792, [1989] AC 346 at 386):

> 'I have no doubt that ... if an order to give access to documentation is made under s 27, the solicitor-client relationship provides a reasonable excuse within the meaning of the section for the solicitor to take his client's instructions as to whether the order should be contested.'

**[64]** In other words, even though the client's criminal intent disqualified him from claiming privilege, it did not disqualify him from his entitlement to be consulted by his lawyer without falling foul of the tipping off rules.

**[65]** Of course there may well be instances where a solicitor's disclosure to a client is in breach of s 333(4) or s 342(5), because the solicitor makes the disclosure with an improper purpose. In such a case the legal professional exemption would, of course, be lost. I cannot, as I understood Mr Mostyn to suggest, give a blanket guarantee to all family practitioners that they will never lose the protection of the exemption. But unless the requisite improper intention is there, the solicitor should be free to communicate such information to his/her client or opponent as is necessary and appropriate in connection with the giving of legal advice or acting in connection with actual or contemplated legal proceedings.

**[66]** I recognise that the conclusion I have reached may cause some difficulty to the investigating authorities. The time lines set out in ss 328, 335 and 338 are independent from the provisions of ss 333 and 342. Having complied with the obligations under s 328, there is nothing in the statute to require a solicitor to delay in informing his client. Either he is entitled to do so forthwith by virtue of the s 333(3) exemption, or if s 333(4) or 342(5) bites, he is not entitled to do so at all. There is no middle ground.

GOOD PRACTICE

**[67]** I am however concerned that the purpose of the Act be respected, and that as a matter of good practice (as opposed to statutory obligation) the investigation authorities should be permitted time to do their job without frustration. In most cases I cannot see why a delay of, at most, seven working days before informing a client would generally cause particular difficulty to the solicitor's obligations to his client or his opponent. Where appropriate consent is refused and a 31-day moratorium is imposed, best practice would suggest that the legal adviser and the NCIS (or other relevant investigating body) try to agree on the degree of information which can be disclosed during the moratorium period without harming the investigation. In the absence of agreement, or in other urgent circumstances where even a short delay in disclosure would be unacceptable (such as where a hearing or FDR is imminent, or orders for discovery require immediate compliance) the guidance of the court may be sought.

**[68]** The Court of Appeal in *C v S* [1999] 2 All ER 343, [1999] 1 WLR 1551 set out a procedure to be followed where compliance with an order for disclosure of information in civil proceedings might reveal money-laundering and cause the

financial institution to be in breach of tipping off provisions under s 93D of the Criminal Justice Act 1988 (as amended). In *Bank of Scotland v A Ltd* the Court of Appeal suggested a similar procedure whereby the bank in that case could have made an application to the court naming the Serious Fraud Office as respondent. The application could be held in private and there would be no question of serving the customer since he would not be a party. The procedures suggested by the Court of Appeal in those two cases might usefully be adapted to the family financial proceedings where a disclosure has been made. Since the purpose of such an application is to protect the legal advisers and, in some cases, the client, I cannot see how one can impose an obligation on the NCIS to be the applicant (although the NCIS would however also be entitled to approach the court if it wished to do so). In my view, it would be appropriate for the legal advisers to make the application without notice to the other side, making the NCIS the respondent to the application. It would be an application however within the ambit of the existing court proceedings and I do not see any difficulty at the moment in the court making any appropriate order, including, if in the High Court, declarations. In the present case I granted declarations since the situation was entirely new and I did so to clarify the situation. It would not seem to me to be necessary for the court generally to grant declarations, but rather to deal with the practical consequences of the authorised disclosure to the NCIS. The application would of course be heard in private and the court should direct that any mechanical recording of the proceedings should not be disclosed or transcribed without the leave of the judge.

**[69]** I should like to remind legal advisers that it would not seem to be necessary to make repeated disclosures on the same facts, unless it is proposed to enter into a new arrangement or a variation of the same arrangement. Each time a further disclosure is made, time will start running again for seven days or possibly seven plus 31 days.

NCIS POSITION STATEMENT

**[70]** Mr Mitchell has provided to the court a position statement setting out the approach of the NCIS to the 2002 Act, which has now have posted on the NCIS' website (www.ncis.co.uk/legaldisclosures.asp). I have appended a copy of it to this judgment.

**[71]** Subject to my expanded conclusions above, paras 2–8 of the position statement are not substantially altered by my judgment in this case.

**[72]** Paragraphs 9 and 10 purport to be expressed in different terms from each other, but the only possible reading of them is that the legal professional exemption under ss 333(3) and 342(4) is lost, by virtue of ss 333(4) and 342(5), whenever any person possesses a criminal purpose regardless of whether the disclosure to the client/opponent is made before or after the making of the authorised disclosure. For the reasons set out above, I do not accept the NCIS' interpretation and would recommend that in light of my judgment, paras 9 and 10 of the guidance be amended.

**[73]** Paragraphs 11 and 12 accord entirely with my views set out herein, and do not require amendment. Paragraphs 13 and 14 do not require my comments. I do however note that the view taken by the NCIS in the last sentence of para 14 simply underlines the importance of a legal adviser making use of his professional exemption and disclosing the relevant information to his/her client so that the client is jointly protected from potential liability under the Act.

THE PRESENT CASE

[74] In the circumstances of this case, the wife's legal advisers were clearly right to make an authorised disclosure to NCIS. It was also entirely proper for the wife's legal team to approach the court for guidance. The coming into force of this Act in February has caused immense confusion and disruption in family proceedings, and no criticism should be made of the wife's representatives for seeking clarification of their statutory obligations, particularly in the light of the approach of the NCIS to the disclosure made by them. In fact, since there was no reply by the end of the seven-day period, the wife's legal advisers were free to continue to deal freely with the other side and to inform the other side that a disclosure had been made to NCIS. They would not have been exposed to the risk of prosecution for tipping off or prejudicing an investigation, as I have found, contrary to the submissions on behalf of the NCIS. But they could not have reasonably known this at the time. This position was reinforced by the consent given in the NCIS letter of 15 July. The wife's solicitors were not however certain from the NCIS letter that they had that right. Mr Mitchell and Mr Tidbury told me that neither the NCIS nor the Inland Revenue had any objection to the husband being informed of the fact that the disclosure report had been made. Accordingly, I ordered that my previous order of 16 July preventing the husband's legal team from making the disclosure to their client should be set aside. I also granted the declarations sought by the wife's representatives, that: (1) the wife's representatives can disclose to the husband and his representatives a copy of their report to the NCIS; (2) the wife's representatives can disclose to the wife a copy of their report to the NCIS; (3) the consent given by the NCIS to the wife's solicitors extends to counsel and the wife herself; and (4) the consent given by the NCIS extends to implementation of any arrangement agreed.

[75] I indicated that I would hear the parties' submissions on costs after I handed down this judgment, should they wish me to do so.

*Order accordingly.*

Celia Fox Barrister.

*APPENDIX*

*Proceeds of Crime Act 2002, Part 7.*

*Position of the National Criminal Intelligence Service in relation to disclosures by the legal profession* (NCIS website August 2003)

1. In the view of the NCIS the following constitutes good practice on the part of a legal advisor who is advising a client in relation to a matter that might involve a suspicious financial arrangement.

2. There is no need to seek the consent of the NCIS to act—that is to take instructions and learn what a case is about. The NCIS will not accept such requests for consent.

3. Should a concern arise in relation to a prospective financial arrangement then the legal advisor should learn sufficient about the client and the source (or final destination) of any funds involved in the arrangement, including as necessary seeking information from the legal advisors, if any, on the other side.

4. Should the legal advisor then have a suspicion at the stage that there is a step to be taken in the case that would involve the legal advisor or their client becoming involved in an arrangement which he knows or suspects facilitates by whatever means the acquisition, retention, use or control of criminal property by or on behalf of another person or there is the possibility of offences under s 327 or s 329 of Proceeds of Crime Act 2002, a written report setting out all relevant details including the grounds for any suspicion should be submitted to the NCIS.

5. Where consent is to be sought to enter into an arrangement this should be explicitly stated and highlighted in the written report faxed to the NCIS Duty Desk.

6. For there to be a disclosure there is no necessity at all for any funds to be contemplated as having to pass through the legal advisors client account or actually to pass through such an account. The test for the legal advisor would simply be whether he had become concerned in an arrangement.

7. At that stage the NCIS will follow the procedure in accordance with s 335 either giving or with holding consent as the case may be. That is that they will give or refuse consent within seven days; if after seven days there has been no response from the NCIS consent to proceed on the basis of the information disclosed will be deemed to have occurred. If the NCIS refuse to give consent then there would follow a 31-day period from the date of the refusal during which the legal advisor could not proceed with the arrangement, without risking the commission of a money laundering offence.

8. Once a disclosure has been made to the NCIS then the solicitor is free to continue with the arrangement (as reported to NCIS) if consent is given, or at the end of the moratorium period if consent is withheld.

9. If a legal advisor takes the view that he should inform his client (or any other person) before making such a disclosure to the NCIS, then he must have regard to s 342. If the legal advisor at least suspects that an investigator, a customs officer, a police officer or in some cases the director of the assets recovery agency is acting or proposing to act in connection with a confiscation, money laundering or civil recovery investigation which is being or is about to be conducted the offence of prejudicing an investigation is made out, whether or not there has been a disclosure to the NCIS. The legal advisor needs to be alert to the defence contained in s 342(3) which permits disclosures to a client or to any person in connection with legal proceedings. This defence is not available where the disclosure is made with the intention of furthering a criminal purpose. The NCIS take the view that the legal advisor does not have to share or be a party to this intention (which may be held solely by the client) for the defence in s.342(3) not to be available (see *Francis & Francis (a firm) v Central Criminal Court* [1988] 3 All ER 775, [1989] AC 346).

10. The NCIS would wish the legal profession to note that subject to s 333(4), under s 333(3) POCA there is no restriction on the legal advisor informing any person of the fact that they have made a report to the NCIS if such a disclosure is to a client or his representative in connection with the giving of legal advice to the client or the disclosure is made in connection with legal proceedings or contemplated legal proceedings.

11. Where the legal advisor has made a disclosure to the NCIS, the NCIS would prefer as a matter of practise the legal advisor not to make any reference to that fact during the seven days following the disclosure or during the period of 31 days following a refusal to consent to an arrangement, unless not to do so

would be in breach of a disclosure obligation imposed by the particular proceedings.

12. In the event that the legal advisor considers that a requirement of the legal proceedings is to require disclosure of the fact of the disclosure to the NCIS, but there has been no consent from NCIS within seven days or the period is still running then the legal advisor should firstly inform the NCIS and try to seek agreement on the way ahead. In the absence of such agreement the legal advisor should consider making a without notice application to the Court for directions giving the NCIS an opportunity to make representations. (See *C v S* [1999] 2 All ER 343, [1999] 1 WLR 1551 and *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 WLR 751).

13. Legal advisors must not assume that 'the other side' in proceedings has reported a suspicion to the NCIS and such enquiries should not be made of the NCIS.

14. Where the client of the legal advisor has joined in the disclosure that has been made the client would, from the point in time when a disclosure is made to the NCIS, not be regarded as having committed an offence under ss 327–329. Where a legal advisor makes a disclosure without the knowledge of their client then plainly and necessarily such protection for the client would not apply.

# Re Buildlead Ltd
# Quicksons (South and West) Ltd v Katz and another

[2003] EWHC 1981 (Ch)

CHANCERY DIVISION
EVANS-LOMBE J
28 JULY, 8 AUGUST 2003

*Company – Voluntary winding up – Liquidator – Application for removal of liquidator – Court possessing discretionary power requiring applicant to give security for liquidator's costs – Approach to exercise of discretion – Insolvency Rules 1986, r 4.120(3).*

The applicant company had a wholly-owned subsidiary which went into creditors' voluntary liquidation. Over five years later the respondent liquidators applied for an order requiring the company and its bank to provide certain information about the subsidiary's affairs and sums transferred from the subsidiary to the company's bank account. The company started proceedings under the Insolvency Act 1986 to remove the liquidators, whose impartiality it questioned, and who it believed had unnecessarily prolonged the application. The liquidators applied for security for their costs in the proceedings under r 4.120(3)[a] of the Insolvency Rules 1986 which provided that the court 'may require' an applicant for the removal of a liquidator to make a deposit or give security for the costs to be incurred by the liquidator on that application. CPR 25.13[b] specified conditions under which, inter alia, a court could make an order for security for costs, including, where the claimant was a company, only the conditions that it was resident outside the United Kingdom and certain international conventions did not apply or that there was reason to believe it would be unable to pay a defendant's costs if ordered to do so. The issue before the court was the identification of the criteria by which the court should exercise its jurisdiction under r 4.120(3) of the 1986 rules.

**Held** – The proper approach to the use of the discretionary power conferred on the court by r 4.120(3) of the 1986 rules was to use sub-r (3) as a means to winnow out applications to remove liquidators which stood little chance of success rather than using it as a means by which the court might protect liquidators from having to pay personally the costs of defending an application to remove them. The legislature could not be taken to have intended the power to be used primarily for both purposes and if the latter approach were adopted the wide ambit of the power conferred by sub-r (3) would be inconsistent with the conditions for ordering the giving of security for costs contained in CPR 25.13. In the instant case, it had not been suggested that the company's application to remove the liquidators stood no reasonable chance of success and, accordingly, no order

a Rule 4.120, so far as material, is set out at [1], below

b CPR 25.13 provides, so far as material: '(1) The court may make an order for security for costs ... if ...(2)(c) the claimant is a company ... and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so ...'

would be made for security for the liquidators' costs of defending the application (see [9], [16], [18], below).

**Notes**

For removal of liquidator by the court and for conditions to be satisfied in security for costs, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) para 2743 and 37 *Halsbury's Laws* (4th edn reissue) para 835, respectively.

For the Insolvency Rules 1986, SI 1986/1925, r 4.120(3), see 3 *Halsbury's Statutory Instruments* (2001 issue), 489.

**Application**

Stephen Mark Katz and John Stephen Kelmanson, the liquidators of Buildlead Ltd, a wholly-owned subsidiary company of Quicksons (South and West) Ltd, in creditors' voluntary liquidation, applied pursuant to r 4.120(3) of the Insolvency Rules 1986 for security for their costs in proceedings brought by Quicksons under s 108(2) of the Insolvency Act 1986 for their removal as liquidators. The facts are set out in the judgment.

*Stephen Davies QC* (instructed by *DJ Murphy*, Cardiff) for Quicksons.
*Jane Giret QC* (instructed by *Moon Beaver*) for the liquidators.

*Cur adv vult*

8 August 2003. The following judgment was delivered.

**EVANS-LOMBE J.**

**[1]** I have before me an application in proceedings by Quicksons (South and West) Ltd (Quicksons) against Stephen Mark Katz and John Stephen Kelmanson (together, the liquidators) for the removal of the liquidators pursuant to s 108(2) of the Insolvency Act 1986. That application is by the liquidators for security for their costs of the proceedings pursuant to r 4.120(3) of the Insolvency Rules 1986, SI 1986/1925. So far as material r 4.120 provides:

> '(1) This Rule applies where application is made to the court for the removal of the liquidator, or for an order directing the liquidator to summon a creditors' meeting for the purpose of removing him.
>
> (2) The court may, if it thinks no sufficient cause is shown for the application, dismiss it; but it shall not do so unless the applicant has had an opportunity to attend the court for an ex parte hearing, of which he has been given at least 7 days' notice.
>
> (3) The court may require the applicant to make a deposit or give security for the costs to be incurred by the liquidator on the application.
>
> (4) The applicant shall, at least 14 days before the hearing, send to the liquidator a notice stating the venue and accompanied by a copy of the application, and of any evidence which he intends to adduce in support of it.
>
> (5) Subject to any contrary order of the court, the costs of the application are not payable out of the assets ...'

**[2]** The background facts to this case are these. Buildlead Ltd (the company) was the wholly-owned subsidiary of Quicksons. On 2 September 1997 the company was placed in creditors' voluntary winding up. Its statement of affairs

shows a small surplus against preferential creditors but a substantial deficit against unsecured creditors.

[3] During August 1997 the company made a series of transfers totalling approximately £155,000 to the credit of Quicksons' account at Lloyds Bank (the bank). There was an arrangement between Quicksons and the bank that there would be a guarantee from Buildlead of Quicksons indebtedness from time to time to the bank. Each company in the Quicksons group had a floating charge over its assets in favour of the bank. In so far as the group required overdraft facilities those were made available to Quicksons. It was a term of the provision of those facilities that the bank should be at liberty to require any subsidiary, including the company, to transfer any credit in a subsidiary account to Quicksons account with the bank so long as that account was in overdraft. It is Quicksons' contention that the sums transferred by the company to Quicksons in August 1997 were transferred by the company to Quicksons' account with the bank as a result of demands made by the bank pursuant to this arrangement.

[4] Mr Kelmanson was appointed liquidator of the company consequent on the resolution to wind it up. On 13 October 1997 Mr Katz was appointed joint liquidator with him.

[5] In April 1998 Mr Katz commenced correspondence with Quicksons and the bank seeking to obtain particulars of the extent of Quicksons' overdraft at the time of the August 1997 transfers. Mr Katz's requests for information were unsuccessful and on 31 October 2002 the liquidators applied for an order pursuant to s 236 of the 1986 Act directed to both the bank and Quicksons requiring them to provide—

> 'all such information regarding the affairs of Buildlead Ltd in their possession including, but not limited to, information concerning the balance of the account between [Quicksons] and [the bank] in August 1997 at which time sums were transferred from the account of [the company] to the account of [Quicksons].'

[6] On 14 January 2003 Quicksons commenced proceedings to remove the liquidators pursuant to s 108(2) of the 1986 Act. On 11 February the liquidators' solicitors wrote to Quicksons' solicitors seeking security for the liquidators' costs pursuant to r 4.120(3) and on 24 April application was made for such security in the sum of £59,750.

[7] In the s 108 proceedings Quicksons have filed points of claim extending to 38 pages and setting out a number of criticisms of the conduct by the liquidators of the liquidation of the company. Their primary criticism is that the liquidation has been unnecessarily prolonged and used by the liquidators as a means of generating fees for themselves. The liquidators reject these criticisms. They say that, apart from the question of whether some or all of the August 1997 transfers can be recovered from Quicksons or the bank for the benefit of the company's creditors, the winding up is complete. It is the liquidators' submission that the application to remove them was triggered by the s 236 application but otherwise it is not suggested that Quicksons' proceedings do not disclose an arguable case for the removal of the liquidators. This is denied by Quicksons. Quicksons' contention is that, whereas the circumstances of the August 1997 transfers are accepted to be a legitimate area of inquiry for a liquidator of the company, the s 236 application has been made far too late in the day. Quicksons' attitude is that they will make the relevant information about the balance of Quicksons' overdraft at the time of the transfers available to the new liquidator of the

company following on the success of their application to remove the liquidators whose impartiality they question.

**[8]** It is not in issue that, whatever may have been the position in August 1997, Quicksons are presently solvent with cash reserves more than sufficient to pay the amount of security sought by the liquidators.

**[9]** As is apparent from the wording of r 4.120(3) the power conferred by that sub-rule on the court is permissive. The first question, therefore, is what are the criteria by which the court should exercise the consequent discretion? It seems to me that these can be grouped under two possible heads, 'security' and 'merits'. Under security I would place consideration of the sub-rule as a means by which the court might protect liquidators from having to pay personally the costs of defending a claim to remove them. Under the heading merits I would place consideration by the court of using the sub-rule as a means to winnow out claims to remove liquidators which stand little chance of success. It does not seem to me that the legislature can be taken to have intended the discretionary power contained in the sub-rule to be used primarily for both purposes, although in some circumstances the fact that an order would protect a liquidator from loss would be an additional reason for ordering money to be brought into court in a doubtful case.

**[10]** Counsel appearing in the case, both experienced in insolvency practice, were not able to point to any established practice as to how the sub-rule is being used if at all. My own researches have failed to uncover any such practice. Beyond setting out the text of the rule, counsel have told me that there is no description of any established practise as to its use in the authoritative textbooks.

**[11]** Proceedings under s 108 of the 1986 Act are proceedings like any other to which the CPR apply. Thus in an application to remove a liquidator it would be open to the applicant or the respondent liquidator to invoke the court's summary judgment powers under CPR Pt 24. Thus, by means of the Pt 24 rules the claim to remove a liquidator or his defence of the claim could be subjected to preliminary examination of the merits with a view either to striking out the claim or giving summary judgment to the claimant.

**[12]** Equally CPR Pt 25 applies to proceedings under s 108 of the 1986 Act so that a respondent liquidator would be able to apply to the court to order the applicant seeking to remove him to give security for his costs under r 25.12 provided that the conditions proscribed by r 25.13 were complied with.

**[13]** Similar powers of course existed under the old Rules of the Supreme Court which preceded the CPR.

**[14]** It is to be observed that r 4.120(3) of the 1986 rules contains an initial filtering provision through which applications for the removal of liquidators must pass.

**[15]** Similar filtering provisions to those contained in sub-r (2) and for the provisions of security in r 4.120(3) are found in relation to applications to remove liquidators in compulsory winding up (see r 4.119(3)) and in members' voluntary winding up (see r 4.140(3)). Unaccountably in r 6.132, which deals with the removal of trustees in bankruptcy, whereas a filtering power similar to r 4.120(2) is found in r 6.132(2), there is no provision for ordering security for costs similar to r 4.120(3). All of these provisions were introduced into the insolvency rules in 1986.

**[16]** I have come to the conclusion, in the absence of any authority or other guidance, that the proper approach to the use of the powers conferred by r 4.120(3) is merits based. I do so because if a security-based approached were

adopted, the wide ambit of the power conferred by sub-r (3) would be inconsistent with the conditions for ordering the giving of security for costs contained in CPR 25.13. Thus under that rule, without more, only an insolvent company claimant can be ordered to give security for costs whereas r 4.120(3) of the 1986 rules would allow an order to be made in respect of an insolvent individual. a

**[17]** I accept Mr Davies QC's submission for Quicksons that there is an analogy between the powers conferred by r 4.120 and those conferred by CPR Pt 24, in particular, the power of the court to grant conditional permission to defend. I accept his submission that, in the scheme of the rules generally, r 4.120(3) of the 1986 rules is best read as a power intended to be exercised by the court at the first filter stage dealt with in r 4.120(2). Thus at that stage if the court were to conclude that the case to remove the liquidator though arguable was likely to fail it would order the applicant to bring a sum of money into court or otherwise give security for the liquidators' costs as an alternative to dismissing the application forthwith. b c

**[18]** In the present case it has not been suggested by the liquidators that Quicksons' case to remove them, set out in Quicksons' points of claim in the s 108 proceedings, stands no reasonable chance of success, or, in the words of r 4.120(2), shows 'no sufficient cause'. It follows, in my judgment, that I should not order security for the liquidators' costs of defending Quicksons' claim to remove them. I should, perhaps, add that had my conclusion been that the proper approach to the application of the sub-rule was 'security based' the result would have been the same because it is accepted that Quicksons are, and in the foreseeable future will be, well able to pay the amount sought by the liquidators as security. d e

*Application dismissed.*

Victoria Parkin Barrister.

# R v Poulton
# R v Celaire
## [2002] EWCA Crim 2487

COURT OF APPEAL, CRIMINAL DIVISION
ROSE LJ, HUGHES AND ROYCE JJ
24 OCTOBER 2002

*Sentence – Possession of an offensive weapon in a public place – Guidance – Prevention of Crime Act 1953, s 1.*

Where an offence of possession of an offensive weapon in a public place, contrary to s 1[a] of the Prevention of Crime Act 1953 (a weapons offence) is committed in conjunction with another offence, the usual considerations in relation to totality apply. Concurrent sentences are usually appropriate if the weapons offence is ancillary to a more serious offence, and a consecutive sentence is appropriate if the weapons offence is distinct and independent from any other offence charged. In determining the appropriate sentence for weapons offences, a balance has to be struck between the fact that the offence in itself does not involve physical injury, and the public's legitimate concern that the culture of carrying weapons encourages violence and may lead to more serious criminal behaviour. In ascertaining the seriousness of a particular offence it may often be helpful for sentencing courts to consider the nature of the weapon involved; the use to which it may be put; the defendant's intention in carrying it, and the defendant's previous record. Three specific factors, as to intention, may aggravate an offence: (i) a specifically planned use of the weapon to commit or threaten violence or intimidate others; (ii) if the offence is motivated by hostility towards a minority individual or group; and (iii) if the defendant was acting under the influence of drugs or alcohol while carrying the weapon. The circumstances of the offence may be an aggravating feature if the offence is committed at vulnerable premises (including schools, hospitals, or other places where vulnerable people may be present); at large public gatherings, especially if there is be a risk of disorder; on public transport; on licensed premises, or on premises where public services are carried out, such as doctors' surgeries and social security offices. Another aggravating feature is if the defendant is on bail. While some weapons are more dangerous than others, the nature of the weapon is not the primary determinative factor in relation to the seriousness of the offence, because relatively less dangerous weapons may be used to create fear, and more obviously dangerous weapons may be carried for reasons of self defence (with no attempt being made to use them). On the other hand, the carrying of certain weapons (eg flick-knives or butterfly knives, or weapons designed or adapted to cause serious injury) may shed some light on the defendant's intention.

a Section 1, so far as material, provides: '(1) Any person who without lawful authority or reasonable excuse ... has with him in any public place any offensive weapon shall be guilty of an offence, and shall be liable—(a) on summary conviction, to imprisonment for a term not exceeding six months or a fine ... or both; (b) on conviction on indictment to imprisonment for a term not exceeding four years or a fine or both. (2) Where any person is convicted of an offence ... the court may make an order for the forfeiture ... of any weapon in respect of which the offence was committed ...'

Mitigating factors include the fact that the weapon is being carried only on a temporary basis, the defendant's co-operation with police, and a timely plea of guilty. A defendant with previous convictions for violence or carrying weapons who is convicted of carrying a particularly dangerous weapon, in circumstances aggravated by any of the above factors, with the clear intent of causing fear or injury, can expect to receive a sentence at or near the statutory maximum. The custody threshold will almost invariably be passed, in the case of an adult defendant of previous good character, where there is a combination of dangerous circumstances and actual use of the weapon to threaten or cause fear. The nature of the weapon and other aggravating and mitigating features will bear on the length of the custodial term. Custody may still be appropriate where no threatening use is made of the weapon. However, the custody threshold may not be passed in cases which lack any aggravating features, where no threat is made, and where the weapon is not particularly dangerous. In such cases, a community penalty towards the top end of the available range is appropriate. If the defendant has previous convictions for violence, or for other weapon offences, a longer sentence is likely. Courts in passing sentence have also to accord with certain statutory duties, including the prevention of offending in young people and the interests of the child. In cases involving young offenders, a pre-sentence report should be obtained before proceeding to sentence. Sentencing courts will also wish to bear in mind the power to order forfeiture (which will almost invariably follow in most cases) and the power to make a compensation order (see [18]–[29], below).

**Notes**

For possession of offensive weapons, see Supp to 11(1) *Halsbury's Laws*, para 167.

For the Prevention of Crime Act 1953, s 1, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 228.

**Cases referred to in judgment**

*R v Avis* [1998] 2 Cr App R (S) 178, CA.
*R v Buzzer* [1996] 2 Cr App R (S) 271, CA.
*R v Edwards* [2002] EWCA Crim 1474, [2002] All ER (D) 578 (May).
*R v Hopkins* [1996] 1 Cr App R (S) 18, CA.
*R v Norman* (1995) 16 Cr App R (S) 848, CA.
*R v Shorter* (1988) 10 Cr App R (S) 4, CA.

**Appeals against sentence**

*R v Poulton*

Sarah Jane Poulton appealed, with leave of a single judge, against the sentence of twelve months' imprisonment imposed upon her by Mr Recorder Hall in the Crown Court at Hove on 28 November 2002 for an offence of possessing an offensive weapon. The facts are set out in the judgment of the court.

*R v Celaire*

Mario Rolando Celaire applied for permission to appeal against the sentence of twelve month's imprisonment imposed upon him by Mr Recorder Raggatt QC in the Inner London Crown Court on 12 July 2002 for an offence of possessing an offensive weapon. The facts are set out in the judgment of the court.

*Pam Rose* (assigned by the *Registrar of Criminal Appeals*) for Poulton.
*John Barker* (assigned by the *Registrar of Criminal Appeals*) for Celaire.

24 October 2002. The following judgment of the court was delivered.

**ROSE LJ.**

[1] Very few appeals against sentence in relation to the offence of carrying an offensive weapon reach this court. The appeal of Poulton and the renewed application for leave to appeal by Celaire provide what, it has transpired, is a slightly tenuous opportunity for this court to suggest guidelines for sentencing for this offence, in the light of the report of the Sentencing Advisory Panel made in May 2000. I say slightly tenuous because, as will emerge, both of these cases have somewhat unusual features.

[2] So far as the appellant, Poulton, is concerned, she on 19 October 2001, at Hove Crown Court, pleaded guilty to having an offensive weapon and, on 28 November, at the same court, was convicted of attempted robbery. She was sentenced by Mr Recorder Hall to three years for attempted robbery and 12 months concurrently for having an offensive weapon. She appeals against that sentence by leave of the single judge.

[3] The facts were that, shortly after midnight, on 26 July 2001, a woman called Miss Crocket and a friend were on their way home from a nightclub. They went towards a taxi rank in central Brighton and were approached by the appellant, who asked Miss Crocket whether she had any cigarettes. Miss Crocket said 'No, sorry', and the appellant produced a penknife with a three or four inch blade from her pocket, showed it to Miss Crocket and demanded that she open her handbag. Miss Crocket complied and, when the appellant found that there were no cigarettes in the bag, she walked away. Miss Crocket followed and telephoned the police. When the officers arrived, the appellant was arrested. When she was interviewed she made no comment.

[4] In passing sentence, the learned recorder, rightly, referred to the fact that two young women had been placed in fear and that this was, in effect, a street robbery using a knife.

[5] The appellant was born on 12 July 1966. She has a considerable number of convictions spanning a period of some 20 years. They include a conviction for assault occasioning actual bodily harm, one for threatening behaviour and one for assaulting a constable; and many convictions for dishonesty. She has been dealt with by way of fine, conditional discharge, probation orders and short periods of imprisonment, the longest being for a period of three months.

[6] There is a psychiatrist's report, dated 19 June 2002, which refers to the appellant's history of growing up in an unstable and insecure environment and of the physical difficulties which she has endured, including a leaking brain aneurysm and the removal of a kidney. She has made several attempts on her life and has been admitted to a psychiatric hospital on more than one occasion. She is described as having a personality disorder and could be categorised as suffering from a psychopathic disorder but absent highly-specialised services, no useful purpose would be served, in the psychiatrist's view, from making an order under the Mental Health Act 1983.

[7] On the other hand, ongoing and repeated custodial sentences are not likely to have an improving effect on her behaviour. The psychiatrist contemplated that, as and when the appellant was released from custody, any treatment which she then had should include within it a residential component. There are before

the court further reports, apart from that of the psychiatrist. In particular, there is one dated 18 October 2002, from Louise Chase, a counsellor at Downview Prison. She first saw the appellant at the beginning of August 2002, and the appellant has expressed a desire to change her way of life and to commit to her children. She has been working hard to come to terms with her position. She gives every indication of having gained more stability than was apparent at the time of the psychiatric report. She has caused no trouble, nor has she subjected herself to self harm while at Downview. She appears to be handling matters, which include having been bullied, well. She has been, it is said, enhancing her life skills and her understanding of herself and the view is expressed that she might have the chance of putting increasing self knowledge to use outside the prison. Furthermore, if she were to be released, a structured day care unit at the Oasis Project in Brighton (who have, as appears from a report from Peter Hale of CARAT within the prison service, agreed to her starting a programme on 25 October 2002) may be of benefit to her.

**[8]** The submission made on her behalf by Miss Rose was that, as she has now served the equivalent of a 22-month sentence, it would be appropriate to order her immediate release without more. This court has invited the liaison probation officer to see the appellant during the currency of these proceedings and, in due course, we shall return to the outcome of matters so far as this appellant is concerned.

**[9]** The applicant, Celaire, to whom we give leave to appeal, pleaded guilty on 20 May 2002, at Camberwell Green Magistrates' Court, to possessing an offensive weapon and using a motor vehicle with no insurance. He was convicted of dangerous driving and committed to Inner London Crown Court for sentence. There, on 12 July 2002, by Mr Recorder Raggatt QC, he was sentenced to 12 months' imprisonment for possession of an offensive weapon. No separate penalty was imposed for using the vehicle with no insurance and he was sentenced to six months consecutively for dangerous driving, that is to say the total sentence was 18 months' imprisonment, and he was disqualified from driving for three years.

**[10]** The facts were these. On the evening of 8 December 2001 police officers in Brixton stopped the appellant, Celaire, who was riding a Yamaha motorcycle, because of the way in which he had overtaken some other vehicles. The officers parked their car in front of the appellant's motorcycle at an angle to prevent him getting away. But, after one of the officers had alighted from the police motorcar, the appellant revved up the engine and sped off through a gap. The officers set off in pursuit. The appellant drove at a speed of 50 miles per hour, in an area restricted to 30. He went through a red light and he passed between two pedestrians on a pelican crossing, causing them to jump out of the way. He drove into a busy road which was solid with traffic and came in contact with four vehicles before coming to a halt. He then began to run off but was detained by plain clothes police officers. He was asked if he had anything on him which he ought not to have. He then produced from his pocket a kitchen knife with a blade between four and five inches long.

**[11]** He was arrested. In interview, he said he carried the knife for his own protection and he admitted he had no insurance. He said he recalled almost colliding with the pedestrians but was not looking at the lights and could not remember going through them on red.

**[12]** The recorder, in passing sentence, referred to the carrying of knives as being extremely dangerous because the production of a knife to threaten people,

in circumstances of potential violence, has the capacity to cause the serious escalation of such violence. With that expression of view this court agrees. He went on to pass the sentence to which earlier we referred.

[13] This appellant was born on 4 February 1978, so he is 24 years of age. He has a previous conviction for rape and indecent assault, in relation to which he was initially sentenced to five years, reduced by this court on appeal to four years' detention in a young offender institution in 1995.

[14] There was a pre-sentence report before the learned recorder, which referred to a high risk of the appellant re-offending, although he appeared to regret his actions. He has no history of mental illness.

[15] The present position, so far as the appellant is concerned, as Mr Barker on his behalf has told this court, is that he is in custody awaiting trial, due to start next week, for murder. It is said, on his behalf, that he was carrying this knife in the circumstances which we have described because the family of the man whom he is alleged to have murdered, before police involvement implicating the appellant, had expressed views adverse to the appellant. Because he was fearful of what they might do, he was carrying a knife in the way which we have described.

[16] Mr Barker submits, by reference to a number of authorities, that the sentence passed in relation to the offensive weapons offence was approximately double what it ought properly to have been. So far as the sentence for dangerous driving is concerned, although initially he had been minded to contend that it was excessive, he accepted, in this court, that that submission could not be advanced; but six months was, he submitted, towards the upper end of the appropriate bracket for this appellant in relation to that offence. Mr Barker, in relation to the offensive weapon offence, drew our attention to *R v Shorter* (1988) 10 Cr App R (S) 4, a decision of this court prior to the increase by Parliament of the maximum penalty for the offence of carrying an offensive weapon from two years to four years, *R v Buzzer* [1996] 2 Cr App R (S) 271, where a sentence of six months was reduced to three months, following conviction for possession of a flick-knife, *R v Edwards* [2002] EWCA Crim 1474, [2002] All ER (D) 578 (May) where a sentence of 12 months was reduced to nine months and *R v Norman* (1995) 16 Cr App R (S) 848, where an appeal against a sentence of 15 months for possession of a broken snooker cue and a nasal spray containing ammonia solution was dismissed, the appellant in that case having many previous convictions for possession of an offensive weapon and violence. Mr Barker also referred to *R v Hopkins* [1996] 1 Cr App R (S) 18, where a sentence of six months passed on a minicab driver, fearful for his own safety, was reduced to three months in relation to the possession by him of a lemon juice bottle containing hydrochloric acid.

[17] The task of issuing guidelines is not made easier by the fact that the maximum penalty for possession of an offensive weapon in a public place, contrary to s 1 of the Prevention of Crime Act 1953, which was two years until 1996 is now four years' imprisonment. But the maximum penalty for possessing an article with a blade or point in a public place, contrary to s 139 of the Criminal Justice Act 1988 is still only two years. It is not obvious to the court why the maximum sentence should be different. It is to be noted that the case of *R v Edwards*, to which Mr Barker referred, involved possessing a bladed article.

[18] For the avoidance of doubt, this judgment relates to offences of possessing an offensive weapon with the four-year maximum, which we shall refer to, in shorthand terms, as a weapons offence. We also emphasise, as with

all guideline decisions of this court, that this judgment affords guidance not a straitjacket to sentencers.

**[19]** As will become apparent we largely, although not entirely, adopt the proposals of the Sentencing Advisory Panel. Where the weapons offence was committed in conjunction with another offence, the usual considerations in relation to totality will apply. A concurrent sentence will usually be appropriate if the weapons offence is ancillary to another more serious offence, as it was in the case of the appellant, Poulton. Where the weapons offence is distinct and independent of another offence, a consecutive sentence will usually be called for, as in the case of the appellant, Celaire. In this respect, therefore, the approach of the sentencing judge in both these cases, the subject of appeal, was correct.

**[20]** There is, in determining the appropriate sentence for an offence of this kind, a balance to be struck between the fact that the offence does not in itself involve physical injury and the public's legitimate concern that a culture of carrying weapons encourages violence and may lead to more serious criminal behaviour.

**[21]** We agree with the panel that, in assessing the seriousness of an offence, it is necessary to consider the offender's intention, the circumstances of the offence and the nature of the weapon involved. In this respect, we also agree that it may often be helpful for a sentencer to ask the sort of questions posed by this court in relation to firearms in *R v Avis* [1998] 2 Cr App R (S) 178, that is to say, to consider the nature of the weapon involved, the use to which it may be put and the defendant's intention in carrying it and the defendant's previous record.

**[22]** As to intention there are, in our judgment, three specific factors which may aggravate the offence. First, there may be a specifically planned use of the weapon, to commit violence or threaten violence or intimidate others. Secondly, the offence may be motivated by hostility towards a minority individual or group, which may give rise to an aggravating feature, such as racial motivation within s 28 of the Crime and Disorder Act 1998. Thirdly, we would regard it as an aggravating aspect if the defendant was acting under the influence of alcohol or drugs while carrying such a weapon.

**[23]** As to the circumstances of the offence, these may be aggravated if its commission takes place at particularly vulnerable premises such as a school, (which may give rise to the possibility of a separate charge under s 139A of the 1988 Act), or a hospital or other place where vulnerable people may be present. Likewise, an offence may be aggravated if committed at a large public gathering, especially one where there may be a risk of disorder; or, if committed on public transport or on licensed premises or on premises where people are carrying out public services, such as in a doctor's surgery or at a social security office. Finally, in this regard, the offence will obviously be aggravated if it is committed while the defendant is on bail. That, of course, is a statutorily aggravating feature under s 29(2) of the Criminal Justice Act 1991.

**[24]** As to the nature of the weapon, some weapons are inherently more dangerous than others. But the nature of the weapon will not be the primary determinant as to the seriousness of the offence, because a relatively less dangerous weapon, such as a billiard cue, or a knuckle-duster, may be used to create fear and such an offence may be at least as serious as one in which a more obviously dangerous weapon, such as a knife, or an acid spray is being carried for self-defence or no actual attempt has been made by the offender to use it.

[25] On the other hand, light may be shed on an offender's intention, if he is carrying a weapon which is offensive per se, such as a flick-knife or a butterfly knife, or a weapon designed or adapted to cause serious injury.

[26] Mitigation will be found if the weapon was being carried only on a temporary basis. As in most other cases, there will be mitigation arising from personal factors, co-operation with the police and a timely plea of guilty. A defendant, with previous convictions for violence or carrying weapons, who is convicted of carrying a particularly dangerous weapon, in circumstances aggravated by any of the factors which we have identified and doing so with the clear intention of causing injury or fear, can expect to receive a sentence at or near the statutory maximum.

[27] In relation to an adult offender of previous good character, the custody threshold will almost invariably be passed where there is a combination of dangerous circumstances and actual use of the weapon to threaten or cause fear. The nature of the weapon and other aggravating or mitigating factors will bear on the length of the custodial term.

[28] Custody may still be appropriate, depending on the circumstances, where no threatening use was made of the weapon. Alternatively, depending on the circumstances, there will be cases where, absent aggravating features of the kind which we have identified and where no threat has been made and where the weapon is not particularly dangerous, the custody threshold may not be passed and a community sentence towards the top end of the available range may be appropriate. Of course, if the defendant has previous convictions for violence or for other weapon offences, then the sentence imposed on him or her is likely to be longer.

[29] So far as young offenders are concerned, the courts will of course, in passing sentence, have regard to their statutory duty to prevent offending by children and young persons, under s 37 of the 1998 Act and the need to have regard to the welfare of the child by virtue of s 44 of the Children and Young Persons Act 1933. It will almost invariably be appropriate, in the case of young offenders, to obtain a pre-sentence report before proceeding to sentence. The sentencing court will also wish to bear in mind its powers to order forfeiture which will almost inevitably follow in relation to offences of this kind, and its powers to make a compensation order.

[30] In the light of those general considerations, we return to the cases of these appellants. So far as Celaire is concerned, as we have already indicated, consecutive sentences were entirely appropriate. There is nothing wrong with the sentence of six months passed in relation to the dangerous driving offence, save that the recorder ought to have ordered and we order, in pursuance of our statutory obligation, that before driving again the appellant undergo a driving test.

[31] So far as the 12-month sentence for possessing an offensive weapon is concerned, we accede, in part, to the submission made by Mr Barker. We take the view that 12 months was somewhat longer than all the circumstances of this case merited. We bear in mind those circumstances, as we have identified them, not least the fact that this was a dangerous knife with a four or five inch blade. We are prepared to quash the sentence of 12 months' imprisonment. We substitute for it a sentence nine months' imprisonment. The total sentence to be served therefore will be one of 15 months rather than 18 months' imprisonment. To that extent, Celaire's appeal is allowed and he may go down.

[32] With regard to the appellant, Poulton, we are indebted to the court's liaison probation officer for making inquiries during the adjournment in relation to this appellant. The sentence of three years which the learned sentencing judge passed cannot, on its face, be regarded as manifestly excessive, in the light of all the material which was before him, when he passed the sentence. This, however, is one of those comparatively rare cases in which, having regard to the material which is before this court bearing upon this appellant, it is possible to take a merciful view at this stage. In this regard we bear in mind that the appellant has already served the equivalent of a 22-month sentence. But we bear principally in mind the signs which are beginning to appear that this appellant is going to change her way of life. It is in the public interest, as well as her interest and the interests of her children, that she does change her way of life. If she does not do so, she will inevitably spend ever-increasing periods in custody.

[33] The view which we take is that, at this stage, we can properly quash the two sentences of imprisonment which were passed upon her in the court below and substitute for them, in each case concurrently, a 12-month community rehabilitation order. We emphasise that this decision is no authority for what is generally the appropriate level of sentencing in relation either to attempted street robbery or for the carrying of an offensive weapon in a public place. We shall attach to that probation order a condition that she attend the Oasis Project in Brighton as identified in the reports before this court to which earlier we referred, or other project as directed by the probation officer.

*Celaire's appeal allowed in part. Poulton's sentences of imprisonment quashed and community rehabilitation orders substituted.*

Lynne Townley Barrister.

# R v T

## [2003] EWCA Crim 1011

COURT OF APPEAL, CRIMINAL DIVISION
AULD LJ, FULFORD J AND JUDGE ZUCKER
17 FEBRUARY 2003

*Sentence – Custodial sentence – Sexual offence – Extended licence – Statutory provision empowering court to extend until end of sentence licence period in respect of sexual offences – Whether provision applying to sentence imposed for offence committed before its implementation – Criminal Justice Act 1991, s 44 (as originally enacted) – Human Rights Act 1998, s 3, Sch 1, Pt I, art 7 – Powers of Criminal Courts (Sentencing) Act 2000, s 86.*

The defendant was sentenced to a total of two-and-a-half years' imprisonment for sexual offences committed before the implementation, on 1 October 1992, of s 44[a] of the Criminal Justice Act 1991. Section 44 had given the court power, when sentencing for a sexual offence, to make an order extending to the whole of the sentence the period spent by the offender on licence following his release. Prior to the implementation of s 44, there had been no provisions available for ordering supervision and recall throughout the whole of the sentence. In respect of sexual offences committed before 30 September 1998, s 44 had been replaced by s 86[b] of the Powers of Criminal Courts (Sentencing) Act 2000, a provision that was in essentially the same terms as s 44. When sentencing the defendant, the judge purported to make an order under s 86 of the 2000 Act. He appealed, contending that a s 86 order, made in respect of an offence committed before 1 October 1992, would violate art 7[c] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)—the provision which prohibited the imposition of a heavier penalty than the one that had been applicable at the time that the criminal offence had been committed. The Court of Appeal was therefore required to determine whether, applying the interpretive obligation contained in s 3[d] of the 1998 Act, s 86 of the 2000 Act was to be read as if it contained a limitation to offences committed on or after 1 October 1992.

**Held** – Section 86 of the 2000 Act was without effect as regards any sentence passed for an offence committed before 1 October 1992. It was punitive and was properly to be contrasted with purely preventative measures that did not invoke any principle against retrospective penalty. Accordingly, s 3 of the 1998 Act was

a Section 44, as originally enacted, is set out, so far as material, at [10], below

b Section 86, so far as material, provides: '(1) Where in the case of a long-term or short-term prisoner—(a) the whole or any part of the sentence was imposed for a sexual offence committed before 30 September 1998, and (b) the court by which he was sentenced for that offence, having had regard to the matters mentioned in section 32(6)(a) and (b) of the Criminal Justice Act 1991, ordered that this section should apply, sections 33(3) and 37(1) of that Act shall each have effect as if for the reference to three-quarters of his sentence there were substituted a reference to the whole of that sentence ...'

c Article 7 is set out at [16], below

d Section 3 is set out at [18], below

to be applied so as to read s 86 of the 2000 Act in a manner that was compatible with art 7 of the convention. That interpretation of s 86 would, however, have been reached independently of the 1998 Act. It was a general principle of law, long applied in England and Wales, that where an act or admission constituted an offence when committed, no penalty was usually imposed that was heavier than the one applicable at that time. The legislation contained no clear terms which required it to be construed as having retrospective operation. Nor was there any necessary or distinct implication that it was to have such effect. Accordingly, the appeal would be allowed, and the purported extension of the licence period under s 86 would be quashed (see [19]–[22], below).

**Notes**

For the convention prohibition on heavier retrospective penalties and for the power to impose on a sexual offender an extended period of post-release supervision, see respectively 8(2) *Halsbury's Laws* (4th edn reissue) para 148 and Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1206.

Section 44 of the Criminal Justice Act 1991, as originally enacted and as it applied to persons sentenced for sexual offences committed before 30 September 1998, has been replaced by s 86 of the Powers of Criminal Courts (Sentencing) Act 2000.

For the Human Rights Act 1998, s 3, Sch 1, Pt I, art 7, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 532, 554.

For the Powers of Criminal Courts (Sentencing) Act 2000, s 86, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1864.

**Case referred to in judgment**

*Ibbotson v UK* (1999) 27 EHRR CD 332, E Com HR.

**Appeal against sentence**

The appellant, T, appealed against the order made in the Crown Court at Maidstone on 30 November 2001 under s 86 of the Powers of Criminal Courts (Sentencing) Act 2000, extending to the whole term of his sentence of two-and-a-half years' imprisonment for various sexual offences the period that he would spend on licence on his release. The facts are set out in the judgment of the court.

*Stephen Wilson* (assigned by the *Registrar for Criminal Appeals*) for the appellant.

**FULFORD J** (giving the judgment of the court at the invitation of Auld LJ).

**[1]** On 8 November 2001 in the Crown Court at Maidstone the appellant was convicted of various offences and on 30 November 2001 was sentenced as follows. On counts 1, 2, 4, 5, 6, 8 and 9, all of indecent assault on a female, he was sentenced to two-and-a-half years' imprisonment on each to be served concurrently. On counts 3, 7, 10 and 11, all of gross indecency with a child, the appellant was sentenced to 12 months' imprisonment on each, concurrent with each other and concurrent with the sentences imposed on the earlier offences. The total sentence was, therefore, one of two-and-a-half years' imprisonment.

**[2]** Having passed that sentence of imprisonment, the learned judge, after some discussion with counsel, stated that his licence period was to be extended

for two years under s 86 of the Powers of Criminal Courts (Sentencing) Act 2000. The learned judge indicated in terms that he wanted to ensure that the appellant was to be under supervision for a period of two years following his release.

[3] Although we do not have a transcript of any court proceedings following the original sentencing hearing, it appears that the learned judge purported to vary the extended licence period after counsel returned to court in order to address him on the terms and effect of s 86. We are told that he stated by way of variation of sentence that the supervision of the appellant would run not for two years, but for the entirety of the sentence. In those circumstances, and in the absence of a proper record, it is difficult to determine exactly what order was made finally by the learned judge.

[4] It is important to note that the offences spanned the period of 4 July 1981 to 2 November 1988. The effect of s 86 is that if an offender is sentenced to a determinate sentence of 12 months or more, and the whole or any part of his sentence was imposed for a sexual offence committed before September 30 1998, the court may order that s 86 of the 2000 Act will apply to him. The consequence of the order is that when he is released on licence he will remain on licence until the end of the whole of his sentence. The offender will not necessarily remain in custody any longer than otherwise would be the case, but he will be liable to supervision and recall throughout the whole of sentence.

[5] The appellant appeals against the part of the sentence that concerns that licence period with the leave of the single judge, the Registrar having granted an extension of time, 159 days, for the filing of grounds of appeal. We turn, briefly to the facts.

[6] Since the issue that falls for determination on this appeal is not fact dependent and relates solely to the validity of the extension of the licence period we are able to deal with the background facts in summary form only.

[7] Between 4 July 1981 and 2 November 1988 the appellant committed a number of indecent acts with three of the female grandchildren of his partner. The victims were all under 13 years of age at the time. The indecent assaults consisted initially of touching the genital area of two of the victims and progressed to digital penetration, oral sex, simulation of sexual intercourse and finally to forcing the children to masturbate him. The appellant indecently exposed himself to the third victim.

[8] The offences were reported to the police in January 2001. On 16 January 2001 the appellant was arrested. When interviewed he denied the offences.

[9] In passing sentence the learned judge observed that the appellant had been convicted of a number of offences of indecency with young girls who were effectively his grandchildren and in those circumstances only a custodial sentence could be justified. In deciding the appropriate sentence account was taken of the fact that the matters were the subject of discussion within the family in 1993, and his partner was currently in ill health, but those were not, in the view of the court, exceptional circumstances such as to justify suspension of the sentence. We have set out above the learned judge's purported orders under s 86 of the 2000 Act.

[10] It is argued that this sentence is invalid in that the offences were committed prior to the coming into force of the relevant legislation that gave the courts the power to extend the licence period. The courts gained these powers by way of s 44 of the Criminal Justice Act 1991, which was later replaced by s 86. Section 44 contains the following:

'(1) Where, in the case of long-term or short-term prisoner—(a) the whole or any part of his sentence was imposed for a sexual offence; and (b) the court by which he was sentenced for that offence, having had regard to the matters mentioned in section 32(6)(a) and (b) above, ordered that this section should apply, sections 33(3) and 37(1) above shall each have effect as if for the reference to three-quarters of his sentence there were substituted a reference to the whole of that sentence.'

[11] Section 33(3) of the 1991 Act required a short-term prisoner who had been released on licence, and then recalled, to be released on licence once he would (but for his release) have served three-quarters of his sentence. Section 37(1) limited the licence period of all prisoners to three-quarters of their sentence.

[12] The matters mentioned in s 32(6)(a) and (b) are the linked needs of protecting the public from serious harm from offenders; preventing the commission by them of further offences and securing their rehabilitation.

[13] Section 86 of the 2000 Act sets out as follows:

'(1) Where, in a case of a long-term or short-term prisoner—(a) the whole or any part of his sentence was imposed for a sexual offence committed before 30th September 1998, and (b) the court by which he was sentenced for that offence, having had regard to the matters mentioned in section 32(6)(a) and (b) of the Criminal Justice Act 1991, ordered that this section should apply.'

There are similar references, as in s 44, to s 33 and s 37 of the 1991 Act (see [11], above).

[14] The provision from which s 86 is derived, s 44 of the 1991 Act, came into force on 1 October 1992 (Criminal Justice Act 1991 (Commencement No 3) Order 1992, SI 1992/333). Before that date the longest period which an offender could serve under any determinate sentence was two thirds of the sentence.

[15] Prior to that date there were no provisions available for ordering supervision and recall throughout the whole of the sentence. It is submitted that the extension of the supervision to the end of the sentence represents a heavier penalty than could have been imposed in accordance with the provisions in force at the time. Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) is relied on in this regard.

[16] Article 7 provides as follows:

'1. No one shall be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.'

[17] It is submitted that these provisions would be violated if an order under s 86 is made in respect of an offence committed before 1 October 1992. Counsel for the appellant argues that s 86 must be interpreted in accordance with s 3 of the 1998 Act as if it contained a limitation to offences committed on or after that date.

[18] Section 3 of the 1998 Act contains the following:

'(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

(2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.'

**[19]** There is no doubt, in our judgment, that these provisions are punitive and are properly to be contrasted with purely preventative measures that do not invoke any principle against retrospective penalty: see *Ibbotson v UK* (1999) 27 EHRR CD 332, where, by contrast, the European Commission held that the registration requirements of the Sex Offenders Act 1997, which have a partially retrospective operation were preventative, rather than punitive in character, and did not therefore constitute a penalty for the purposes of art 7.

**[20]** We, therefore, accept the submissions that we should apply s 3 of the 1998 Act so as to read s 86 in a manner that is compatible with art 7 of the convention. There is no incompatibility with primary legislation, and, accordingly, we have no hesitation in applying to s 86 the interpretation contended for, namely that it is without effect as regards any sentence passed for an offence committed before 1 October 1992. We add that we would have arrived at this conclusion independently of the 1998 Act for it is a general principle of law long applied in England and Wales that where an act or admission constituted an offence when committed no penalty is usually to be imposed which is heavier than the one applicable at that time.

**[21]** *Maxwell on the Interpretation of Statutes* (12th edn, 1969) p 215 puts the matter in emphatic terms:

'It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.'

No such terms or necessary or distinct implication is to be found under the relevant legislation.

**[22]** We quash the purported extension of the licence period under s 86, but otherwise the sentence in all other respects remains as passed, namely two-and-a-half years' imprisonment.

**[23]** It is an offence to publish the name and address of the victim, or any matter which might lead to identification of the victim.

*Appeal allowed.*

Stephen Leake Barrister.

# R v R

## [2003] EWCA Crim 2199

COURT OF APPEAL, CRIMINAL DIVISION
4, 25 JULY 2003
KENNEDY LJ AND PITCHERS J

*Sentence – Custodial sentence – Sexual offence – Extended licence – Statutory provision empowering court to extend until end of sentence licence period in respect of sexual offences – Whether such extension violating convention prohibition on heavier retrospective penalties if imposed in respect of offence committed before provision implemented – Criminal Justice Act 1991, s 32(6) – Human Rights Act 1998, Sch 1, Pt I, art 7 – Powers of Criminal Courts (Sentencing) Act 2000, s 86.*

The defendant was sentenced to two years' imprisonment for sexual offences committed before the implementation, on 1 October 1992, of the Criminal Justice Act 1991. If he had been sentenced for those offences when they had been committed, he would have been eligible to apply for parole after serving 12 months and would have remained on licence until the two-thirds point. However, s 86[a] of the Power of Criminal Courts (Sentencing) Act 2000, when read with certain provisions of the 1991 Act, gave the sentencing court power, in respect of sexual offences committed before 30 September 1998, to extend the licence period until the end of the sentence. That power, which replaced a similar power originally contained in the 1991 Act, could be invoked once the court had had regard to the matters mentioned in s 32(6)[b] of the 1991 Act, namely the need to protect the public from serious harm from offenders and the desirability of preventing the commission by them of further offences and of securing their rehabilitation. If he were in breach of his licence, a person subject to an order under s 86 of the 2000 Act could be fined or recalled to prison for up to six months. The sentencing judge imposed a s 86 order on the defendant. He appealed, contending that such an order, when made in respect of an offence committed before 1 October 1992, violated art 7(1)[c] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)—the provision which prohibited the imposition of a heavier penalty than the one that had been applicable at the time that the criminal offence had been committed.

**Held** – The imposition, under s 86 of the 2000 Act, of an order for an extended licence in respect of offences committed before 1 October 1992 did not violate art 7 of the convention. Such an order was preventive, not punitive. Its operation related to the execution of the sentence and was part of the machinery of carrying out the penalty. Adding such an order to a sentence of imprisonment for an offence committed before 1 October 1992 did not constitute the imposition of a heavier penalty than was available when the offence was committed. It followed in the instant case that there was no violation of art 7, and accordingly the appeal would be dismissed (see [29], [34], below).

a Section 86 is set out at [5], below
b Section 32, so far as material, is set out at [6], below
c Article 7(1) is set out at [12], below

*R v Hodgeon* [1997] 1 Cr App Rep (S) 399 considered.
*R v T* [2003] 4 All ER 877 disapproved.

**Notes**

For the convention prohibition on heavier retrospective penalties and for the power to impose on a sexual offender an extended period of post-release supervision, see respectively 8(2) *Halsbury's Laws* (4th edn reissue) para 148 and Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1206.

For the Criminal Justice Act 1991, s 32, see 34 *Halsbury's Statutes* (4th edn) (2001 reissue) 805.

For the Human Rights Act 1998, Sch 1, Pt I, art 7, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

For the Powers of Criminal Courts (Sentencing) Act 2000, s 86, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1864.

**Cases referred to in judgment**

*Hogben v UK* (1986) 46 DR 231, E Com HR.
*Ibbotson v UK* (1999) 27 EHRR CD 332, E Com HR.
*R v Field, R v Young* [2002] EWCA Crim 2913, [2003] 3 All ER 769, [2003] 1 WLR 882.
*R v Hodgeon* [1997] 1 Cr App Rep (S) 399, CA.
*R v Simpson* [2003] EWCA Crim 1499, [2003] 3 All ER 531, [2003] 3 WLR 337.
*R v T* [2003] EWCA Crim 1011, [2003] 4 All ER 877.
*R v Taylor* [1996] 2 Cr App Rep 64, CA.
*R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2002] 3 WLR 1800.
*R (on the application of McFetrich) v Secretary of State for the Home Dept* [2003] EWHC 1542 (Admin), [2003] All ER (D) 386 (Jun), DC.
*R (on the application of Uttley) v Secretary of State for the Home Dept* [2003] EWHC 950 (Admin), [2003] All ER (D) 130 (Apr); *rvsd* [2003] EWCA Civ 1130, [2003] 4 All ER 891.
*Stafford v UK* (2002) 35 EHRR 1121, [2002] ECHR 46295/99, ECt HR.
*Taylor v UK* [1998] EHRLR 90, E Com HR,
*Welch v UK* (1995) 20 EHRR 247, [1995] ECHR 17440/90, ECt HR.

**Adjourned appeal against sentence**

Following its dismissal on 8 May 2003 ([2003] EWCA Crim 1518) of an appeal by the appellant, R, against the sentence of two years' imprisonment imposed on him in the Crown Court at Bury St Edmunds on 16 December 2002 for four offences of indecent assault, the Court of Appeal adjourned for further argument that part of the appeal which related to the judge's decision to impose on the appellant an order under s 86 of the Powers of Criminal Courts (Sentencing) Act 2000 extending, until the end of his sentence, the period that he would spend on licence. The facts are set out in the judgment of the court.

*Jonathan Goodman* (assigned by the *Registrar of Criminal Appeals*) for the appellant.
*Tim Owen QC* and *Alison Macdonald* (instructed by the *Crown Prosecution Service*) as advocates to the court.

*Cur adv vult*

25 July 2003. The following judgment of the court was delivered.

**PITCHERS J.**

INTRODUCTION

**[1]** On 8 May 2003 ([2003] EWCA Crim 1518), we heard the appeal of this appellant against his sentence of two years imposed for four offences of indecent assault. We dismissed the appeal against the custodial term but adjourned consideration of the legality of the order that his licence be extended under s 86 of the Powers of Criminal Courts (Sentencing) Act 2000 so that counsel might be instructed as an advocate to the court to assist the court on what is a matter of law of some importance. As will become clear in this judgment, we have been greatly assisted by Mr Tim Owen QC who was so instructed.

**[2]** For the full details of the facts of the case and our reasons for dismissing that part of the appeal, reference should be made to the judgment delivered on 8 May. For the purposes of this part of the judgment, the only relevant facts are these: (i) The appellant pleaded guilty to four offences of indecent assault for which he was sentenced to a total of two years, which custodial term we upheld; (ii) the charges represented a course of conduct of indecency against his two stepdaughters who at the time of the offences were 10 and 8; (iii) the offences were committed between 1976 and 1979 and 1976 and 1982 respectively.

**[3]** The judge wished to include as part of his order an extension to the licence period to which the appellant would normally have been subject. The power to do so under s 85 of the 2000 Act was not available because that section expressly applies only to offences that were committed after 30 September 1998. The judge therefore purported to exercise his power under s 86 which applies to sexual offences committed before 30 September 1998. The question raised in this part of the appeal is whether there was power to extend the licence in the way that the judge did or whether that was unlawful as being a retrospective penalty and as such in breach of art 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

**[4]** Before dealing with the major point in the appeal, we should dispose of a subsidiary argument advanced by Mr Goodman in his written submissions but not elaborated orally. He argues that, if the order was lawful, it should not have been made on the facts of this case. We disagree. The necessary criteria, which we set out in full below, were satisfied and it was not wrong in principle for the judge to make the order that he did.

THE STATUTORY FRAMEWORK

**[5]** Section 86 of the 2000 Act:

> '*Sexual offences committed before 30th September 1998.*—(1) Where, in the case of a long-term or short-term prisoner—(a) the whole or any part of his sentence was imposed for a sexual offence committed before 30th September 1998, and (b) the court by which he was sentenced for that offence, having had regard to the matters mentioned in section 32(6)(a) and (b) of the Criminal Justice Act 1991, ordered that this section should apply, sections 33(3) and 37(1) of that Act shall each have effect as if for the reference to three-quarters of his sentence there were substituted a reference to the whole of that sentence.

(2) Expressions used in this section shall be construed as if they were contained in Part II of the Criminal Justice Act 1991.

(3) The reference in subsection (1) above to section 33(3) of the Criminal Justice Act 1991 is to section 33(3) as it has effect without the amendment made by section 104(1) of the Crime and Disorder Act 1998 (which substituted the words "on licence" for the word "unconditionally" and does not apply in relation to a prisoner whose sentence or any part of whose sentence was imposed for an offence committed before 30th September 1998).'

[6] The matters mentioned in s 32(6)(a) and (b) are 'the need to protect the public from serious harm from offenders' and 'the desirability of preventing the commission by them of further offences and of securing their rehabilitation'. That section was originally contained in s 44 of the Criminal Justice Act 1991 which came into force on 1 October 1992. That section was itself amended by s 58 of the Crime and Disorder Act 1998.

[7] The effect of the interplay of these sections is this. In an ordinary case, if the sentence is at least twelve months but less than four years ('a short term prisoner'), the prisoner is released after one half of his sentence and remains on licence until he would have served three quarters of his sentence had he not been released. If his sentence is four years or more ('a long term prisoner'), he is eligible for release on parole after one half of his sentence, he must be released after two-thirds and also remains on licence until three quarters of his sentence would have been served. If, in a sexual case, the judge passing sentence has made an order under s 86 of the 2000 Act, the licence continues not until the prisoner would (but for his release) have served three-quarters of his sentence but until the end of the total sentence.

[8] The consequences of any breach of licence were set out in s 38 of the 1991 Act:

'(1) A short-term prisoner—(a) who is released on licence under this Part; and (b) who fails to comply with such conditions as may for the time being be specified in the licence, shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(2) The magistrates' court by which a person is convicted of an offence under subsection (1) above may, whether or not it passes any other sentence on him—(a) suspend the licence for a period not exceeding six months; and (b) order him to be recalled to prison for the period during which the licence is so suspended.

(3) On the suspension of the licence of any person under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large.'

This section applies to any prisoner who is serving a sentence for an offence committed before 30 September 1998 although it has been repealed for all other purposes.

[9] The potential consequences for a defendant in respect of whom an order under s 86 of the 2000 Act is made are thus that he may, if in breach of his licence, be fined or recalled to prison for up to six months.

[10] It is those potential consequences that lead counsel for the appellant in the present case to argue that a sentence passed under s 86 for an offence committed before 1 October 1992 (the commencement date of the 1991 Act)

violates art 7(1) of the convention as being a heavier retrospective penalty. Consistent with the court's duty under s 3 of the Human Rights Act 1998 to give effect to legislation in a way that is compatible with convention rights so far as is possible, counsel argues that this provision should be interpreted as not applying to cases involving offences committed before 1 October 1992. This argument is not advanced in relation to sentences for offences committed after 1 October 1992 but before 30 September 1998.

**[11]** Had the appellant been sentenced for these offences at the time he committed them, his release would have been governed by the Criminal Justice Act 1967. Under s 60 of that Act, a prisoner serving a two-year sentence was eligible to apply for parole after twelve months of his sentence and would have remained on licence until the two-thirds point.

THE TEST UNDER THE CONVENTION

**[12]** Article 7(1) reads as follows:

> 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

**[13]** Certain matters are not in dispute between the parties. First, 'penalty' is an autonomous concept under the convention. Secondly, the relevant leading case in the European Court of Human Rights is *Welch v UK* (1995) 20 EHRR 247. The criteria for determining whether an order is a penalty, distilled from that case, were set out by this court in *R v Field, R v Young* [2002] EWCA Crim 2913, [2003] 3 All ER 769, [2003] 1 WLR 882. (i) The starting point is whether the measure is imposed following a criminal conviction (see *Welch*'s case (1995) 20 EHRR 247 at 262 (paras 28 and 29)). (ii) The nature and purpose of the measure are also relevant (see (1995) 20 EHRR 247 at 262 (paras 28 and 30)). (iii) Its characterisation under national law is relevant (see paras 28 and 31 (at 262)). (iv) The procedures involved in the making and implementation of the measure are relevant (see para 28). (v) Its severity is relevant (see paras 28 and 32 (at 262–263)). (vi) The court will look at the substance, rather than the form, in determining whether the measure forms part of a 'regime of punishment' (see paras 27, 33 and 34 (at 261, 263)).

RELEVANT CASE LAW

**[14]** The courts have been called upon to determine whether a measure is a penalty and to apply the *Welch* criteria in a number of recent cases. For present purposes they can be divided into two broad categories: those where the court had to consider a measure which stood on its own and those where the court was considering early release from a custodial sentence. The first group of cases is helpful in showing the approach of the courts to this issue but it is the second group which is most closely analogous to the present case.

CASES INVOLVING STAND-ALONE MEASURES

**[15]** The case of *Welch* itself concerned a confiscation order made under the Drug Trafficking Offences Act 1986, the operative provisions of which came into force on 12 January 1987. The drug offences triggering the order were committed in 1986. The European Court of Human Rights held that the measure

was a penalty. The sweeping nature of the statutory assumptions, the fact that confiscation was not limited to the actual enrichment, the discretion in the judge to have regard to the culpability of the accused and the possibility of imprisonment in default were elements which taken together provided a strong indication of a regime of punishment.

**[16]** In *R v Taylor* [1996] 2 Cr App Rep 64 this court held that a confiscation order which involved confiscating the proceeds of drug trafficking before the coming into effect of the relevant Act did not violate art 7 because the conviction which triggered the confiscation proceedings related to conduct after the coming into effect of the Act so the defendant must be presumed to have known the consequences of his offending when he committed the offence. This distinction from *Welch*'s case was also made in the subsequent decision in the European Commission of Human Rights (see *Taylor v UK* [1998] EHRLR 90)

**[17]** In *Ibbotson v UK* (1999) 27 EHRR CD 332, an application to the Court of Human Rights in respect of the registration requirement under the Sex Offenders Act 1997 was refused on the grounds that the measure was preventive rather than punitive and hence did not violate art 7. The same view for the same reason was taken by this court of a disqualification order under s 28 of the Criminal Justice and Court Services Act 2000 in so far as it operated retrospectively (see *R v Field* [2003] 3 All ER 769)

CASES CONCERNING EARLY RELEASE

**[18]** Understandably, Mr Goodman for the appellant puts the decision of this court in *R v T* [2003] EWCA Crim 1011, [2003] 4 All ER 877 at the forefront of his argument. That case is the only one in which the precise issue of orders made under s 86 of the 2000 Act in respect of offences committed before 1 October 1992 has been considered. The court said (at [19]):

> 'There is no doubt, in our judgment, that these provisions are punitive and are properly to be contrasted with purely preventative measures that do not invoke any principle against retrospective penalty ...'

Accordingly, the court held that s 86 must be read as not applying to offences committed before 1 October 1992. It follows that, if we come to a contrary conclusion, it can only be on the basis that *R v T* was decided per incuriam.

**[19]** In an admissibility decision, *Hogben v UK* (1986) 46 DR 231 the Commission rejected the argument that the introduction in 1983 of the tariff system by the then Home Secretary was a breach of art 7. Although part of their reasoning can no longer be regarded as sound following the decision of the Court of Human Rights in *Stafford v UK* (2002) 35 EHRR 1121 and of the House of Lords in *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2002] 3 WLR 1800, the following paragraph is unaffected by those decisions:

> 'Although [the change in parole policy] may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the "penalty" which remains that of life imprisonment. Accordingly it cannot be said that the "penalty" imposed is a heavier one than that imposed by the trial judge.' (See (1986) 46 DR 231 at 236.)

**[20]** The nature of licence provisions in determinate sentences was considered recently by Moses J in the Administrative Court in *R (on the application of Uttley) v*

*Secretary of State for the Home Dept* [2003] EWHC 950 (Admin), [2003] All ER (D) 130 (Apr). The claimant was a long-term prisoner whose offences had been committed before 1983. The passing of the 1991 Act meant that he would be eligible for release on licence at a later point in his sentence than would have been the case had he been sentenced in 1983. He argued that these provisions were contrary to art 7. In rejecting that argument, Moses J said:

> '[14] It is plain that the purpose of a licence is to enable the long-term prisoner to stay out of trouble, both for his own benefit and for the benefit of the community, and so that thereby he does not lose his liberty. True it is that, if he breaches his licence, he is at risk of recall, but the licence itself is designed to avoid the risk of further offences and a return to prison. Nor in any real sense can it be said that the imposition of the licence follows conviction. The judge makes no order. The licence follows by virtue of the operation of s 33 on release and is plainly part of the rehabilitation process.
>
> [15] I conclude that the nature and purpose of the licence are such that they dominate the factors which go to the conclusion as to whether the imposition of the licence is a penalty or not. The imposition of the licence is designed to protect the public once a prisoner is released, and assist in preventing the prisoner from committing further offences.'

In the present case, the extension of the licence is imposed by the judge at the time of sentence. However, in our judgment, the analysis of the purpose and effect of licence provisions set out in that passage is correct.

**[21]** The case of *R (on the application of McFetrich) v Secretary of State for the Home Dept* [2003] EWHC 1542 (Admin), [2003] All ER (D) 386 (Jun) was decided on 30 June 2003 but the judgment was not available at the time of the oral hearing of this case. Accordingly, counsel have not had the opportunity to consider it. However, it is relevant to the present case since it deals with the impact of art 7 on the tariff period of a mandatory life sentence. Scott Baker LJ said:

> '[20] ... Article 7 is concerned with retrospectivity and the word "penalty" is in my view referring to the whole penalty rather than to its constituent elements. The penalty is a life sentence and the fact that some prisoners, perhaps the vast majority, are released during their lifetime does not prevent the sentence from being a life sentence. Even after release the sentence continues for the prisoner is on licence for the rest of his life and liable to recall to prison. If he is recalled to prison he will inevitably serve a greater period in custody than the original tariff.
>
> [21] A sentence of life imprisonment is different from a determinate sentence because it contains separate elements aimed (i) at retribution and deterrence and (ii) at the protection of the public. It is, in my judgment, however, not possible to equate the period to be served for retribution and deterrence (the tariff) with the penalty for the offence. Put slightly differently, art 7 is not concerned with the machinery for carrying out the penalty but rather with the penalty itself ...'

APPLICATION OF THE *WELCH* CRITERIA.

**[22]** (i) Measure made following a criminal conviction. Clearly the order can only be made when there is a conviction.

**[23]** (ii) The nature and purpose of the measure. The statutory criteria for the making of an order are 'the need to protect the public from serious harm from

offenders' and 'the desirability of preventing the commission by them of further offences and of securing their rehabilitation'. Although these criteria are expressed in words suggesting a preventive measure and are in the context of a section dealing with the basis for release on parole, it should be noted that the words of the first are the same as one of the pre-conditions for passing a custodial sentence in violent or sexual offences (s 1(2)(b)).

[24] We have set out above our view of the correct way of looking at licence provisions in the context of art 7 generally. Strong support for the proposition that this is the proper view of s 86 is contained in the judgment of this court given by Lord Bingham CJ in *R v Hodgeon* [1997] 1 Cr App Rep (S) 399 at 403:

> '[Section 44] is a section which gives the authorities additional control over an offender in relation to whom such an order is made. It affects both the period which an offender will continue to serve if recalled to prison after release on licence and the period for which a prisoner will be supervised after release on licence. In making such an order the primary considerations to be borne in mind are the need to protect the public from serious harm from offenders, the desirability of preventing the commission by them of further offences, and the rehabilitation of offenders.'

[25] (iii) Its characterisation under national law. Although the forerunner of s 86 was passed before the incorporation of the Human Rights Act 1998, there is no doubt that Parliament intended that the measure should apply to all offences committed before 30 September 1998 regardless of whether they predated the coming into force of the Criminal Justice Act 1991. It is also true that the section was applied retrospectively after the passing of the 1991 Act both at first instance and in this court. That has continued since the implementation of the 1998 Act and, with the exception of *R v T* [2003] 4 All ER 877 to which we will return, has not been questioned in this court.

[26] (iv) The procedures involved in the making and implementation of the measure. An order under s 86 can only be made as part of a custodial sentence. The maximum length of that sentence remains unchanged by the 1991 Act. It will only be implemented in the event of a breach by the released prisoner. The licence terminates at the end of the notional sentence and cannot exceed it.

[27] (v) The severity of the measure. There is no doubt that the extended licence in itself involves a restriction of the liberty of the released prisoner even if he does not commit a breach of it. A breach may lead to a penalty of up to six months' imprisonment. That, however, is not conclusive. Breaches of a number of orders held not to be penalties may similarly lead to loss of liberty or other sanction if breached.

[28] (vi) The substance rather than the form. It is the exercise of looking at the substance rather than the form that we have been carrying out in our review of the statutory provisions and relevant case law.

CONCLUSION

[29] In our judgment, the true analysis of the relevant statutory provisions and the way in which they have been interpreted in the domestic and European courts demonstrates that an order for an extended licence is preventive not punitive. Its operation relates to the 'execution of the sentence' (*Hogben v UK* (1986) 46 DR 231) and is part of 'the machinery for carrying out the penalty' (*R (on the application of McFetrich) v Secretary of State for the Home Dept* [2003] All ER (D) 386 (Jun) at [21]). Adding such an order to a sentence of imprisonment for an offence committed before 1 October

1992 is not to impose a heavier penalty than was available when the offence was committed and does not violate art 7.

**[30]** As we have already indicated, the conclusion to which we have come necessarily involves the further conclusion that *R v T* was wrongly decided. In concluding that we may properly consider that decision as per incuriam, we have had regard to the guidance given recently by this court in *R v Simpson* [2003] EWCA Crim 1499, [2003] 3 All ER 531, [2003] 3 WLR 337 in relation to the modern doctrine of per incuriam in criminal cases.

**[31]** Lord Woolf CJ, giving the judgment of a five-judge court, said (at [34]):

> 'We appreciate that there may be a case for not interpreting the law contrary to a previous authority in a manner that would mean that an offender who otherwise would not have committed an offence would be held to have committed an offence. However, we do not understand why that should apply to a situation where a defendant, as here, wishes to rely upon a wrongly decided case to provide a technical defence. While justice for a defendant is extremely important, justice for the public at large is also important. So is the maintenance of confidence in the criminal justice system.'

**[35]** Here we prefer the approach indicated in Bennion *Statutory Interpretation* (4th edn, 2002) p 134 which states:

> 'The basis of the *per incuriam* doctrine is that a decision given in the absence of relevant information cannot be safely relied on. This applies whenever it is at least probable that if information had been known the decision would have been affected by it.'

**[32]** There are two significant factors in this case which fall into the category of information referred to in the quotation from Bennion *Statutory Interpretation*. First, and importantly, *R v T* was a sentence appeal where only the appellant was represented. The court therefore did not have the benefit of the sort of submissions which have been advanced to us by Mr Owen. Secondly, the court had cited to it only one of the cases to which we have been referred, namely *Ibbotson v UK* (1999) 27 EHRR CD 332. In particular, neither *Hogben v UK* (1986) 46 DR 231 nor *R v Hodgeon* [1997] 1 Cr App Rep (S) 399 was cited and each is, in our judgment, important to the proper consideration of this issue.

**[33]** Mr Goodman reminds us that we are a two-judge court and the court in *R v T* was a three-judge court. That is a relevant consideration: see *R v Simpson* [2003] 3 All ER 531 at [38]. However, that cannot outweigh the other factors to which we have referred. We have come to the clear view that *R v T* should be regarded as decided per incuriam and not followed. Had the court in that case been provided with the information that we have had, we have no doubt they would have come to the same conclusion as we do.

**[34]** Accordingly, the appeal is dismissed.

*Appeal dismissed.*

Sanchia Pereira Barrister.

# R (on the application of Uttley) v Secretary of State for the Home Department

[2003] EWCA Civ 1130

COURT OF APPEAL, CIVIL DIVISION

PILL, LONGMORE LJJ AND MAURICE KAY J

4, 30 JULY 2003

*Sentence – Custodial sentence – Licence – Statutory scheme providing for release of offender on licence rather than unconditionally – Whether scheme incompatible with convention prohibition on heavier retrospective penalties when applying to offences committed before scheme's implementation – Criminal Justice Act 1991, ss 33(2), 37, 39 – Human Rights Act 1998, Sch 1, Pt I, art 7.*

The claimant was sentenced to 12 years' imprisonment for sexual offences committed before the implementation of the Criminal Justice Act 1991. Under the pre-1991 Act regime, an offender in the claimant's position would have been entitled to release without licence after serving two-thirds of his sentence. By virtue, however, of ss 33(2)[a] and 37(1)[b] of the 1991 Act, the claimant was entitled to be released at the two-thirds point on licence only until the completion of three-quarters of the sentence. The terms of such a licence commonly included placing the offender under the supervision of a supervising officer (as provided for by s 37(4A)), and requiring him to keep in touch with the officer and to live where reasonably approved by the officer. There could also be restrictions on travel without obtaining the permission of the officer. Under s 39[c] of the Act, a prisoner on licence was liable to be recalled by the Secretary of State to serve the remainder of his sentence. An offender was also liable to be returned to custody if convicted of a further imprisonable offence while the licence was in force. In judicial review proceedings, the claimant contended that the statutory scheme, as it applied to him, was incompatible with art 7(1)[d] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)—the provision which prohibited the imposition of a heavier penalty than the one that had been applicable at the time that the criminal offence had been committed. That contention was rejected by the judge. On the claimant's appeal, the Secretary of State contended that the 12-years' custodial sentence was the penalty with which art 7 of the convention was concerned and that provisions for early release from that sentence of imprisonment did not engage the concept of penalty. In so contending, he submitted that the licence was completely separate from the sentencing process, that it was instead part of the procedure for release and rehabilitation, and that it was preventative rather than punitive.

a Section 33(2) is set out at [3], below
b Section 37, so far as material, is set out at [3], below
c Section 39, so far as material, is set out at [4], below
d Article 7, so far as material, is set out at [6], below

**Held** – Sections 33(2), 37(4A) and 39 of the 1991 Act were incompatible with an offender's rights under art 7 of the convention in so far as they provided that he would be released at the two-thirds point of his sentence on licence with conditions and would be liable to be recalled to prison (such an offender having committed the index offences before the 1991 Act came into force, and at a time when he would have expected to be released unconditionally at the two-thirds point of any sentence). The licence was plainly part of the sentence originally imposed by the sentencing judge. The sentence comprised a period of detention followed by a period on licence. Although the judge pronounced a sentence of imprisonment for a particular number of years, it was a fiction to the extent that there were detailed provisions as to what, in terms of punishment, it actually meant. Approached in that way, a sentence which included a period of licence, inevitably extending beyond two-thirds of the term imposed, was a heavier penalty than a sentence without that requirement. While conditions on licence varied, conditions would inevitably be imposed which were impediments upon the offender's freedom of action. Moreover, the conditions created a potential liability to serve a further substantial period in custody, as did the provisions dealing with the effects of re-conviction. Arguments that the purpose of the licence procedures was rehabilitative and preventative, as undoubtedly they were in part, did not detract from their onerous nature viewed as part of the sentence. Accordingly, the appeal would be allowed, and a declaration of incompatibility granted (see [14], [15], [25]–[27], [39], [40], below).

*R (on the application of West) v Parole Board* [2003] 1 WLR 705 distinguished.

**Notes**

For the convention prohibition on heavier retrospective penalties and for release on licence, see respectively 8(2) *Halsbury's Laws* (4th edn reissue) para 148 and 36(2) *Halsbury's Laws* (4th edn reissue) para 617.

For the Criminal Justice Act 1991, ss 33, 37, 39, see 34 *Halsbury's Statutes* (4th edn) (2001 reissue) 806, 812, 816.

For the Human Rights Act 1998, Sch 1, Pt I, art 7, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

**Cases referred to in judgments**

*B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 All ER 562, [2001] 1 WLR 340, DC.

*Ezeh v UK* (2002) 12 BHRC 589, ECt HR.

*Findlay v Secretary of State for the Home Dept* [1984] 3 All ER 801, [1985] AC 318, [1984] 4 WLR 1159, HL.

*Gough v Chief Constable of Derbyshire Constabulary, R (on the application of Miller) v Leeds Magistrates' Court, Lilley v DPP* [2001] EWHC Admin 554, [2001] 4 All ER 289, [2002] QB 459, [2001] 3 WLR 1392, DC; *affd* [2002] EWCA Civ 351, [2002] 2 All ER 985, [2002] QB 1213, [2002] 3 WLR 289.

*Hogben v UK* (1986) 46 DR 231, E Com HR.

*Ibbotson v UK* (1999) 27 EHRR CD 332, E Com HR.

*Practice Note (custodial sentences: explanation)* [1998] 1 All ER 733, [1998] 1 WLR 278, CA.

*Practice Note (sentence: early release of prisoners)* [1992] 4 All ER 307, [1992] 1 WLR 948, CA.

*R v Field, R v Young* [2002] EWCA Crim 2913, [2003] 3 All ER 769, [2003] 1 WLR 882.

*R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC* [2002] UKHL 39, [2002] 4 All ER 593, [2003] 1 AC 787, [2002] 3 WLR 1313.

*R (on the application of West) v Parole Board* [2002] EWCA Civ 1641, [2003] 1 WLR 705.

*Welch v UK* (1995) 20 EHRR 247, [1995] ECHR 17440/90, ECt HR.

**Cases also cited or referred to in skeleton arguments**

*Aldrian v Austria* (1990) 65 DR 337, E Com HR.

*Brown v UK* (1998) 28 EHRR CD 233, E Com HR.

*Guzzardi v Italy* (1980) 3 EHRR 333, [1980] ECHR 7367/76, ECt HR.

*Jamil v France* (1995) 21 EHRR 65, [1995] ECHR 15917/89, ECt HR.

*M v Italy* (1991) 70 DR 59, E Com HR.

*Raimondo v Italy* (1994) 18 EHRR 237, ECt HR.

*Weeks v UK* (1987) 10 EHRR 293, [1987] ECHR 9787/82, ECt HR.

**Appeal**

Brian Uttley appealed with permission of Kay LJ granted on 12 May 2003 from the decision of Moses J on 8 April 2003 ([2003] EWHC 950 (Admin), [2003] All ER (D) 130 (Apr)) dismissing his proceedings for judicial review against the respondent, the Secretary of State for the Home Department, seeking a declaration that certain provisions of the Criminal Justice Act 1991 were incompatible with his rights under art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The facts are set out in the judgment of Pill LJ.

*Anthony Scrivener QC* and *Sharon Watson* (instructed by *Rooney & Co*, Birkenhead) for the appellant.

*Jonathan Crow* and *Jenni Richards* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*Cur adv vult*

4 July 2003. The following judgments were delivered.

**PILL LJ.**

[1] This is an appeal against a judgment of Moses J given in the Administrative Court on 8 April 2003 ([2003] All ER (D) 130 (Apr)) in which he dismissed an application by Mr Brian Uttley (the appellant) whereby the appellant sought declarations in relation to provisions in the Criminal Justice Act 1991. The appellant claimed that provisions under which he will from 24 October 2003 be subject to licence under s 33 of the 1991 Act are contrary to art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[2] On 24 October 1995, the appellant pleaded guilty to serious sexual offences which he had committed many years before the 1991 Act came into

force. He was sentenced to a term of 12 years' imprisonment. He is entitled to be released on 24 October 2003 when he has completed two-thirds of that sentence but he will thereafter remain on licence until he has served three-quarters of his sentence.

**[3]** Section 33(2) of the 1991 Act provides:

> 'As soon as a long-term prisoner [a prisoner serving a sentence of imprisonment for a term of four years or more] has served two-thirds of his sentence, it shall be the duty of the Secretary of State to release him on licence.'

Section 37(1), in so far as is material, provides:

> '... where a ... long-term prisoner is released on licence, the licence shall ... remain in force until the date on which he would (but for his release) have served three-quarters of his sentence.'

By amendment, the statute now provides (s 37(1A)) that in some circumstances s 37(1) 'shall have effect as if for the reference to three-quarters of his sentence there were substituted a reference to the whole of that sentence'. That provision is not claimed to apply to the appellant.

**[4]** Section 39 of the Act provides, in so far as is material:

> '(1) If recommended to do so by the Board [the Parole Board] in the case of a ... long-term ... prisoner who has been released on licence under this Part [Pt II, which includes s 33], the Secretary of State may revoke his licence and recall him to prison.
>
> (2) The Secretary of State may revoke the licence of any such person and recall him to prison without a recommendation by the Board, where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable.'

Safeguards are provided in the section for offenders in relation to whom those powers are exercised and sub-s (6) provides:

> 'On the revocation of the licence of any person under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large.'

A recalled prisoner is liable to serve the remainder of the sentence which had been imposed.

**[5]** It is common ground that the terms of a licence under s 33 will commonly include placing the offender under the supervision of a supervising officer (as provided for by s 37(4A)), will require the offender to keep in touch with the officer and to live where reasonably approved by the officer. There may also be restrictions, for example, upon travel without obtaining the permission of the officer and for attendance for medical treatment. Section 40 of the 1991 Act, (now replaced by s 116 of the Powers of Criminal Courts (Sentencing) Act 2000) provides that the offender is also liable to be returned to custody if convicted of a further imprisonable offence while the licence is in force. The court dealing with the new offence may add all or part of the outstanding period of the original sentence to any new sentence imposed.

**[6]** The submission on behalf of the appellant is that this statutory scheme is, in his case, in breach of that part of art 7(1) of the convention which provides:

'Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

[7] It is also common ground that, prior to the 1991 Act, the regime under the Criminal Justice Act 1967, the Prison Act 1952, and orders made thereunder, had the effect that an offender in the appellant's position was entitled to be released without licence having served two-thirds of his sentence. The reduction from the full term imposed by way of sentence was achieved by a system of remissions. Its operation was summarised by the European Court of Human Rights in its statement of the position of the United Kingdom government in a judgment dated 15 July 2002 in *Ezeh v UK* (2002) 12 BHRC 589 at 606 (para 74):

> 'The government maintained that there was no useful distinction to be drawn, for Convention purposes, between the pre-and post-1991 Act system of remission of sentence or between the previous disciplinary sanction of loss of remission and that of the award of additional days introduced by that Act. Prior to the 1991 Act, remission was, as a technical matter, characterised as a privilege. But the rules for calculating remission were standardised and were invariably applied and, if remission were granted, the prisoner had a legal right to be released before he had served the full term of his sentence on the basis of his legitimate expectation that the remission system would be correctly applied. In the event of the commission of a disciplinary offence a prison governor could order a reduction in the period of remission and such reductions would postpone the date when the prisoner would be released and thereby operate as an award of additional days to be served before release. By the 1991 Act the previous remission system was replaced by a clear statutory code governing remission of sentence. The change in the law [was] affected by the Act, in the interests of accessibility and transparency ...'

Mr Crow did faintly argue that an offender was better off under the new system than the old because he now has a statutory right but the submission cannot survive that clear statement of how the former system operated, one which accords with the experience of members of the court.

[8] Transitional provisions were included in Sch 12 to the 1991 Act the effect of which, as stated by the judge, was that while those whose offences predated 1 October 1992 and began serving a custodial sentence before that date did not come within the new regime, those, such as the appellant, whose offences predated 1 October 1992 and were convicted only after that date, did come within the new regime. As expressed by the parties, the issue is whether the offender's liability to the conditions of a licence, and the possible consequences of that liability, constitute a 'heavier penalty' within the meaning of art 7, no such liability having arisen at the time the criminal offence was committed.

[9] For the appellant, Mr Scrivener QC submits that there can be no logical distinction for convention purposes between persons convicted before and after the relevant date because art 7 is concerned with the date 'a criminal offence was committed' and not with the date of conviction or sentence. It is likely that the draftsman of the 1991 Act did not have art 7 in mind, he submits. To illustrate how the system could work, Mr Scrivener refers to the transitional provisions in Sch 11 to the 2000 Act, in which it is the date of the 'offence' which is identified, and correctly identified, he submits, as the relevant date.

**[10]** The apparent anomaly in the 1991 Act does not determine the issue but suggests that Parliament may have intended that the 1991 regime should not have retrospective effect but failed, when attempting to give effect to that intention, to recognise the category of offender to which the appellant belongs and failed thereby to identify the relevant date as the date of the offence, as required by art 7, rather than the date of the conviction.

**[11]** The submissions of Mr Scrivener were expressed, and can be summarised, succinctly. The liability to licence conditions is an integral part of the sentence imposed following conviction for a criminal offence. The sentence as a whole undoubtedly constitutes a penalty within the meaning of art 7. Liability to licence conditions makes that penalty heavier than it would otherwise have been. Conditions imposed with the licence will inevitably impose impediments on the freedom of action of the released prisoner, though it is not suggested that in themselves they involve a breach of art 5. Moreover, the prisoner on licence is liable to be recalled to serve the remainder of the sentence and, secondly, is liable, upon conviction of a further offence during the licence period, to be subject to a court order requiring him to serve the outstanding period of the original sentence.

**[12]** For the Secretary of State, Mr Crow submits that the penalty with which art 7 is concerned is the 12-year custodial sentence. Provisions for early release from the imposed sentence of 12 years do not engage the concept of penalty. The provisions as to licence introduced by the 1991 Act are not integral to the sentencing process but to the execution of the sentence. The licence is completely separate from the sentencing process and a part of the procedure for release and rehabilitation. It is preventative rather than punitive. The licence has been imposed not by a sentence of the court but by virtue of the statute and is separate from the sentence. Moreover, the fact that a breach of licence conditions may have penal consequences does not make the licence conditions themselves penal.

**[13]** The court has been referred to cases in which the frequently litigated question was considered as to whether a proceeding was in relation to a 'criminal offence' within the meaning of art 6(2) of the convention, and to cases in which the definition of 'penalty' in art 7(1) has been considered. Propositions enunciated in decisions upon one article of the convention may legitimately be used to test the soundness of propositions advanced under other articles. The questions posed are separate ones but are associated in that the starting point in any assessment in the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence' (see *Welch v UK* (1995) 20 EHRR 247). If Mr Crow were to be correct in his submission that the licence is separate from the sentencing process, it would be necessary to consider in detail the relevant criteria, set out in *Welch*'s case and other cases, for determining whether a particular provision represents a penalty and as such is covered by art 7. However, the sentence imposed upon the appellant in 1995, whatever it included, was plainly a penalty. If the licence and its conditions are an integral part of that penalty, the complexities of categorisation, which have arisen with respect to distinct procedures such as banning orders (see *Gough v Chief Constable of Derbyshire Constabulary, R (on the application of Miller) v Leeds Magistrates' Court, Lilley v DPP* [2001] EWHC Admin 554, [2001] 4 All ER 289, [2002] QB 459), sex offender orders (see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 All ER 562, [2001] 1 WLR 340), disqualification orders (see *R v Field, R v Young* [2002] EWCA Crim 2913, [2003] 3 All ER 769, [2003] 1 WLR 882) and anti-social offender orders (see *R (on the application of McCann) v Crown Court at Manchester,*

*Clingham v Kensington and Chelsea Royal London BC* [2002] UKHL 39, [2002] 4 All ER 593, [2003] 1 AC 787), do not arise.

**[14]** In my judgment, the licence is plainly a part of the sentence originally imposed by the sentencing judge. Under s 33(2) of the 1991 Act, the Secretary of State is required on a specific date following the imposition of the sentence not only to release the prisoner but to release him on licence. The sentence imposed by the judge thus comprised a period of detention followed by a period on licence. The statute, and the previous requirements of the Prison Rules 1964, SI 1964/388, specify the effect of the order made by the judge. The judge pronounces a 12-year sentence but, by virtue of the statutory provisions, that is a fiction to the extent that there are detailed provisions as to what, in terms of punishment, it actually means.

**[15]** Approached in that way, a sentence which includes a period of licence inevitably extending beyond two-thirds of the term imposed is in my judgment a heavier penalty than a sentence without that requirement. The fiction that in each case the penalty is one of 12 years in custody must not be allowed to obscure the reality of the effects of the licence. While licence conditions vary, and in some cases will be more onerous than in others, it is not and cannot be disputed that conditions will inevitably be imposed which are impediments upon the offender's freedom of action. Moreover, the conditions create a potential liability to serve a further substantial period in custody, as do the provisions dealing with the effects of re-conviction. Arguments that the purpose of the licence procedures is rehabilitative and preventative, as undoubtedly in part they are, do not detract from their onerous nature viewed as a part of the sentence. Whatever the purpose, the effect is onerous. In my judgment, the judge fell into error in deciding the case on a consideration of the purpose of a licence as such rather than its effect as a part of the sentence.

**[16]** The approach I have adopted is supported by the directions relating to the recall of determinate sentence prisoners subject to licence issued by the parole board in 2002. They provide that 'where an offender is subject to a custodial sentence, the licence period is an integral part of the sentence, and compliance with licence conditions is required'.

**[17]** The cases cited by Mr Crow do not in my judgment support the submission that, in the statutory scheme, the licence is separate from the sentence. In *R (on the application of West) v Parole Board* [2002] EWCA Civ 1641, [2003] 1 WLR 705, the Secretary of State had exercised his power under s 39(2) of the 1991 Act to revoke the offender's licence and recall him to prison. The Parole Board declined to give the offender an oral hearing when deciding not to order his re-release under s 39(5) of the Act. It was claimed that the board's decision involved the determination of a 'criminal charge' within the meaning of art 6(1) of the convention and the offender was therefore entitled to an oral hearing. By a majority, the court held that, in exercising their powers, the board were not determining a criminal charge and were not seeking to impose punishment.

**[18]** Those were the issues before the court and on those issues, which are different from the present issue, the fact that the revocation was solely with a view to the prevention of risk and the protection of the public, and not by way of punishment, were important considerations. The nature of the powers exercised by the board were analysed in relation to art 6(1) but that does not determine the question whether the original sentence is more onerous by reason of the presence of the licence condition. The nature of the procedures to be followed upon an alleged breach of licence, and the purposes for which those procedures exist, are

not determinative of the question as to what, as a penalty, is included in the original sentence. a

**[19]** Mr Crow relies on the decision of the Commission in *Hogben v UK* (1986) 46 DR 231. The applicant had been sentenced to life imprisonment for murder. After 13 years in custody, he was transferred to an open prison and told that he would be recommended for parole. In the event he was transferred back to a closed prison, a new parole policy having been introduced. A breach of art 7 was alleged. In the House of Lords, Lord Scarman stated: b

> 'The sentence of the court is in law the punishment. The disappointment of the expectation which prisoners may have that under the parole system they will not have to serve the whole of a sentence in prison may be distressing but is not a punishment or penalty which goes beyond the sentence of the court.' (See *Findlay v Secretary of State for the Home Dept* [1984] 3 All ER 801 at 829, [1985] AC 318 at 337.) c

**[20]** The Commission concluded ((1986) 46 DR 231 at 236): d

> '3. The Commission recalls that the applicant was sentenced to life imprisonment in 1969 for committing a murder in the course of a robbery. It is clear that the penalty for this offence at the time it was committed was life imprisonment and thus no issue under article 7 arises in this respect.
>
> 4. Furthermore, in the opinion of the Commission, the "penalty" for purposes of article 7(1), must be considered to be that of life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. Although this may give rise to the result that his imprisonment is effectively harsher that if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the "penalty" which remains that of life imprisonment. Accordingly, it cannot be said that the "penalty" imposed is a heavier one that that imposed by the trial judge.' e f

**[21]** Reliance on the Commission's use of the expression 'the execution of the sentence' is in my judgment misplaced. The Commission held, as had Lord Scarman, that the penalty was that of life imprisonment, that is, the sentence of the court. Subsequent procedures did not impose a heavier penalty than the indeterminate sentence imposed by the trial judge and did not go beyond the sentence of the court. Indeed it is the comprehensiveness of the original sentence which is stressed and that is not affected by increased custody within that sentence. In the present case, the sentence of the court must also be viewed comprehensively. It includes, by statute, a period on licence to which the applicant would not have been subject under the law as it was at the time he committed the offence. g h

**[22]** Reliance is also placed on the decision of the Commission in *Ibbotson v UK* (1999) 27 EHRR CD 332. While a sentence of imprisonment for possession of obscene and indecent material was still in force, the Sex Offenders Act 1997, under which the offender was required to register with the police under the reporting provisions in the Act, came into operation. It was argued that the passing of the Act and its impact on the offender involved a 'penalty' within the meaning of art 7. j

[23] The registration requirements applied automatically to an offender in the applicant's position in that case and the judge had no role in the imposition of the Act's requirements. The Commission held (at 334):

> 'Overall the Commission considers that, given in particular the way in which the measures imposed by the Act operate completely separately from the ordinary sentencing procedures, and the fact that the measures do not, ultimately, require more than mere registration, it cannot be said that the measures imposed on the applicant amounted to a "penalty" within the meaning of art 7 of the Convention.'

[24] While the 1997 Act did impose an additional obligation and one which would not have arisen but for the earlier conviction and sentence, it arose 'completely separately from the ordinary sentencing procedures'. That factor may assist in deciding whether an additional and separate obligation should be categorised as a penalty within the meaning of art 7(1). It does not bear upon the effect of an obligation which is integral to the sentence imposed by the court.

[25] In other cases cited, the requirements imposed are in my judgment separate from the original sentence imposed and not a part of it as was the requirement in the present case. At the time the appellant was sentenced, there was a statutory requirement that, upon a sentence for a term of years, the appellant serve a specific period in custody followed by a specific period on licence. That is the 'clear statutory code' to which the government referred in its submission to the Court of Human Rights in *Ezeh v UK* (2002) 12 BHRC 589. The conditions of sentence are, inevitably, though to a variable degree, onerous. The sentence of 12 years' imprisonment the judge imposed was a penalty within the meaning of art 7(1) of the convention and had a more onerous effect than the same nominal sentence would have had at the time the offence was committed.

[26] The appellant is in my judgment entitled to the declaration sought. The parties have helpfully drafted and agreed a form of declaration (amended when judgment was handed down) appropriate on the basis of the above findings:

> 'A declaration pursuant to s 4(2) of the Human Rights Act 1998 that s 33(2), s 37(4A) and s 39 of the Criminal Justice Act 1991 are incompatible with the claimant's rights under art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in so far as it provides that he will be released at the two-thirds point of his sentence "on licence with conditions and be liable to be recalled to prison" (he having committed the index offences before the 1991 Act came into force, and at a time when he would have expected (subject to good behaviour) to be released at the two-thirds point of any sentence unconditionally, pursuant to the practice that had developed in implementing r 5 of the Prison Rules 1964, SI 1964/388).'

[27] I would allow this appeal and make that declaration.

**LONGMORE LJ.**

[28] Before ss 32–40 of the Criminal Justice Act 1991 came into force on 1 October 1992, any convicted defendant who was sentenced to a lengthy determinate sentence and was of good behaviour could legitimately expect that one-third of his sentence would be remitted and that he would be released after

he had served two-thirds of his sentence. This was, initially, at any rate, because r 5(1) of the Prison Rules 1964, SI 1964/388 provided:

> 'A prisoner serving a sentence of imprisonment of more than one month may, on the ground of his industry and good conduct, be granted remission in accordance with the provisions of the Rule.'

Although the rule is phrased in discretionary terms, it is accepted that by 1992, remission of one-third of the sentence was a settled expectation: see *Ezeh v UK*, (2002) 12 BHRC 589, cited by Pill LJ. Section 25(1) of the Prison Act 1952 provided that, on release, the sentence expired.

**[29]** As from 1 October 1992, ss 32–40 of the 1991 Act made 'radical changes with regard to sentences' as stated by Lord Taylor of Gosforth CJ in his *Practice Note (sentence: early release of prisoners)* [1992] 4 All ER 307, [1992] 1 WLR 948. Remission was abolished. Parole would only affect criminals sentenced to four or more years of imprisonment (long-term prisoners), but, apart from earlier parole, such prisoners would be entitled to be released after serving two-thirds of their sentence. To that extent, their date of release could be expected to be the same before and after 1 October 1992. But one of the 'radical changes' was that when such prisoners were released they would be released 'on licence' (s 33(2)) which Lord Taylor CJ described as 'in effect ... a continuing suspended sentence'. Section 37(1) then provided that the licence was to remain in force 'until the date on which he would (but for his release) have served three-quarters of his sentence'. This has now been changed by s 104 of and para 17 of Sch 9 to the Crime and Disorder Act 1998 to 'the whole of his sentence'. But this provision is not said to apply to the appellant.

**[30]** The reason why Lord Taylor CJ described the licence as 'in effect ... a continuing suspended sentence' was that, by virtue of s 39 of the 1991 Act, the Secretary of State was entitled to revoke the licence and recall the convicted defendant to prison on the recommendation of the Parole Board, or, even, without such recommendation 'where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable' (s 39(2)). The recommendation of the Parole Board or the exercise of discretion by the Secretary of State is statutorily unfettered. Moreover if the offender is convicted of a further imprisonable offence while on licence, he is liable to be returned to custody.

**[31]** The difference between the effect of a sentence of 12 years imposed on the appellant, Uttley, before 1992 from the effect of the sentence actually imposed, as it was in 1995, can be stated in this way. Given a sentence of 12 years before 1992, he could have expected to be released after the passage of eight years without risk of recall. Given the sentence that he was, he must be released after eight years but remains at risk of recall for one further year, as well as being required to comply with whatever licence conditions the Home Secretary may choose to impose for that further one-year period.

**[32]** The question for the court is whether the post-1992 regime constitutes a 'heavier penalty' than the penalty applicable at the time Uttley committed his offence for the purposes of art 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provides:

> 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or

a international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

[33] Mr Crow, counsel for the Home Secretary, submitted that Uttley was sentenced to 12 years; that penalty was applicable both before and after 1992. b Matters of remission or release on licence were irrelevant to the question of penalty since they were not 'imposed' in any rational sense of the word; still less were they imposed on conviction and it was only penalties imposed on conviction that came within the scope of art 7(1).

[34] Mr Scrivener QC for Uttley submitted that that approach was far too formalistic. The convention did not look to the nominal penalty only. Any c informed reader of the convention knows that any convicted prisoner will not serve the whole of the sentence pronounced by the judge on or after conviction. The reality is and has been for many years that he is released well before the end of the sentence pronounced. For that reason judges have been required to inform not merely the defendant but also the public as a whole in the course of their d sentencing reasons how much time the defendant will actually serve in custody (see *Practice Note (custodial sentences: explanation)* [1998] 1 All ER 733, [1998] 1 WLR 278). If, since 1992, the terms of a prisoner's release are harsher than they were before 1992, a heavier penalty will have been imposed than the one applicable at the time when the offence was committed.

[35] Moses J ([2003] All ER (D) 130 (Apr)) decided that the Home Secretary e was right because the licence was not part of the penalty at all; it is imposed for the benefit of the defendant not to punish him and it is also for the benefit of the community since it is part of the rehabilitation process. He also accepted the argument that the licence is not imposed on conviction. It is merely statutory consequence of the imposition of the penalty.

f [36] Although I have not found this case entirely easy I have come to the conclusion that Mr Crow's submission cannot be accepted. It is tempting to treat the matter as one of form and say that the sentence of 12 years, which remains the same both before and after 1992, is all that the court can look at. But that would be the triumph of form over substance. The reality is that before 1992, in normal circumstances, the sentence expired after two-thirds of it had elapsed. g After 1992 the sentence only expires at the conclusion of three-quarters of that sentence. Indeed, now it only expires at the end of the sentence; meanwhile the prisoner is subject to recall. Any prisoner would regard the penalty of 12 years as harsher after 1992 than before. So, in my view, would the ordinary informed observer.

h [37] The judge is, of course, not incorrect to observe that the licence provisions are a benefit to the defendant and to the community. In that sense they are preventive. But they are also penal in as much as the licence period operates as part of the sentence and the defendant can be recalled during that part. That is different from (and harsher than) the position that operated pre-1992. The j preventive aspect of the licence regime cannot annul the penal aspect.

[38] Moreover if, as the judge observed, the licence is a statutory consequence of the imposition of the penalty, it is part of the penalty. The fact that it does not come into operation until two-thirds of the sentence have elapsed does not mean it is not part of the penalty. It only comes into existence when it does as a result of the pronouncement of the sentence. It is thus different from *Ibbotson v UK* (1999) 27 EHRR CD 332 relied on by Mr Crow, where a post-conviction statute

required the registration of a sex offender. That was not and could not be any part of the penalty imposed on conviction. Here the licence is part of the penalty imposed on conviction. a

[39] I have thought it right to express my conclusion in my own words since we are differing from the judge. But they are effectively the same as Pill LJ with whom I entirely agree. I would allow the appeal and make the declaration set out at [26], above. b

**MAURICE KAY J**

[40] I also agree and would allow the appeal and make the declaration in the agreed form.

*Appeal allowed. Permission to appeal granted.* c

Stephen Leake Barrister.

# Evans v Amicus Healthcare Ltd and others
# Hadley v Midland Fertility Services Ltd and others

[2003] EWHC 2161 (Fam)

FAMILY DIVISION

WALL J

30 JUNE, 1–4 JULY, 1 OCTOBER 2003

*Medical treatment – Human fertilisation – Embryo – Frozen stored embryos – Consent to treatment together of each of male and female gamete providers in treatment involving in vitro fertilisation, freezing and storage of embryos – Whether consent effective after couple separating – Whether implantation of embryo in female gamete provider 'treatment together' – Whether requirement for consent by both partners contrary to right to respect for private and family life – Human Fertilisation and Embryology Act 1990, Sch 3, para 6(3) – Human Rights Act 1998, Sch 1, Pt 1, art 8.*

Under para 6(3) of Sch 3 to the Human Fertilisation and Embryology Act 1990, an embryo created by in vitro fertilisation (IVF) could not be used for any purpose unless there was an effective consent by each person whose gametes were used to bring about the creation of the embryo to the use of the embryo for that purpose. Under para 1 , 'effective consent' meant a consent under Sch 3 which had not been withdrawn and para 4 allowed for withdrawal of consent by notice to the person keeping the embryo. The claimants in two separate cases had each had IVF treatment with their respective male partners at fertility clinics. Embryos were created from the gametes of each claimant and her partner. The embryos were frozen and stored. The consents given for the purposes of the 1990 Act by each person in both cases were for use of each person's gametes for IVF in 'the treatment of myself together with a named partner'. Both couples subsequently separated and each claimant later sought to have the stored embryos transferred to her, to enable her to become pregnant. Both men objected, withdrew their consents to the continued storage of the embryos, and expressed the wish that the embryos be allowed to perish. Both claimants sought relief from the court, including declarations allowing the implantation of the embryos. The issues before the court included (i) whether the original consents to 'treatment together' were still effective; (ii) whether the provisions of Sch 3 to the 1990 Act breached the claimants' rights to respect for private and family life provided by art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998); and (iii) whether representations by the male partner in the first case to the effect that any embryos created from his gametes would always be available to be used by the claimant in the first case founded an equitable estoppel sufficient to make it unconscionable for him to be permitted to withdraw his consent to the embryos being transferred to the claimant.

**Held** – (1) The only consent given by each of the defendant male gamete providers, in the instant cases, had been for treatment 'together' with his partner. Treatment together was a matter of fact. The time to ascertain whether a couple

were being treated together was when the process of unfreezing and transfer of the embryos took place. It followed that neither couple was still being treated together. There was therefore no effective consent by the male gamete providers to the continuing treatment of the claimants on their own (see [133], [134], [136], [137], [147], [149], below); *Re R (a child)* [2003] 2 All ER 131 applied.

(2) The provisions of Sch 3 which permitted the male gamete providers in the instant cases to refuse to allow the claimants access to the embryos for the purpose of transfer into them was an interference by the state with both the rights of both the female and the male gamete providers to respect for their private lives. However, the right to respect for family life was not engaged. The four adults lived separate lives and an embryo was not a person or an individual with rights under the convention. The state's interference with their art 8 rights was necessary for the protection of the rights of all four and proportionate in its effect. The foundation for the legislation was a treatment regime based on the twin pillars of consent and the interests of the unborn child. The requirement that couples embarking on IVF treatment were in agreement about the treatment, and that it should be possible for either party to withdraw from it at any time before the created embryo was transferred into the female gamete provider was entirely appropriate (see [175], [181]–[183], [248]–[250], [255], [259], below).

(3) The wider public interest of the proper operation of the scheme of licensed treatment operated under the 1990 Act did not allow the giving of an unequivocal consent to the use of embryos irrespective of any change of circumstances. The estoppel argued for in the instant case could therefore not take effect. Accordingly, the claims in both cases would be dismissed (see [295], [297], [310], [315], below).

**Notes**

For consents, see 30 *Halsbury's Laws* (4th edn reissue) para 65.

For the Human Fertilisation and Embryology Act 1990, Sch 3, para 6, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 335.

**Cases referred to in judgment**

*Abdulaziz v UK* (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR.
*Airey v Ireland* (1979) 2 EHRR 305, [1979] ECHR 6289/73, ECt HR.
*AZ v BZ* (2000) 725 NE 2d 1051, Mass SC.
*B (minors) (parentage), Re* [1996] 3 FCR 697.
*Baker v Secretary of State for the Home Dept* [2002] EWHC Admin 381.
*Botta v Italy* (1998) 4 BHRC 81, ECt HR.
*Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256n, [1947] KB 130.
*Centre for Reproductive Medicine v U* [2002] EWCA Civ 565, [2002] All ER (D) 213 (Apr).
*Chassagnou v France* (2000) 7 BHRC 151, ECt HR.
*Combe v Combe* [1951] 1 All ER 767, [1951] 2 KB 215, CA.
*Cossey v UK* [1993] 2 FCR 97, (1990) 13 EHRR 622, ECt HR.
*Davis v Davis* (1992) 842 SW 2d 588, Tenn SC.
*F (in utero), Re* [1988] 2 All ER 193, [1988] Fam 122, [1988] 2 WLR 1288, CA.
*Gaskin v UK* (1989) 12 EHRR 36, [1989] ECHR 10454/83, ECt HR.
*Goodwin v UK* [2002] 2 FCR 577, ECt HR.
*Greenfield v Irwin (a firm)* [2001] EWCA Civ 113, [2001] 1 WLR 1279.
*Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, [1874–80] All ER Rep 187, HL.

*Jabari v Turkey* (2000) 9 BHRC 1, ECt HR.
*Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.
*Johnson v Moreton* [1978] 3 All ER 37, [1980] AC 37, [1978] 3 WLR 538, HL.
*Kass v Kass* (1998) 673 NYS 2d 350, NY SC.
*Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 All ER 300, [1964] AC 993, [1964] 2 WLR 150, PC.
*Leeds Teaching Hospital NHS Trust v A* [2003] 1 FLR 412.
*Marckx v Belgium* (1979) 2 EHRR 330, [1979] ECHR 6833/74, ECt HR.
*MB (an adult: medical treatment), Re* [1997] 2 FCR 541, CA.
*Paton v Trustees of BPAS* [1978] 2 All ER 987, [1979] QB 276, [1978] 3 WLR 687.
*Paton v UK* (1980) 3 EHRR 408, E Com HR.
*Petrovic v Austria* (1998) 4 BHRC 232, ECt HR.
*Q (a minor) (parental order), Re* [1996] 2 FCR 345.
*R v A* [2001] UKHL 25, [2002] 1 AC 45, [2001] 3 All ER 1, [2001] 2 WLR 1546.
*R v DPP, ex p Kebeline, R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
*R v Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 All ER 687, [1999] Fam 151, [1997] 2 WLR 806, CA.
*R v Lichniak, R v Pyrah* [2002] UKHL 47, [2002] 4 All ER 1122, [2003] 1 AC 903, [2002] 3 WLR 1834.
*R v North West Lancashire Health Authority, ex p A* [2000] 2 FCR 525, [2000] 1 WLR 977, CA.
*R (a child), Re* [2003] EWCA Civ 182, [2003] 2 All ER 131, [2003] 2 WLR 1485.
*R (on the application of Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority* [2002] EWCA Civ 20, [2003] 1 FCR 266.
*R (on the application of CD) v Secretary of State for the Home Dept* [2003] EWHC 155 (Admin), [2003] 1 FLR 979.
*R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673.
*R (on the application of Mellor) v Secretary of State for the Home Dept* [2001] EWCA Civ 472, [2002] QB 13, [2001] 3 WLR 533.
*R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] EWCA Civ 667, [2003] 3 All ER 257, [2003] 3 WLR 878.
*R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 WLR 692.
*R (P) v Secretary of State for the Home Dept, R (Q) v Secretary of State for the Home Dept* [2001] EWCA Civ 1151, [2001] 1 WLR 2002.
*Rasmussen v Denmark* (1985) 7 EHRR 371, [1984] ECHR 8777/79, ECt HR.
*U v W (A-G intervening)* [1998] 1 FCR 526, [1998] Fam 29, [1997] 3 WLR 739.
*Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.
*X v Netherlands* (1985) 8 EHRR 235, [1985] ECHR 8978/80, ECt HR.
*Yaxley v Gotts* [2000] 1 All ER 711, [2000] Ch 162, [1999] 3 WLR 1217, CA.

**Claims**

*Evans v Amicus Healthcare Ltd and others*

The claimant, Natallie Evans, claimed declaratory and injunctive relief against the defendants, Amicus Healthcare Ltd, Howard Roy Johnston and the Royal United Hospital Bath NHS Trust. By order of Dame Elizabeth Butler-Sloss P on

19 September 2002 the Secretary of State for Health and the Human Fertilisation and Embryology Authority were joined to the proceedings. The facts are set out in the judgment.

*Hadley v Midland Fertility Services Ltd and others*

The claimant, Lorraine Hadley, claimed declaratory relief against the defendants, Midland Fertility Services Ltd and Wayne Hadley. By order of Dame Elizabeth Butler-Sloss P on 19 September 2002 the Secretary of State for Health and the Human Fertilisation and Embryology Authority were joined to the proceedings. The facts are set out in the judgment.

*Robin Tolson QC* and *Susan Freeborn* (instructed by *Withy King*) for the claimants.
*Dr Kristina Stern* (instructed by *Bevan Ashford*) for Amicus Healthcare Ltd and the Royal United Hospital Bath NHS Trust.
*Dr Kristina Stern* (instructed by *Young & Lee*) for Midland Fertility Services Ltd.
*Kambiz Moradifar* and *Vanessa McKinlay* (instructed by *Davey Son & Jones*) for Mr Johnston.
*Stefano Nuvoloni* (instructed by *Baches*) for Mr Hadley.
*Jason Coppel* (instructed by the *Department of Health*) for the Secretary of State.
*Dinah Rose* (instructed by *Morgan Cole*) for the authority.

*Cur adv vult*

1 October 2003. The following judgment was delivered.

**WALL J.**

GLOSSARY AND INDEX

**[1]** Throughout this judgment, I propose to use the following abbreviations. (1) 'The Act' means the Human Fertilisation and Embryology Act 1990. (2) 'AID' means artificial insemination by donor. (3) 'The authority' means the Human Fertilisation and Embryology Authority. (4) 'The clinic' in the case of Ms Evans and Mr Johnston means Bath Assisted Conception Clinic and in the case of Mr and Mrs Hadley means Midland Fertility Services Ltd. 'The clinics' means both. (5) 'The convention' means the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as incorporated into English law by the Human Rights Act 1998. (6) 'HRA 1998' means the Human Rights Act 1998. (7) 'ICSI' means Intra Cytoplasmic Sperm Injection. (8) 'IVF' means in vitro, fertilisation. (9) PGD means Pre-Implantation Genetic Diagnosis. (10) 'The Secretary of State' means the Secretary of State for Health. (11) 'Warnock' means the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (July 1984) (Cmnd 9314) chaired by Dame Mary Warnock DBE. (12) 'The White Paper' means *Human Fertilisation and Embryology: A Framework for Legislation* (Cm 259) (November 1987).

**[2]** The arguments in these two cases were detailed and ranged over a wide area. I was told that this was the first major example of litigation between parties to IVF treatment in the United Kingdom, and the first time that the consent provisions of the Act had been subject to a full-blown HRA 1998 challenge. Given the importance of the issues involved, therefore, I have decided to set out both the facts and the arguments addressed to me in some detail. The result is a judgment of greater length than I had anticipated, and no doubt longer than is strictly necessary for the resolution of the issues, on which I have formed clear

views. In order to help those reading the judgment, or wishing to identify a particular issue, I have prepared the following index.


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INTRODUCTION: THE CASES IN BROAD OUTLINE AND AS PLEADED

**[3]** With some exceptions, these two cases raise the same issues, and have been heard together. The two claimants are Ms Natallie Evans and Mrs Lorraine Hadley. Each underwent IVF treatment with a partner (respectively the second defendants in each of the actions, Mr Howard Johnston and Mr Wayne Hadley) from whom each subsequently separated, and with who neither has any

continuing relationship. In each case there remain in existence embryos, currently frozen and in storage, created from the gametes of each claimant and her former partner. Each claimant now wishes to remove the embryos created with her gametes from storage in order to have them transferred into her with a view to becoming pregnant.

[4] As pleaded in the amended particulars of claim by Mr Robin Tolson QC and Miss Susan Freeborn, who appear for both claimants, the relief sought in Ms Evans' case is as follows. (a) A declaration that (Mr Johnston) has not and may not in the future vary or withdraw his consent given on 10 October 2001 to the storage or use of the embryos. (b) An injunction requiring Mr Johnston to restore his consent to the storage and use of the embryos. (c) A declaration that the embryos may lawfully be stored until 9 October 2011 (the expiry of the ten-year storage period for which consent was originally given). (d) A declaration that the claimant may lawfully be treated with the embryos during the storage period. (e) If necessary, a declaration of incompatibility pursuant to s 4(4) of the HRA 1998 to the effect that s 12 and paras 6(3), 8(2) and 4(1) of Sch 3 to the Act (i) constitute an unnecessary interference with (Ms Evans') right to respect for her private and/or family life under art 8 of the convention; (ii) fail to secure (Ms Evans') right to found a family under art 12 of the convention; (iii) permit discrimination against (Ms Evans) as a result of her infertility and/or disability, contrary to art 14; and (iv) fail to accord the embryo with any protection for such rights under arts 2 and 8 as its status may justify; further or alternatively fail to protect any proprietary/possessory interest (Ms Evans') may enjoy in respect of the embryo pursuant to art 1 of the First Protocol of the convention. (f) Such interim orders preserving the embryos as may be necessary in the event that the clinic alters its present position where it has agreed to continue to store the embryos.

[5] The relief sought by Mrs Hadley is the same, except that in her case there is no application for an injunction. In her case, however, because three of the embryos created from the gametes provided by herself and Mr Hadley had, on a previous occasion, been unsuccessfully transferred into her (and thus used), it was argued that the remaining two embryos in storage had also been used. Accordingly, since para 4(2)(a) of Sch 3 to the Act prevents any withdrawal of consent to treatment once an embryo has been used in providing treatment services, it was argued that Mr Hadley was prevented by the Act from withdrawing his consent. The argument was initially limited to Mrs Hadley's case, but in their closing submissions Mr Tolson and Miss Freeborn sought to include Ms Evans within it. I will deal with the argument under the heading 'The Second Point of Law' in [150]–[165], below.

[6] Neither Mr Johnston nor Mr Hadley consents to the embryos being unfrozen in order for them to be transferred into the claimants. Both have withdrawn their consent to the continued storage of the embryos, and both wish the embryos to be allowed to perish. Both say, quite simply, that the Act gives them (and the claimants) an unequivocal and unconditional right to withdraw their consent to treatment and to continued storage of the embryos up until the moment the embryo is used. The stored embryos, they say, have not been 'used', since in the context of this case, 'use' means the transfer of the embryo into a woman. In so far as convention rights under the HRA 1998 are concerned, both men say they are either not engaged, or, if engaged, are not breached. Article 8 in particular, they say, gives each of the four adults the right to respect for their private lives, and the state's 'interference' under art 8(2) with those rights, by

allowing them to withdraw their consent and thus prevent the transfer of the embryos into the claimants is, they say, necessary to prevent a breach of their art 8 rights, and thus both justified and proportionate.

[7] The clinics which treated the couples are parties to the proceedings, although, in the event, no relief was sought against them, and in each case the clinics took a neutral stance in relation to the relief sought by each claimant. I was, however, materially assisted by the evidence called on behalf of the clinics and by argument from Dr Kristina Stern, who appeared on their behalf. I was particularly impressed by the evidence of Dr Nicholas Sharp, consultant obstetrician and gynaecologist specialising in reproductive medicine at the Royal United Hospital Bath NHS Trust, who was responsible for Ms Evans' treatment; and by the evidence of Dr Gillian Lockwood, obstetrician/gynaecologist at the clinic attended by Mrs Hadley. I also heard from Mrs Pamela Spearman, a fertility sister at Ms Evans' clinic, and from Ms Susan Lowbridge, a fertility nursing sister at the clinic attended by Mrs Hadley. I was generally impressed by the overall quality of the care which each of the claimants had received; and it was in my judgment quite appropriate in each case for Mr Tolson to preface his cross-examination of the clinics' witnesses by stressing how grateful each of the claimants was for the treatment they had received.

[8] In addition, and because of the importance of the issues raised by the case, both the authority itself and the Secretary of State were joined to the proceedings by order of Dame Elizabeth Butler-Sloss P made on 19 September 2002. I thus had the advantage of argument from counsel instructed on behalf of each. Both took a neutral stance on the facts, but each argued that the terms of the Act itself precluded the court granting the relief the claimants sought.

[9] The first point taken by both the Secretary of State and the authority was that the original consents which each couple gave to IVF treatment were no longer effective. Both couples had consented, exclusively, to being 'treated together' with their respective partners. Given the fact that both couples had separated, the argument was that it was simply not open to the clinics to treat the claimants by transferring the embryos into them.

[10] Secondly, and in the alternative, both the Secretary of State and the authority submitted that the provisions of the Act were unambiguous and gave both Mr Johnston and Mr Hadley (as well as both claimants) an unqualified right to withdraw their consent to the continued storage and use of the embryos.

[11] Both the Secretary of State and the authority argued further that, in so far as the claimants' convention rights were engaged, the terms of the Act do not breach them, with the result that no question of a declaration of incompatibility under s 4 of the HRA 1998 arose.

[12] In the case of Ms Evans, a further point arose. She relied on representations which she says Mr Johnston made to her prior to the initiation of the IVF treatment. She argued that these representations, on which she says she acted to her detriment, create an equitable estoppel sufficient to make it unconscionable for Mr Johnston now to be permitted to withdraw his consent to the embryos being transferred into her.

[13] In the amended particulars of claim, the matter is pleaded in the following way:

> '5. Before undergoing IVF treatment (Ms Evans), realising that the eggs to be harvested from her represented her last chance of bearing a child, discussed with (Mr Johnston) what should happen if their relationship were

to end. In particular, on a date presently unknown to (Ms Evans) she suggested to (Mr Johnston) in the presence of a member of the nursing staff at the clinic known to (Ms Evans) only as "Pam" (Mrs Spearman) that she should have some of her eggs frozen, as opposed to be fertilised so that if necessary they might later be fertilised by sperm from a donor other than (Mr Johnston) and be available for her use.

6. By his words and actions (Mr Johnston) gave (Ms Evans) to understand that any embryos created from his sperm would always be available for her to use and that there was no need to consider other options. Amongst other things, he told the claimant that he loved her, wanted to share his life with her, would never leave her and was anxious to be a father ((Ms Evans) gives the gist of the words used). The couple discussed the position generally and agreed that sperm from (Mr Johnston) would be used to attempt to fertilise all the eggs which were harvested

7. When agreeing to fertilise all the eggs, (Mr Johnston) knew that these eggs would represent (Ms Evans') last chance to bear a child naturally. He knew, further, that (Ms Evans) would, but for his assurances, have sought advice about and investigated in discussions with the clinic the possibilities of "insuring" against the breakdown of their relationship, whether by freezing unfertilised eggs (which Ms Evans understands to be a problematic procedure) or by storing eggs fertilised by a donor other than (Mr Johnston).'

**[14]** On this basis, the creation of a promissory estoppel is pleaded as follows:

'34. If and to the extent that (Mr Johnston) had a legal right, whether contractual or arising under the Act, to vary or withdraw his consent, then he represented by the words and conduct set out above that his consent would be irrevocable or that it would not be withdrawn in the present circumstances.

35. (Ms Evans) relied on the representation in deciding not to seek further advice on the storage of unfertilised eggs or embryos created using sperm from another donor. It is (Ms Evans') case that in the absence of the assurances she received from (Mr Johnston) she would have taken every opportunity to maximise her prospects of having children in the future including specifically the storage of unfertilised eggs or eggs fertilised by another donor or by investigating other treatments for her cancer than the removal of her ovaries.

36. In the circumstances, (Mr Johnston) is estopped from relying on any legal right to vary or withdraw his consent.'

**[15]** Mr Johnston denies inducing the belief in Ms Evans that any embryos created from his sperm would always be available for her to use, and asserts that no estoppel arises on the facts. He also submits, however, that even on the case made by Ms Evans the elements necessary for an equitable estoppel do not arise. In this latter context, he adopts an argument put forward by the Secretary of State that an estoppel is inconsistent with and excluded by the policy considerations underlying the terms of the Act.

THE HISTORY OF THE ACT

**[16]** The background to the Act, and the manner in which the Act regulates certain forms of fertility treatment, including of course IVF, the storage of gametes, and the creation, storage and use of human embryos outside the body for treatment services or research, are all authoritatively set out in the speech of

Lord Bingham of Cornhill in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 WLR 692 hereinafter called *Quintavalle CNR* (cell nuclear replacement) in order to distinguish it from a second case involving Mrs Quintavalle, *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] EWCA Civ 667, [2003] 3 All ER 257, [2003] 3 WLR 878 (which I shall call *Quintavalle (tissue typing)* and in which there is also a detailed discussion of Warnock, the White Paper, the proceedings in Parliament leading to the passing of the Act and of the Act itself—see the judgment of Lord Phillips of Worth Matravers MR, and in particular at [27]–[36].

**[17]** It is, I think, helpful to repeat what Lord Bingham of Cornhill said both about the background to the Act, and the approach to its interpretation. He said ([2003] 2 All ER 113, [2003] 2 WLR 692):

> '[11] The birth of the first child resulting from in vitro fertilisation in July 1978 prompted much ethical and scientific debate which in turn led to the appointment in July 1982 of a Committee of Inquiry under the chairmanship of Dame Mary Warnock DBE to—
>
> "consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations."
>
> The committee reported in July 1984 (*Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314) (the Warnock Report)). A White Paper was published in November 1987 *Human Fertilisation and Embryology: A Framework for Legislation* (Cm 259) when the Department of Health and Social Security recognised (para 6) "the particular difficulties of framing legislation on these sensitive issues against a background of fast-moving medical and scientific development".
>
> [12] There is no doubting the sensitivity of the issues. There were those who considered the creation of embryos, and thus of life, in vitro to be either sacrilegious or ethically repugnant and wished to ban such activities altogether. There were others who considered that these new techniques, by offering means of enabling the infertile to have children and increasing knowledge of congenital disease, had the potential to improve the human condition, and this view also did not lack religious and moral arguments to support it. Nor can one doubt the difficulty of legislating against a background of fast-moving medical and scientific development. It is not often that Parliament has to frame legislation apt to apply to developments at the advanced cutting edge of science.
>
> [13] The solution recommended and embodied in the 1990 Act was not to ban all creation and subsequent use of live human embryos produced in vitro but instead, and subject to certain express prohibitions of which some have been noted above, to permit such creation and use subject to specified conditions, restrictions and time limits and subject to the regimes of control briefly described in [4], above. The merits of this solution are not a matter for the House in its judicial capacity. It is, however, plain that while Parliament outlawed certain grotesque possibilities (such as placing a live animal embryo in a woman or a live human embryo in an animal), it

otherwise opted for a strict regime of control. No activity within this field was left unregulated. There was to be no free for all.'

STATUTORY INTERPRETATION AS APPLIED TO THE ACT

**[18]** For present purposes, one paragraph from Lord Bingham's speech in *Quintavalle CNR* on the subject of statutory interpretation will, suffice. He said ([2003] 2 All ER 113 at [8], [2003] 2 WLR 692 at [8]):

> 'The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'

**[19]** The history of the legislation, and the policy issues to which the Act gives expression are of considerable importance. They come to the fore when considering whether or not there are any breaches of Ms Evans' and Mrs Hadley's convention rights, and in particular whether any interference with their private and family lives is justified under art 8(2) of the convention. I will therefore deal with questions of policy when considering the convention aspects of the claims.

THE RELEVANT PROVISIONS OF THE ACT

**[20]** Before turning to the facts, it is necessary to set out the provisions of the Act which are relevant to the two cases. I do so by reference to the helpful synopsis provided by Ms Dinah Rose, counsel for the authority.

**[21]** The long title of the Act describes it as:

> 'An Act to make provision in connection with human embryos and any subsequent development of such embryos; to prohibit certain practices in connection with embryos and gametes; to establish a Human Fertilisation and Embryology Authority; to make provision about the persons who in certain circumstances are to be treated in law as the parents of a child; and to amend the Surrogacy Arrangements Act 1985.'

**[22]** At para [4] of his speech in *Quintavalle CNR*, Lord Bingham identifies the three levels of control which the Act imposes, namely: (1) that contained within the Act itself; (2) that provided by the Secretary of State through regulations; and (3) that exercised by the authority. The instant cases fall within the category (3). As Lord Bingham points out in the extract from his speech which I have cited at

[17], above, the Act occupies a field of great ethical sensitivity and controversy, in which the science is rapidly advancing.

**[23]** Sections 1 and 2 of the Act define a number of the terms used in the Act. In particular: (1) by s 1(1)(a), an embryo is defined as 'a live human embryo where fertilisation is complete, and by s 1(1)(b) 'references to an embryo include an egg in the process of fertilisation; (2) s 1(2) of the Act provides that in so far as it governs bringing about the creation of an embryo, the Act applies only to bringing about the creation of an embryo outside the human body; (3) by s 1(3), in so far as it governs the keeping or use of an embryo, the Act applies only to keeping or using an embryo outside the human body; (4) by s 2(1), 'treatment services' are defined as 'medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children'; and (5) by s 2(2), references in the Act to keeping, in relation to embryos or gametes, include keeping while preserved (whether by cryopreservation or in any other way). Embryos so kept are referred to in the Act as 'stored'.

**[24]** Section 3 deals with activities governed by the Act. By s 3(1), no person shall bring about the creation of an embryo, or keep or use an embryo except in pursuance of a licence. The storage or use of an embryo can only take place lawfully in accordance with the requirements of the licence in question. The contravention of s 3(1) is an offence, pursuant to s 41(2)(a) of the Act: see *R v Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 All ER 687 at 695, [1999] Fam 151 at 178.

**[25]** Sections 11–13 of the Act deal with the scope of licences granted by the authority and licence conditions. The authority is empowered by s 11(1) to grant only three licences. The first of these is a licence for treatment under paras 1 and 2 of Sch 2 and which authorises the following (amongst others) in the course of providing treatment services '(a) bringing about the creation of embryos in vitro, (b) keeping embryos, (c) using gametes, (d) practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose, (e) placing any embryo in a woman'.

**[26]** The second type of licences provided for in para 2 of Sch 2 are those authorising the storage of gametes and embryos; and the third are those authorising activities for the purposes of research (ibid para 3). In the instant case we are, of course, only concerned with the first two types of licence.

**[27]** By s 12(c) of the Act, it is a condition of every licence granted that the provisions of Sch 3 to the Act shall be complied with. Before turning to Sch 3, however, it is necessary to identify one of the mandatory, and in my judgment very important conditions of licences for treatment identified in s 13(5) of the Act namely the following:

> 'A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.'

**[28]** The means whereby the statutory obligation contained in s 13(5) of the Act is implemented is the code of practice which the authority is required to maintain by s 25(1) of the Act. Section 25(2) provides that the guidance given by the code shall include guidance for those providing treatment services about the matters contained within s 13(5).

[29] The current code of practice sets out in paras 3.8–3.21 the approach which centres should adopt and the matters which should be taken into account. It is not necessary for the purposes of this judgment to reproduce these paragraphs. It is, I think, sufficient to say that they cover, comprehensively (and to a much greater extent than, for example, is contained in the so-called welfare check list in s 1(3) of the Children Act 1989) every possible aspect of the unborn child's physical and emotional welfare in the context of being born as a result of IVF treatment, and every aspect of the capacity of those seeking the treatment to care for the child. It is an impressive document.

SCHEDULE 3 TO THE ACT

[30] Schedule 3 to the Act is at the heart of this case. It governs consents to the use of gametes or embryos. By para 1, a consent under Sch 3 must be given in writing, and an effective consent means a consent under Sch 3 which has not been withdrawn.

[31] By para 2 of Sch 3, a consent to the use of any embryo must specify one or more of the following purposes: (1) 'use in providing treatment services to the person giving consent, or that person and another specified person together'; (2) 'use in providing treatment services to persons not including the person giving consent'; (3) 'use for the purposes of any project of research'. A consent may specify conditions subject to which the embryo may be so used.

[32] By para 3, a consent to the storage of any gametes or embryo must specify the maximum period of storage (if less than the statutory maximum); and must state what is to happen to the gametes or embryo if the person giving the consent dies or is unable because of incapacity to vary the terms of the consent or revoke it. Such a consent may also specify conditions subject to which the gametes or embryo may remain in storage.

[33] Paragraph 3 in Sch 3 deals with the procedure for giving consent. A person must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and must be provided with such information as is proper, before giving consent under Sch 3. In particular, by para 3(2): 'Before a person gives consent under this Schedule, he must be informed of the effect of paragraph 4 below.'

[34] Paragraph 4, which is the critical paragraph provides:

> '(1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo to which the consent is relevant.
>
> (2) The terms of any consent to the use of any embryo cannot be varied, and such consent cannot be withdrawn, once the embryo has been used—(a) in providing treatment services, or (b) for the purposes of any project of research.'

[35] By para 6(3) of Sch 3, an embryo the creation of which was brought about in vitro must not be used for any purpose unless there is an effective consent by each person whose gametes were used to bring about the creation of the embryo to the use for that purpose of the embryo, and the embryo is used in accordance with those consents.

[36] By para 8(2) of Sch 3, an embryo the creation of which was brought about in vitro must not be kept in storage unless there is an effective consent, by each person whose gametes were used to bring about the creation of the embryo, to

the storage of the embryo and the embryo is stored in accordance with those consents.

THE TWO MOST IMPORTANT PRINCIPLES UNDERLYING THE ACT

**[37]** These are the relevant statutory provisions for my purposes. Before moving on, however, a reading of the Act and the Code of Practice seems to me amply to justify the submission made by Miss Rose that the two most important principles to be found in the Act are (1) the welfare of any children born by treatment under its provisions, and (2) the requirements of consent from those participating in the treatment. For these propositions she relied upon *Leeds Teaching Hospital NHS Trust v A* [2003] 1 FLR 412 at [20] per Dame Elizabeth Butler-Sloss P, approving and quoting a passage from the judgment of Hale LJ in *Centre for Reproductive Medicine v U* [2002] EWCA Civ 565 at [24], [2002] All ER (D) 213 (Apr) at [24]. Dame Elizabeth Butler-Sloss P said:

> 'The two most important principles to be found in the Act are the welfare of any children born by treatment under the provisions: see for instance s 13(5) and the requirements of consent (see Sch 3(5), s 28(2) and the statutory consent forms, and Annex C to the Code of Practice. Hale LJ said in *Centre for Reproductive Medicine v U* (at [24]):
>
> > "The whole scheme of the 1990 Act lays great emphasis upon consent. The new scientific techniques which have developed since the birth of the first IVF baby in 1978 open up the possibility of creating human life in ways and circumstances quite different from anything experienced before then. These possibilities bring with them huge practical and ethical difficulties. These have to be balanced against the strength and depth of the feelings of people who desperately long for the children which only these techniques can give them, as well as the natural desire of clinicians and scientists to use their skills to fulfil those wishes. Parliament has devised a legislative scheme and a statutory authority for regulating assisted reproduction in a way which tries to strike a fair balance between the various interests and concerns. Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught up in it."'

THE FACTS IN THE CASE OF MS EVANS AND MR JOHNSTON

**[38]** Against that background, I now turn to examine the facts of the two cases. I am conscious that both have been heard in public, and that my judgment will be handed down in public. I will therefore provide only such details of both claimants' medical conditions and histories as are necessary for the purposes of my decision. Furthermore, although I heard factual evidence about a number of aspects of the personal lives of Ms Evans and Mr Johnston in particular, and formed my impression of them both on all the evidence I heard, I propose only to make findings of fact in relation to those issues which are strictly necessary for my decision.

**[39]** Ms Evans was born on 23 October 1971. She is thus now 31. Mr Johnston was born on 2 November 1976, and is now 26. In October 2001, when the critical events with which I am concerned occurred, she was rising 30 and he was rising 25. Mr Johnston has never been married.

**[40]** On 30 August 1995, when she was married to another man, Ms Evans was referred by her general practitioner with her husband to the clinic. At that point,

she and her husband had been trying to achieve a pregnancy for two years without success. Ms Evans had an irregular menstrual cycle with borderline serum progesterone suggestive of defective ovulation. She was prescribed Clomid, a drug used to stimulate ovulation.

[41] I do not need to chronicle Ms Evans' treatment thereafter, which is set out in the statement from Dr Sharp. According to his statement in the proceedings, he suggested IVF treatment to Ms Evans and her then husband on 2 July 1997. This did not occur due to the subsequent breakdown of her marriage, and the clinic did not see Ms Evans again until 12 July 2000, when she attended with Mr Johnston. However, I accept Ms Evans' evidence that she had always wanted to conceive a child, and was bitterly disappointed when all her attempts at doing so failed.

[42] Between July 2000 and March 2001, Ms Evans was again treated with Clomid. She did not, however, become pregnant. In April 2001 she had a hysterosalpingogram, an examination of the uterus and fallopian tubes, which demonstrated that both fallopian tubes were clear. She was, however, recommended for a laparoscopy, which took place on 13 September 2001. That examination gave rise to concern over the condition of her ovaries, and on 27 September 2001, she underwent a laparatomy, or surgical incision into the peritoneal cavity. The findings were, in summary, of serious borderline tumours present in both ovaries.

[43] On 9 October 2001 there was a meeting of the doctors at the clinic, the conclusions of which were that Ms Evans would require an oophorectomy (the removal of her ovaries) but that because the ovarian tumours were growing slowly Ms Evans could have IVF and embryo freezing followed by a formal oophorectomy with what is described as a 'staging procedure' as soon as convenient but not before the IVF services were content that they had retrieved the eggs they needed.

THE EVENTS OF 10 OCTOBER 2001

[44] The news that she was going to need an oophorectomy was conveyed to Ms Evans on 10 October 2001 when she attended the clinic with Mr Johnston. Since this was the day on which both Ms Evans and Mr Johnson signed their consents to IVF treatment, and since what Mr Johnson is alleged to have said to Ms Evans during a meeting with Mrs Spearman forms the basis of the promissory estoppel upon which she seeks to rely, I need to look at the events of the day in some detail.

[45] I preface my description of what happened on 10 October 2001 by recording my sympathy for Ms Evans both in relation both to her medical condition and to the events of that day. Events moved very swiftly. It was within minutes of receiving the terrible news that she had a life-threatening condition and would need the removal of her ovaries that she was discussing the details of IVF with Mrs Spearman and Mr Johnston. In her oral evidence to me, she described the meeting with Mrs Spearman as like being in a room full of water. It felt, she said, as if everybody was under water and she could not hear what he or she were saying. It was a graphic description.

[46] In her statement made for the purposes of the proceedings on 29 October 2002, Ms Evans describes what happened on 10 October 2001 in the following terms:

> '14. On 10 October 2001, Howard (Mr Johnston) and I went to see Nick Johnson (a consultant in gynaecological oncology who had carried out the

formal laparotomy and ovarian cystectomy with Mr Jaaback on 27 September) at the RUH. He told me that I would need a laparotomy procedure to remove my ovaries and my fallopian tubes. It was a complete shock and I was devastated.

15. He told me that because I needed to have my ovaries and fallopian tubes removed I had to consider whether I wanted to try IVF now before it was too late. He took Howard and I over to see Mr Nick Sharp at the clinic to discuss this.

16. Twenty minutes after being told that I had ovarian cancer, Howard and I were sitting down with Mr Sharp who explained what our options were. He told us that we could have one cycle of IVF' treatment to attempt to harvest some eggs. Howard and I agreed with Mr Sharp that before I underwent surgery to have my ovaries and fallopian tubes removed I would have some eggs harvested, which Howard would then fertilise. The embryos that resulted could then be frozen for use after my surgery so we could still have a family ...

18. We saw Mr Sharp and then went into another room where we saw Pam Spearman, one of the nurses. We signed the consent forms that we were asked to sign and I was shown what I needed to do in terms of injections and using a nasal spray.

19. I would say that our whole visit to the clinic took no more than about an hour. I know that during this visit we discussed a lot of things about the IVF treatment and what it would involve. It was a bit overwhelming. I was very anxious about my cancer, the surgery I needed and the whole IVF process. It was difficult to take in everything that we were told, and I have no clear recollection of what was or was not discussed.'

[47] Ms Evans then identifies the consents which were signed, and in her statement that concludes her narration of the events of that day. The statement then continues as follows:

'22. Howard and I then attended the clinic on a regular basis. I recall one specific occasion, prior to the eggs being harvested, when we were with Pam Spearman. I cannot be certain of the date. I believe it was while we were in the process of having treatment. I cannot remember how the conversation started, but I asked Pam whether we had to have all the eggs that were harvested fertilised and then frozen. I asked whether it was possible simply to have my eggs frozen. Pam replied that they did not carry out that procedure at the clinic and that if I wanted to have my eggs frozen prior to them being fertilised I would need to go to another IVF clinic.

23. At this point Howard told me not to be stupid and that there was no need for that. He told me that he loved me, that we would be getting married and having a family together. I said, "But what if we split up?" Howard told me that we were not going to and that I should not be such a negative person.

24. I suggested that perhaps we freeze some of the eggs and that if we were still together in a couple of years' time and wanted to use them he would always fertilise them then. He told me again that we would not be splitting up, that our future was together and that he loved me. He told me that he loved me, that he wanted to have a family and that I was the woman he wanted to share his life with. He told me that he would never leave me, and

that he wanted to be the father of my children. I told him that I loved him and trusted him.

25. Pam Spearman was present throughout this conversation. She said that we would need to really think about what we wanted and to make up our minds what we wanted to do. Howard continued to reassure me and in the end I simply accepted what he said and we just carried on. It was not mentioned again.'

[48] It is now clear, and Ms Evans in her oral evidence accepted, that she is wrong in ascribing the conversation which she describes in paras 22 to 25 of her statement to a date after 10 October 2001. The conversation, whatever its precise terms, took place on 10 October 2001.

[49] Mr Johnston, in his statement for the proceedings dated 17 January 2003, deals with the meeting with Mrs Spearman on 10 October 2001 in the following way:

'9. I recall that the claimant and I then attended a further consultation with Pamela Spearman. Mrs Spearman explained, in further detail, IVF treatment. It had already been made clear to us that the Clinic would not be able to store any unfertilised eggs and that if this was to be considered, we would have to attend an alternative clinic.

10. Eventually, (Ms Evans) and I signed consent forms for the IVF treatment at the Clinic. The contents of the consent forms were explained to us. Indeed, we were taken through the consent forms on a paragraph by paragraph basis. It was obviously made clear to us that the consent of both myself and (Ms Evans) would be required before anything could be done. It was also explained to us that the continued storage of the embryos would be considered on an annual basis so as to ensure that both myself and (Ms Evans) wanted the storage to continue. In addition, it was clear that upon the termination of our relationship the storage and use of the embryos would need to be reviewed. It was therefore clear that we would still maintain freedom to choose either whether we wanted to start a family together or when we would start a family together. I suppose I was reassured by the fact that I would still maintain the same control regarding this decision as I would had these unfortunate events not occurred. Having said that, I would estimate that the entire consultation lasted approximately 90 minutes. This was from the diagnosis being given to (Ms Evans) and us embarking on a course of IVF treatment. As outlined above, the circumstances were far from ideal. (Ms Evans) and I certainly had no opportunity to discuss matters in details privately. In fact, the only time we had time to discuss matters alone was when we talked in whispers for about 60 seconds whilst staff went to obtain an IVF kit.

11. I obviously wanted to reassure (Ms Evans) during this difficult time. I was concerned for her welfare. I cannot recall providing her with any specific reassurances at this time. As outlined above, save for about 60 seconds or so, (Ms Evans) and I were not alone. However, it is highly likely that I would have been trying to reassure and support (Ms Evans). I could hardly have done anything else in the circumstances. Certainly, I did not enter into any form of legally binding agreement with (Ms Evans). I would have only provided (Ms Evans) with assurances, the nature of which are frequently given on a daily basis in any relationship. As far as I am concerned, both myself and (Ms Evans) were fully aware of the basis upon

which the embryos would be stored and used, namely in accordance with the consent forms which were fully explained to us, and which were signed by both of us.'

**[50]** Mrs Spearman gives her account in her statement made on 29 October 2002. She first met Ms Evans and Mr Johnston on 10 October 2001. She states she has a clear recollection of them, not least because of the very tragic circumstances in which they found themselves attending the clinic. She says that in view of those circumstances, and the fact that she was seeing the couple immediately after their consultation with Mr Sharp:

'... the couple required particularly careful and detailed information and support to ensure that they were in full possession of all the physical, emotional and legal elements of the IVF treatment in order to understand its full implications.'

**[51]** Mrs Spearman exhibits to her statement the checklist which she used to ensure that all the relevant points had been covered. In particular she states in para 13 that she sought confirmation that Ms Evans and Mr Johnston had received the clinic's information pack, a copy of which she annexes to her statement. She says she checked carefully that the couple had read and understood a leaflet included in the pack entitled 'IVF and ICSI Treatment'.

**[52]** Mrs Spearman also states:

'16. I made it clear to the couple that the Clinic would not take any action to dispose of the embryos in storage without contacting both parties. Likewise, I conformed that nothing would be done with the embryos without the consent of both partners. I also explained that the Clinic would write to them on an annual basis to check that both partners wanted their embryos to remain in storage.

17. Clause two of para 4 (of the consent form) states that: "Upon the cessation of our domestic relationship by divorce or legal separation we understand that the storage and use of the embryos must be reviewed." I explained to Ms Evans and Mr Johnston that this applied equally to unmarried couples. I also explained that they should notify the clinic of any change or breakdown in their relationship.

18. I also elaborated upon what was meant by "reviewing" the storage and use of embryos. I explained that, in the event of the breakdown of their relationship, it would not be possible for them to attend with a new partner and expect the Clinic to treat them using the same embryos.'

**[53]** Mrs Spearman then describes the process of taking Ms Evans and Mr Johnston through the authority's forms. She then states:

'23. I recall that Ms Evans seemed quite tense during our meeting and she was very naturally upset about the operation she was going to have. However, I had no concerns about her relationship with Mr Johnston: they appeared to be very happy together and he came across as being very supportive of Ms Evans. He did mention that his mother had expressed some concerns about him pursuing this course of treatment with Ms Evans, but Mr Johnston himself seemed committed to his partner.

24. I do not recall Ms Evans asking me about alternative treatments available although I am aware that she has suggested she asked me about the possibility of oocyte freezing. The question of oocyte freezing is frequently

raised by couples who, at initial consultation, may not be aware of or understand the difference between oocytes and embryos. Had such a query arisen regarding treatment, I would have referred the couple back to Mr Sharp and the wider team for further discussion and consultation. This is because if oocyte freezing had been raised, it would have suggested to me that there was some doubt about them seeking treatment as a couple. This would have changed both my and the team's perception of the suitability and appropriateness of IVF treatment for the couple since the welfare of any potential child or children from such treatment is always our paramount concern.'

[54] Having had the opportunity to consider Mr Johnston's statement, Ms Evans saw no reason to disagree with him that information about the clinic's inability to store unfertilised eggs was provided on 10 October 2001 and not on any later date, as she had initially thought. Her recollection was that Mrs Spearman took Mr Johnson and herself through the forms very briefly, and that they had to be signed then and there.

[55] Ms Evans is also very clear that neither she nor Mr Johnston had been sent a copy of the clinic's Information Pack, and that Mrs Spearman is simply wrong in para 13 of her statement (see [51], above) when she says she sought confirmation that they had received it, and when she says she checked carefully to ensure that they had read the particular leaflet contained within it. Ms Evans says that the first time she saw this document was when it was annexed to Mrs Spearman's statement I accept her evidence on this point, which was supported by that of Mr Johnston.

[56] Mrs Spearman also filed a supplementary statement on 25 June 2003 which, for the most part maintains her original position. However, she accepts:

'9. With regard to egg freezing, it is possible that Ms Evans asked me whether or not the Clinic offered egg freezing as a service to patients. Many patients have read or heard about egg freezing, and many confuse embryos and eggs. It was relatively common for patients to ask about egg freezing and I would not have found such a query remarkable if it had come from Ms Evans. I would simply have explained that the Clinic did not offer it as a service to patients.

10. In contrast, if Ms Evans had indicated that she wished to pursue egg freezing as an option, this would have raised concerns about her and Mr Johnston receiving treatment as a couple. I would therefore have referred them back to Mr Sharp and am sure that I would recall such a conversation if it had occurred in the manner described by Ms Evans.'

MY FINDINGS OF FACT IN RELATION TO THE EVENTS OF 10 OCTOBER 2001

[57] I heard oral evidence from Ms Evans, Mr Johnston and Mrs Spearman. I also heard from Dr Sharp, although he could give no direct evidence as to what was said at the meeting between Ms Evans, Mr Johnston and Mrs Spearman. I thought all three were trying their best to assist me. As I have already made clear, Ms Evans frankly told me that she felt numb with shock on 10 October 2001 when given the results of the laparotomy and on being told that she would have to have surgery to remove her ovaries. No doubt it was this which caused her to place the critical conversation on the wrong date.

[58] Ms Evans' oral evidence to me was very much along the lines of her statement. She was being told that the only option was to fertilise her eggs with

Mr Johnston's sperm. She therefore asked Mrs Spearman about egg freezing. She was trying to safeguard having a child—this was the real issue; she was concerned that Mr Johnston would leave her. She told me that Mrs Spearman said words to the effect of 'we don't do egg freezing at this clinic—you will have to go to an alternative clinic', and that it was at this point that Mr Johnston told her not to be a negative person: they did not need to have egg freezing. She said he told her he was not going to leave her. She put all her trust in him. He was trying to reassure her and he was going to be the father of her children. Had he not given her those assurances she would have looked for alternative treatment—either a different clinic or donor sperm.

**[59]** When cross-examined by Mr Moradifar for Mr Johnston the areas of dispute between Ms Evans and Mr Johnston seemed to diminish. Ms Evans accepted that Mr Johnston was not telling her in terms that she could always use the embryos but seeking to reassure her that they were not going to split up. Equally, when Mrs Spearman gave evidence, the slightly defensive dogmatism of her statements softened. She was clear that there had not been a discussion with her about freezing eggs, but she accepted that it had quite possibly arisen as a question which was not followed up. She would have told Ms Evans that it was something the clinic did not do, and that Ms Evans would have to discuss it with Mr Sharp.

**[60]** Mr Sharp, when he gave evidence, had no recollection of any discussions with him about egg freezing. However, he regarded single person egg freezing as very much in its infancy and far removed from standard medical practice. The clinic did not have a licence for it, and as far as he was aware, there were no reported pregnancies in the United Kingdom resulting from it.

**[61]** Mr Johnston's evidence seemed to me to confirm the narrowing of the issue. It had been a very emotional meeting. He had not given an unequivocal assurance about the embryos, but he had done his best to be supportive. In a skilful cross-examination by Mr Robin Tolson QC for Ms Evans he said that he was very much in love with Ms Evans. It had not crossed his mind that they might want to go their separate ways, although he knew the relationship would have ended if he had told her that he was not going to give her the child she so desperately wanted. He could not remember what he had said but he accepted that she had said words to the effect of 'what if we split up' and that he had replied 'we are not going to split up'. He saw no reason at that point why they should.

**[62]** Although I have spent a great deal of time setting out the evidence, the result, having seen the three principal witnesses on this point in the witness box, is reasonably clear. Despite errors in her initial statement (notably, of course, the date of the conversation) and despite the fact that—as Dr Stern for the clinics pointed out—Ms Evans was at points unable to recall important aspects of her treatment—I am satisfied, on the balance of probabilities, that during the session with Mrs Spearman Ms Evans did raise, as a general inquiry, the possibility of freezing her eggs as opposed to freezing fertilised embryos. I am satisfied that Mrs Spearman told her simply and shortly that this was something which the clinic did not do. I also find, on the balance of probabilities, that she added that if Ms Evans wished to pursue this aspect, she would have to go back to Mr Sharp.

**[63]** I am equally satisfied on the balance of probabilities that when Mrs Spearman had answered the inquiry about freezing eggs, Mr Johnston gave Ms Evans the assurances I have set out in [58], above. They were not going to split up. She did not need to go in for egg freezing. She should not be negative. He wanted to be the father of her children.

[64] I find further on the balance of probabilities that Mrs Spearman did hear Mr Johnston give these assurances, but that she did not absorb them. As time has passed, and Mrs Spearman having seen many couples since, the assurances have become simply part of her perception of him as a reassuring and supportive presence.

[65] It is, I think, quite clear, and accepted by Ms Evans that Mr Johnston did not give her any categorical assurance, in terms, that whatever happened between them she could use the embryos in order to become pregnant. That, however, she says is the irresistible inference from what he did say.

[66] I am equally clear that, at the time he gave Ms Evans the assurances I have identified, Mr Johnston meant what he said. In other words, he gave the assurances in good faith. He was in love with Ms Evans: he intended at that time to stay with her indefinitely. Despite some reservations about it, he entered into the treatment process with Ms Evans on the basis that if it was successful he would be the father of the resulting child, and that he and Ms Evans would in due course marry.

[67] I shall need to discuss, later, whether the assurances which I have found Mr Johnston gave Ms Evans are capable of providing the basis for a promissory estoppel. I shall also need to consider the extent to which it can properly be said that Ms Evans relied on them to her detriment.

THE CONSENTS WHICH MS EVANS AND MR JOHNSTON SIGNED ON 10 OCTOBER 2001

[68] The documents which both Ms Evans and Mr Johnston signed on 10 October 2001 fall into two categories. The first comprises those provided by the clinic: the second category comprises those provided by the authority which the clinic needed in order to observe the terms of its licence. Several of the forms (notably those not signed on 10 October 2001) deal with the release of information by and to the couple's general practitioner. Nothing turns on these forms, and I will not reproduce them.

[69] The most important form for my purposes is that in which Ms Evans and Mr Johnston give their consent to treatment involving egg retrieval and embryo replacement. It is in two parts. Part 1, which is signed by Ms Evans, reads as follows:

> '1. I consent to [delete / complete as applicable]
> (i) be prepared for egg retrieval;
> (ii) the removal of eggs from my ovaries with the aid of ultrasound;
> (iii) the administration of any drugs and anaesthetics which may be found necessary in the course of the procedure(s)
> (iv) the mixing of the following: [tick each column as required]; my egg(s) with the sperm of my partner/ husband ("husband" is deleted)
> 2. I understand that if the donor has given effective consent under (the Act), the donor will not be the legal parent of any resulting child.
> 3. I have discussed with Mr Sharp/Pam Spearman the procedures outlined above. I have been given information orally and in writing about them.
> 4. I have been given a suitable opportunity to take part in counselling about the implications of the proposed treatment (using donated sperm or eggs, or any IVF treatment).'

[70] I have set out Part 1 of the clinic's consent form in full, even though several parts of it are inapplicable (this was not, of course, an AID case). The relevance of this information, however, is that on the form itself, two columns

are provided for the answer to question 1(iv) with three boxes in each column. Ms Evans has ticked the first box in each column. Thus her consent is to the mixing of her eggs with the sperm of her partner/husband. The second box in the left hand column is designated 'eggs donated by' with a blank left for the name. The third box in the column is designated 'an anonymous donor's egg(s)'. The second box in the right hand column is designated 'with sperm donated by' and a gap for the name. The third box in the right hand column is designated 'with an anonymous donor's sperm'.

[71] It is thus clear from Pt 1 of the clinic's consent form that the treatment to which Ms Evans was giving her consent on this form was to the mixing of her eggs with Mr Johnston's sperm. She did not give her consent to the mixing of her eggs with the sperm of any other named person than Mr Johnston, and she was not consenting to AID.

[72] Part H of the form is signed by both Ms Evans and Mr Johnston. It deals with the creation of embryos, the transfer of embryos, the fertilisation of surplus eggs and the storage of excess embryos. The phrase on the form: 'We authorise/do not authorise the medical practitioner to store excess embryo(s)' is left untouched. The form does, however, contain the provision that if authorisation is given for the storage of excess embryo(s) such storage will cease upon the following occurring: (a) upon their joint request for their use in a future treatment cycle; (b) upon jointly signed written request by them to discontinue storage; and (c) at the expiration of an agreed period of time but in any event no longer than ten years from the date of the commencement of storage.

[73] The form also provides that upon cessation of their domestic relationship by divorce or legal separation they understand that the storage and use of the embryos must be reviewed (see Mrs Spearman's statement as recorded at [52], above). There is provision for an annual review, a medical disclaimer and both agree they have discussed the procedures with Mr Sharp and Mrs Spearman and have been given information orally and in writing about them.

[74] Mr Johnston signed the clinic's 'Male Partner's Acknowledgement'. This reads: 'I am not married to Natallie Evans, but I acknowledge that she and I are being treated together, and that I will become the legal father of any resulting child.'

[75] The next relevant form is the authority's Form for Consent to Storage and Use of Eggs and Embryos, which begins with the following warning in bold type:

> 'NB Do not sign this form unless you have received information about these matters and have been offered counselling. You may vary the terms of this consent or withdraw this consent at any time except in relation to eggs or embryos which have already been used.'

[76] There follows a warning about the risks of storing eggs. This is in the following terms:

> 'Patients wishing to store their eggs should note that egg freezing and the use of frozen eggs in treatment are experimental techniques. Not all eggs will survive the freezing and thawing process, and sometimes no embryo will be created using frozen eggs. There have not yet been enough treatments to be able accurately to predict the chance of a baby being born using frozen eggs. You are strongly advised to read the HFEA information leaflet on egg freezing before giving your consent.'

[77] The form is then divided into two parts: use and storage. Ms Evans was given three options in relation to the use of her eggs. They were (i) in her own treatment (ii) in treating others and (iii) in any project of research. The form is completed by ticking 'Yes' and 'No' boxes. Ms Evans ticked the 'Yes' box in relation to her own treatment and the 'No' box in relation to treating others and research.

[78] The second question under use (as completed) reads as follows:

> '(b) I hereby consent to my egg(s) being fertilised in vitro to develop embryo(s) and to the use of those embryo(s) for the following purposes:—
> (i) In the treatment of myself Yes
> in the treatment of myself with a named partner Yes
> Full name of partner Howard Roy Johnston
> (ii) in treating others No
> (iii) in any project of research No ...'

[79] As with the first question under 'use', the answers in relation to the questions (b)(i)–(iii) are given by ticking boxes marked 'Yes' and 'No'. Consistent with her answers to the first question, Ms Evans is, accordingly, consenting once again to IVF treatment with Mr Johnston.

[80] In relation to storage, Ms Evans consented to the storage of her eggs for a maximum period of ten years, and to the storage of embryos developed in vitro from her eggs for ten years. If she died or became mentally incapacitated she elected that neither her eggs nor her embryos should be allowed to perish; that they should continue in storage for the purposes specified in the answers to questions relating to use and storage, but should not continue in storage for any other purposes.

[81] The authority's form for consent to storage and use of sperm and Embryos signed by Mr Johnston is structured identically to that signed by Ms Evans with, of course, the necessary substitution of 'sperm' for eggs. The form has the same warning at the top in relation to the right to vary or withdraw consent. Mr Johnston consented to the following:

> 'I hereby consent to the use of my sperm to fertilise egg(s) in vitro and to the use of embryo(s) developed from these egg(s) for the following purposes:
> i. in the treatment of myself together with a named partner Yes
> Full name of partner: Miss Natallie Evans
> ii. In treating others No
> iii. in any project of research No ...'

[82] Mr Johnston's instructions in relation to storage and to what should happen in the event of his death or incapacity are identical to those of Ms Evans, save that he did not tick any other boxes relating to the eggs/embryos continuing in storage for any other purposes.

[83] Before leaving the forms, it is, I think, unfortunate that Part II of the clinic's consent to treatment form, which I have summarised at [72], [73], above, does not fully reflect the terms of paras 4(1) and 6 of Sch 3 to the Act. In this context the word 'review' seems to me ambiguous, and inconsistent with the accurate statement (which I have set out in [75], above) which heads up the authority's form of consent to storage and use of eggs and embryos. No doubt this is something the clinic may wish to consider further in the light of this judgment.

EVENTS AFTER 10 OCTOBER 2001

[84] Ms Evans duly began the course of treatment, part of which involved the injection of hormones. On 16 October 2001 Ms Evans and Mr Johnston signed the 'Welfare of the Child: Consent to Release of Information about Me' form consenting to their general practitioner, Dr Slack, providing information about them to the clinic. They declared that they had read and understood the contents of the authority's leaflet on the welfare of the child. On 17 October 2001 Dr Slack completed the welfare of the child information and declaration for GPs declaring that she knew of no reason why treatment should not proceed.

[85] From the evidence both Ms Evans and Mr Johnston gave, it was plainly a tense and difficult time. On the morning of 12 November 2001, the day they were to attend the clinic together for Ms Evans' eggs to be harvested and fertilised, there was an argument between them. Ms Evans says Mr Johnston told her he was not going through with the treatment. Mr Johnston says that Ms Evans initially refused to have her last injection, and told him that the whole thing was a waste of time, although she changed her mind shortly afterwards.

[86] I am reluctant to make findings of fact except in relation to issues of direct relevance unless I need to, and I am conscious of the fact that during the hearing, I discouraged cross-examination on the personal aspects of the relationship between Ms Evans and Mr Johnston. On this point, however, having heard both of them, I accept Mr Johnston's version of this argument. I do not think for a moment that Ms Evans meant it when she said that the whole thing was a waste of time. It is, however, an indication of the tension under which both she and Mr Johnston were operating, and may have some relevance in relation to the issue of estoppel.

[87] In any event, however, later on 12 November 2001, Ms Evans and Mr Johnston both attended the clinic. Eleven eggs were harvested and fertilised. From these, six embryos were created and on the following day these were duly placed in storage by the clinic. On 26 November 2001, Ms Evans underwent a successful bilateral oophorectomy for high-grade multiple tumours of borderline malignant potential. The positive news is that, although Ms Evans cannot now conceive a child spontaneously, the latest ultrasound scans were normal, and she has been given the 'all clear'. Since the cancer did not spread to her uterus, it is the opinion of Professor Ledger, the independent expert brought in to advise pursuant to the order of the President of 19 September 2002 that Ms Evans should be able to carry a pregnancy normally, although if she is unable to use the six frozen embryos fertilised on 12 November 2001, there is no prospect of her bearing a child which is genetically hers.

[88] On 19 December 2001, Ms Evans was advised that she ought to wait for two years before an embryo transfer should be attempted, although it could be done earlier. However, on 27 May 2002 the relationship between Ms Evans and Mr Johnston came to an end. The causes of the breakdown of the relationship are irrelevant for my purposes.

[89] Ms Evans says that subsequent to their separation there was an agreement between them that she could use the embryos provided he was not named on the birth certificate as the father and would not be financially liable for any maintenance. Mr Johnson denies that any such agreement was reached. The furthest it went, he said, was her suggestion that she should set up a meeting with a solicitor to enable an agreement to be discussed and drawn up. He accepts that he agreed to attend such a meeting to discuss the possibilities, but Ms Evans did not arrange it. She agreed that this was the case, and attributed her failure to

progress the matter by the serious emotional effect which the breakdown of the relationship had on her.

[90] On this part of the case, having seen them both in the witness box, I prefer Mr Johnston's evidence, and I am quite satisfied that no such agreement was reached. But even if it had been it would not, in my judgment, have been effective to achieve the objective Ms Evans desired. I will return to this point later—see [253], below.

[91] On 4 July 2002 Mr Johnston wrote to the clinic, informing it that his relationship with Ms Evans had come to an end, and explaining that as far as he was concerned the embryos could be destroyed. The clinic then advised Ms Evans that Mr Johnston had withdrawn his consent to their further storage. On 11 September 2002 Ms Evans instituted proceedings, and at a directions hearing before Dame Elizabeth Butler-Sloss P on 19 September 2002 the clinic undertook not to make any arrangements for the embryos to perish or be otherwise altered or destroyed until agreement between the parties or the final determination of these proceedings.

[92] All I need to add in relation to this part of the case is that whilst it was unfortunate that on 10 October 2001 the meeting with Mrs Spearman had to take place immediately after Ms Evans had received the terrible news that she required radical surgery to remove her ovaries, and whilst Mrs Spearman was, as I indicated in [59], above somewhat defensive in her original statement, I accept Dr Stern's submission that no criticism of the clinic can be made either in relation to Ms Evans' treatment or in relation to the information which was given to Ms Evans and Mr Johnston on 10 October 2001. Ms Evans does not seek to say—nor could she—that the consents she signed were invalid or that she did not know what she was signing.

[93] Mrs Spearman, whom I thought a pleasant, decent professional, and one who no doubt has, over the years, fielded the distress of many an IVF patient, fell into the trap—no doubt triggered by the fact of litigation—of turning her description of what she usually did into a narrative of what she actually did—and did so with more certainty than was perhaps warranted. For example, I have already accepted Ms Evans' and Mr Johnston's evidence that they were not sent an information pack prior to 10 October 2001. Mr Sharp agreed that this sometimes happened. Mrs Spearman should not have been so unequivocal about it.

THE FACTS IN THE HADLEY CASE

[94] These can be taken much more shortly. Mrs Hadley was born on 31 December 1964. She is thus now 38. Mr Hadley was born on 1 April 1971 and is now 32. They married on 2 June 1995. Mrs Hadley has a daughter from a previous relationship who is now 18.

[95] In June 1999, following upon previous preliminary assessments and investigations of the couple at the clinic, Mr and Mrs Hadley commenced IVF treatment. The consents which they signed in August 1999 in relation to both treatment and storage are in no material respects different from those signed by Ms Evans and Mr Johnston.

[96] On 20 September 1999, 11 eggs were harvested from Mrs Hadley. Of these, ten were successfully fertilised, of which seven had potential to develop. On 22 September 1999, three of seven embryos were transferred into Mrs Hadley. Of the remainder, two were placed in storage and two did not develop.

[97] In May 2000, Mr and Mrs Hadley separated. They were divorced on 3 December 2001. In the intervening period, there were discussions between them about Mrs Hadley being able to have the remaining embryos transferred into her on the basis that a resulting pregnancy would have no financial or other consequences for Mr Hadley. Mrs Hadley's case is that Mr Hadley agreed to this. Mr Hadley denies it. Mrs Hadley then suggests that Mr Hadley agreed she could use the embryos provided that Mr Hadley was registered as a semen donor and thus avoided financial responsibility for any subsequently born child. Mr Hadley's case is that the agreement between them was that the embryos should be allowed to perish at the end of the storage period (five years in their case).

[98] As in the case of Ms Evans and Mr Johnston, I am satisfied that no post-separation agreement was reached between Mr and Mrs Hadley in relation to the two stored embryos; but as in the case of Ms Evans and Mr Johnston, no such agreement would, in my judgment, have been binding.

[99] Mrs Hadley says she contacted the clinic in 2002 in the light of the agreement which she says she had reached with Mr Hadley, but that the clinic said that if she wanted to have the embryos transferred into her both Mr Hadley and his new partner would need to come into the clinic for a meeting and to give their consent. Mrs Hadley says that she was very unhappy about the prospect of having to sit down with Mr Hadley's new partner, who was pregnant by him, to ask for her permission to use the embryos. She therefore let matters lie.

[100] Mrs Hadley says that later in 2002, Mr Hadley told her he was no longer content that she should use the embryos. By this time his new partner had given birth to their child. The clinic then contacted Mrs Hadley to tell her that it had no alternative but to allow the embryos to perish at the end of the five-year period. However, in August 2002 Mrs Hadley read about Ms Evans' case in the newspaper. She contacted the newspaper, which ran a story about her on its front page. Mr Hadley's reaction, she says, was to contact the clinic and to inform them in writing that he wished the embryos destroyed. After taking legal advice, Mrs Hadley instituted proceedings on 11 September 2002. Similar directions were given in her case as in the case of Ms Evans and Mr Johnston.

[101] Mrs Hadley's position, as she readily recognises, has none of the poignancy of Ms Evans' case. Mrs Hadley suffers from polycystic ovary syndrome, a condition which does not preclude normal conception. In addition, she has, of course, already given birth to a healthy child, who is now adult, and who attended the final day of the hearing.

[102] Mrs Hadley's position, set out in her statement and repeated several times in oral evidence before me was that she and Mr Hadley had begun a process; they had created two lives—two embryos; and that the embryos should not be allowed to perish. She wanted the opportunity to complete that which she and her former husband had begun. Life had already been started, she said, and she wanted to finish the job.

[103] Mr Hadley, in his oral evidence, made it clear that he wished to be a father to any child in the full sense. He said he already had three children: his current partner had a child by a previous relationship: he was step-father to Mrs Hadley's child, and he now had a child by his current partner. 'If I have a child on this planet I would be a father to it' he said, in answer to Mr Tolson in cross- examination, explaining why nothing would now suffice to make him change his mind in relation to the two remaining frozen embryos.

THE FIRST POINT OF LAW: ARE THE CONSENTS GIVEN IN THIS CASE CAPABLE OF OPERATING TO ENABLE THE CLINICS TO TREAT MS EVANS AND MRS HADLEY ON THEIR OWN?

*The argument*

**[104]** Both the authority and the Secretary of State take the point that Mr Johnston and Mr Hadley each gave consent only to the use of embryos fertilised with his sperm for the treatment of himself, together with his named partner. As the consent forms make clear, each was given the opportunity, but specifically declined, to consent to such embryos being used in the treatment of any other person, including, for example, Ms Evans and Mrs Hadley being treated alone, or with a different partner.

**[105]** In these circumstances both the authority and the Secretary of State argue that (irrespective of whether or not the original consents have been subsequently varied or withdrawn), Sch 3, para 6(3) of the 1990 Act prohibits the use of the embryos in either case for any purpose other than for the treatment of Mr Johnston or Mr Hadley together with their respective partners. Since both couples have separated, the consents are no longer effective. If either claimant approached either clinic on her own, there would be no operative consent upon which either clinic could treat her.

**[106]** For ease of reference, I will set out the terms of para 6(3) of Sch 3. It reads:

> 'An embryo the creation of which was brought about in vitro must not be used for any purpose unless there is an effective consent by each person whose gametes were used to bring about the creation of the embryo to the use for that purpose and the embryo is used in accordance with those consents ...'

**[107]** If the phrase 'in the treatment of myself together with a named partner' (the form of each of the consents in this case) is to be decided as a simple issue of fact, it is difficult to see how, given the separation of the two couples, either Ms Evans or Mrs Hadley presenting on their own at the respective clinics for treatment by transfer into them of the stored embryos could constitute treatment together with their named partner.

**[108]** Ms Rose, for the authority, accepted that the term 'treatment together' is both used in a variety of contexts in the Act, and is not defined (see, for example, ss 4(1)(b) and 28(3)(a)). She argued, however, that the various uses of the phrase in a single statute ought to be consistently interpreted, and that the interpretation to be given to the phrase in para 6(3) of Sch 3 was entirely consistent with that given to it the decided cases under s 28(3) of the Act, where the issue under consideration was that of the paternity of subsequently born children.

**[109]** It therefore becomes necessary to look at the cases in which the phrase 'treatment together' has been considered by the courts. They are, in chronological sequence, *Re B (minors) (parentage)* [1996] 3 FCR 697, a decision of Bracewell J; *U v W (A-G intervening)* [1998] 1 FCR 526, [1998] Fam 29, a decision of Wilson J; and *Re R (a child)* [2003] EWCA Civ 182, [2003] 2 All ER 131, [2003] 2 WLR 1485, a decision of the Court of Appeal (Sir Andrew Morritt V-C, Hale and Dyson LJJ) in which the judgment of the court was given by Hale LJ.

**[110]** In *Re B*, the couple separated between the man's donation of sperm in July 1991 and insemination of the woman, which took place in December 1991, although the judge found that sexual intercourse took place between them as late

as November 1991. The donation of sperm took place before (whilst the insemination took place after) the relevant provisions of the Act had come into force. There was therefore no statutory consent, and the case is complicated by consideration of the transitional provisions.

**[111]** In essence, however, what happened was that following the birth of twins in August 1992, of whom the man accepted that he was the biological father, the mother sought financial provision for the children. In the absence of an express consent to treatment, the transitional provisions of the Act provided that he would be deemed to have consented, and would be treated as the father of the twins if he and the mother were receiving treatment together, including AID, and the man had not subsequently withdrawn his deemed consent. Since there had been no such deemed withdrawal of consent, the critical question was whether or not the treatment had been received jointly.

**[112]** Inevitably, *Re B* turns very largely on its facts. Bracewell J comprehensively rejected the man's assertions that the donation of sperm had been a casual favour and that there had been no joint enterprise to conceive a child. The man's case before the judge, it must be said, appears singularly unmeritorious, given that following the birth of the twins he had in September 1992 made a statutory declaration that he was the children's father, was named on their birth certificates as their father, and was continuing to have sexual intercourse with the woman up until a short time before insemination.

**[113]** An indication of the nature of Bracewell J's findings is given by the following extract ([1996] 3 FCR 697 at 701–702):

> 'I find the respondent knew of the hospital consultations, that the information relayed by the applicant was a truthful account of their common intentions and attempts to conceive despite the geographical constraints occasioned by work commitments. The respondent knew what was involved and after some initial hesitation he consented to the giving of sperm as part of a joint enterprise and he made a journey involving an air flight in order to do so. His version that there was no sex after 1989, possibly not even a meeting in 1990, and then an agreement merely as a casual favour to give sperm in the summer of 1991, makes no sense at all and I reject it. I do not find he donated as though he was an anonymous donor doing a favour which could have no repercussions for him. On the contrary, he was playing his essential role in aiding the applicant to achieve what both had been trying for, namely a pregnancy.'

**[114]** *U v W* is another case under s 28(3) of the Act, this time involving the use of donor sperm. The facts are unusual. The couple had undergone IVF treatment, unsuccessfully, in England. The man's sperm was weak. They went to Rome, where a particular doctor had developed a particular technique for implanting embryos into the uterus with a laser. The couple wanted to use the man's sperm, but when it came to the point of insertion, the doctor told them that he had fertilised 12 of the woman's eggs but that only one of them had been fertilised with the man's sperm. The couple were told that the chances of the single embryo developing successfully if implanted on its own were negligible. The couple asked for time to reflect overnight, and on the following morning agreed that the treatment should proceed using six of the embryos, one of which, of course, was from the man. The man signed a form acknowledging paternity of the unborn child. Insertion then occurred.

[115] The woman was subsequently told that the embryo which the man had fertilised had died. Three of the remaining embryos developed. However, the woman was advised that for the safety of the foetuses, the third embryo should be the subject of termination. This operation took place in England.

[116] The couple's relationship did not survive the woman's return to England. Following the birth of the twins, the mother sought financial provision for them. Two questions arose, the first of which was whether or not the couple had received treatment services together within s 23(3) of the Act.

[117] Wilson J found that they had. Having referred to *Re B*, the decision of the Court of Appeal in *R v Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 All ER 687, [1999] Fam 151 the decision of Johnson J in *Re Q (a minor) (parental order)* [1996] 2 FCR 345 and the authority's Code of Practice, he stated ([1998] 1 FCR 526 at 539, [1998] Fam 29 at 39):

> 'I have no doubt that there is a mental element inherent in the notion of "treatment ... together" and that, if the respondent had believed at all material times that the treatment which was being provided was treatment in which his sperm alone was to be used, Dr A's treatment of the applicant with donor sperm would not have amounted to services provided for them together.'

That hypothesis, however, does not fit the facts of this case.

[118] Having then analysed the facts, he continued ([1998] 1 FCR 526 at 539–540, [1998] Fam 29 at 40):

> 'The test in s 28(3)(a) is not whether the man consented either to be deemed in law to be the father of the prospective child or to become legally responsible for him: it is whether the relevant treatment services were provided for the woman and him together. It stretches the requisite mental element in the man too far to require either form of such consent. In my view, what has to be demonstrated is that, in the provision of treatment services with donor sperm, the doctor was responding to a request for that form of treatment made by the woman and the man as a couple, notwithstanding the absence in the man of any physical role in such treatment.'

[119] *Re R* was also a donor insemination case. The woman had signed a consent form for IVF treatment involving egg removal, donor insemination and embryo replacement. The man countersigned the consent form acknowledging that they were being treated together and that he would become the legal father of any resulting child, pursuant to s 28(3) of the Act. Initial treatment did not result in a successful pregnancy, and the couple then separated. The woman began a relationship with a new partner. She became pregnant as a result of further treatment, carried out without the first man's knowledge, but about which he found out a few months later. After the birth of the child he applied for parental responsibility and contact orders under the Children Act 1989.

[120] Before the judge, both the Official Solicitor, who had been appointed to act for the child, and the woman conceded that the man was the child's legal father. The judge ordered indirect contact and adjourned the application for parental responsibility generally. The man was refused permission to appeal against that decision, but on the hearing of the application for permission, the court expressed concern that jurisdiction had been assumed on the basis of a concession made without proper exploration of the facts.

**[121]** The man then sought to clarify the situation by reinstating his application for parental responsibility and asking for consideration of his status under s 28(3) as a preliminary issue. The judge granted the respondent a declaration of paternity. The mother appealed, contending that the embryos which had resulted in the successful pregnancy had not been placed in her 'in the course of treatment services provided for her and a man together' for the purposes of s 28(3) if at the time when they had been so placed the parties had separated and the respondent had taken no part in the treatment she had then received.

**[122]** That argument succeeded in the Court of Appeal. It rejected the judge's analysis, which bears some resemblance to the argument advanced on this point by (Ms Evans) in the instant case. The judge had said:

> 'I am satisfied that "a course of treatment" is for the purpose of s 28(3) that which is spelled out in the consent form of the mother which her partner joins in by acknowledging the legal consequences to him. It seems to me that if circumstances change not only can either party withdraw if they so choose but that under the current Code of Practice the hospital, if informed, should bring that course of treatment to an end. *If however that is not done then in my judgment the original course of treatment continues as treatment services provided to both of them together and, if a child is conceived in the course of that, the man will be the father.*'

**[123]** The Court of Appeal rejected that interpretation, which it regarded as an unwarranted gloss on the simple words of the statute. In its view:

> 'Section 28(3) cannot mean that the man is to be treated as the legal father if at some time during the provision of treatment services for the woman they were provided for them together. Gametes and embryos can be stored for up to ten years or even longer in some circumstances. There must be a point when the question has to be judged. The simple answer is that the embryo must be placed in the mother at a time when treatment services are being provided for the woman and the man together.'

**[124]** The court likewise warned against treating Wilson J's statement in *U v W* (which I have cited at [118], above, and which it regarded as clearly correct as part of his explanation of the decision in his case) as laying down a test to be applied to all cases, since to do so would also be to add a gloss to the clear words of the section. The simple and correct approach was to rely on the clear words of the Act.

**[125]** In the light of these authorities, and in particular the approach of the Court of Appeal in *Re R*, Miss Rose puts forward a very simple argument. Neither Mr Johnston nor Mr Hadley has ever given consent to the treatment of Ms Evans or Mrs Hadley alone or with another partner. The embryos therefore cannot be used in circumstances in which both men are separated from their partners and are taking no part in any treatment services. Thus the embryos cannot be used to treat either woman within the terms of the original consents, regardless of whether such consents have been or can be varied or withdrawn. Effective consent must mean consent effective at the point at which the embryos are transferred into Ms Evans and Mrs Hadley. That consent cannot be effective if the couples are no longer being treated together.

**[126]** The authority's argument is supported on this point by the Secretary of State and by counsel for both Mr Johnston and Mr Hadley.

[127] In their initial skeleton argument, Mr Tolson and Miss Freeborn sought to meet this point by submitting that the argument of the authority and the Secretary of State gave an unwarranted meaning to the word 'together'. The Act, they argued, did not require two persons presenting for treatment together to be a 'couple'. There is merely the person giving consent and 'another specified person' (Sch 3, para 1(2)(a)). It is the fact that the one consents which means that they are treated 'together'.

[128] To test this submission, they posited the example of a person whose sole purpose is to provide a friend with sperm to fertilise her eggs. He attends the clinic, receives his medical treatment (the collection of his sperm and their use in fertilising the woman's eggs) provides moral support during this phase and perhaps during a first cycle of treatment and then, as originally intended, plays no further part. It was submitted the clinic would not look to obtain a para 2(1)(b) 'donor' consent to implantation and would not have to do so. The man's continuing consent would constitute the only but vital element to create treatment together.

[129] Mr Tolson and Miss Freeborn also submitted that if Mr Hadley had separated from Mrs Hadley but maintained his existing consent, the effect of the authority's argument would be that Mrs Hadley would not be able to use the embryos despite the continued existence of the original consent: they would not be treated together during implantation. Worse, she would not be able to obtain any necessary variation of the consent if the embryos had already been 'used', whether in a selection process or in, say, tissue typing.

[130] Mr Tolson and Miss Freeborn also submitted that a purposive construction of the relevant provisions produced a similar result. Necessarily, they argued, a withdrawal of consent will often attend a separation. As a consequence it was important to make the consent, not the physical separation, the decisive factor in determining whether or not two people were being treated together.

[131] In reply, Mr Tolson and Miss Freeborn sought to argue that even a superficial reading of *Re R* demonstrated that there were material differences between s 28 and Sch 3 and a potential need to interpret them differently, a point which the Court of Appeal did not have to decide: see [2003] 2 All ER 131 at [24], [2003] 2 WLR 1485 at [24] per Hale LJ. Schedule 3 provided a 'bright line' non-fact-sensitive approach, designed to protect the treating clinic. Mr Tolson and Miss Freeborn sought to argue that the danger of the authority's approach was that in every case the clinic would have to ask 'are this couple together?'. The test would be utterly fact-specific, potentially requiring an investigation into the state of the relationship of every IVF couple, throughout treatment services.

*Discussion and analysis*

[132] I agree with Miss Rose that the various uses of the phrase 'treatment/treated together' should be consistently interpreted within the same statute, unless the statute itself makes it clear that the phrase is to be interpreted differently in differing circumstances. Moreover, I have no difficulty in applying the straightforward interpretation of the phrase given by the Court of Appeal in *Re R* to the system of consents required pursuant to Sch 3. In each case, it seems to me, it is a simple question of fact.

[133] In cases involving disputes as to paternity, where, by definition, embryos have been successfully transferred, the question is whether, at the moment the embryo was placed in the woman, treatment services were being

provided for the woman and the man together. Where, as in the case of Ms Evans and Mr Johnston, we are concerned with embryos which have been created and are now stored, the question is whether, if Ms Evans sought to have the embryos transferred to her, that would still constitute treatment together with Mr Johnston.

**[134]** In my judgment, there can be only one answer to this proposition, and it is 'No'. Ms Evans and Mr Johnston were undoubtedly being treated together on 12 November 2001 when Ms Evans' eggs were harvested and fertilised by Mr Johnston's sperm. In my judgment, they remained in treatment together, notwithstanding that nothing happened, until their relationship broke down. From that point onwards it seems to me impossible to say that the couple are being treated together, or that if Ms Evans went to the clinic and asked to have the embryos inserted into her, this would be treatment of the couple together.

**[135]** There are, of course, elements of artificiality about the argument because, in conventional terms, the only 'treatment' undergone by Mr Johnston was the provision of his sperm. Furthermore, in the instant case, it is very difficult to divorce the fact of separation from the accompanying fact that Mr Johnston is no longer willing to give his consent to Ms Evans having the embryos transferred to her. If 'treatment together' is an issue fact, the mental element identified by Wilson J in *U v W* cannot be ignored.

**[136]** However, in the same way as the cases under s 28(3) of the Act make the critical moment for treatment together the moment when the embryos are transferred into the woman, the terms of para 6(3) of Sch 3 are equally clear and have the same underlying purpose. The latter provide that an embryo must not be used for any purpose unless both gamete providers consent to the use of the embryo for that purpose and the embryo is used in accordance with those consents. Both the cases decided under s 28(3) and the terms of para 6(3) of Sch 3 have the same underlying reality.

**[137]** The purpose of the treatment is the creation of a pregnancy. That pregnancy begins when the embryos are successfully transferred and implanted. It is at that moment that one looks to see if the couple are being treated together for the purposes of s 28(3). In the instant case the only material difference is that the embryos in question have been frozen. The claimants now wish to have them unfrozen and transferred into them. The question is whether or not that process would constitute treatment together. In this analysis, I see no material difference in the approach to or use of the phrase 'treatment together'. In both cases, it is an issue of fact.

**[138]** Furthermore, Miss Rose points out, the Act requires consideration to be given to the welfare of any unborn child, and that counselling should be offered to prospective parents. If the circumstances which were taken into account when the couple were together change dramatically, it would plainly better serve the purposes of the Act if the matter had to be reconsidered and fresh counselling offered before a further attempt at implantation was offered.

**[139]** I agree with that submission. It also seems to me that Miss Rose's analysis generally not only fits the scheme of the Act, but also reflects the reality. As an ongoing series of events over time, treatment together must be something which can change and, in particular, come to an end in different ways. Thus, I have no doubt that on 22 September 1999, when three fertilised embryos were placed in Mrs Hadley, that constituted treatment together within the terms of Mr Hadley's consent. They were together as a couple and were so treated. Even

if they had separated after the transfer of the embryos into Mrs Hadley and before the birth of the child. Mr Hadley would have been the father of the child.

**[140]** However, the breakdown in the relationship between Mr and Mrs Hadley before the transfer of the remaining embryos followed by the couple's physical separation and divorce means not only that they are no longer physically together, but that the treatment which they were receiving together has come to an end, and the consent which Mr Hadley gave to being treated together with Mrs Hadley no longer applies.

**[141]** In my judgment, Mr Tolson and Miss Freeborn's argument falls into the trap identified by the Court of Appeal in *Re R* of providing a sophisticated gloss to essentially very simple words and an equally straightforward concept. It equally gives too little weight to the fact that treatment designed to enable a woman to give birth to a child can only be provided in accordance with the strict terms of a clinic's licence, and requires the clinic to take account of the welfare of the unborn child. The need for the clinic to have an effective, continuing consent of both gamete providers pursuant to para 6(3) of Sch 3 at all times up to the transfer of the embryo into the woman is thus critical. It is not a matter of the clinic being protected by a bright line, non-fact sensitive approach. Without effective consents, the clinic cannot lawfully use the embryos.

**[142]** I am reinforced in this view by the evidence of the two doctors from the respective clinics, particularly that of Dr Lockwood, who had been treating Mrs Hadley. Dr Lockwood told me that what was required was, as she put it, 'the ongoing valid consent of both parties'. In the instant case what she had was consent for treatment with a named partner. Treatment of Mrs Hadley without Mr Hadley's effective, ongoing consent would render her in breach of her licence.

**[143]** When cross-examined by Mr Tolson, Dr Lockwood told me that this was the first case in her experience in which there had been resistance to ongoing treatment by one of the gamete contributors. She had experience of couples separating during the course of treatment, since treatment was stressful, and could both drive couples apart as well as bring them closer together. However, she only had one or two separations every year out of some 1,500 treatments.

**[144]** Dr Lockwood also told me that there was nothing to stop a separating couple reaching an amicable agreement about the woman having access to the embryos, although this would not relieve the clinic of its obligations to consider the unborn child and to offer counselling. Dr Lockwood could not imagine a married couple wanting this. She would have very real concerns about asking a couple what would happen if they separated: if they wanted to discuss that option she would want to counsel them and they would have to come back for further discussion if separation occurred. In such a situation she would have to go to the authority for guidance, as it would require a whole new process: it was not possible to build it in as a contingency.

**[145]** Relating her evidence specifically to the situation in the case of Mr and Mrs Hadley, Dr Lockwood was clear that the situation now appertaining was not envisaged when the consents were given, and that she would not consider treatment of Mrs Hadley alone to fall within the terms of the original consent. It was for these reasons that she considered the clinic would be in breach of its licence if it treated Mrs Hadley in these circumstances.

**[146]** I accept the argument advanced by Mr Tolson and Miss Freeborn that it would be open to a clinic to treat a separated couple where the man maintained his consent to treatment (and, presumably, his willingness to acknowledge

paternity of any child born as a result of the treatment) although such a situation would be highly unusual, and I bear in mind the evidence of Dr Lockwood on the point, set out above. To treat in those circumstances, however, the clinic, in my judgment, would not only have to be positively satisfied of the man's continuing consent to the treatment, but would have to give particular attention to s 13(5). This, however, is not the situation with which I am faced.

**[147]** I also accept that, as a matter of reality, and as Mr Tolson and Miss Freeborn submitted, separation and the withdrawal of consent to continuing treatment will usually go hand in hand. That is what has happened in the instant case. They are thus entitled to argue (because the point is being considered irrespective of whether or not the consents have in reality been withdrawn) that we are positing a consent which has not been withdrawn, and which therefore remains in existence. The point, however, remains whether or not the consent is still effective. This is, essentially, an issue of fact. The facts here are that both couples have separated, and no longer have any form of relationship with each other. In these circumstances, in my judgment, it cannot be said, as a matter of fact, that either couple in this case is still being treated together.

**[148]** The licensing provisions of the Act are very strict. As I have already stated, for there to be continuing 'treatment together' in circumstances in which a couple have separated, the clinic, in my judgment, would need to be satisfied that the man's consent remained effective. I accept that this places a burden on clinics, but it is one, in my judgment, which it is appropriate for them to bear. I did not get the impression that either Dr Sharp or Dr Lockwood thought such a burden inappropriate. Indeed, their evidence seemed to me to be entirely consistent with the argument being advanced by the authority and the Secretary of State. The twin pillars of the Act are effective consent to treatment and the welfare of the unborn child. Schedule 3 is critical to the operation of the Act and the process of regulation. Mr Tolson's and Miss Freeborn's interpretation of para 6(3) of Sch 3 to the Act would, I think, undermine its operation.

**[149]** I am very conscious of the dangers of importing an unnecessary gloss onto the simple terms of the Act. On the facts of this case, however, it is clear to me that there is no effective consent by Mr Johnston and Mr Hadley to the continuing treatment of either Ms Evans or Mrs Hadley on their own. The only consent is for treatment together, and for the reasons I have attempted to give, I do not think either couple can now be said to being treated together. I am therefore satisfied that, on this point, the argument of the authority and the Secretary of State is correct, and that the claim in each case falls at this hurdle.

THE SECOND POINT OF LAW: HAVE THE REMAINING EMBRYOS IN MRS HADLEY'S CASE BEEN 'USED' IN THE PROVISION OF TREATMENT SERVICES, SO THAT MR HADLEY'S CONSENT TO THEIR USE CANNOT BE VARIED OR WITHDRAWN?

*The argument*

**[150]** My decision on the first issue is, subject to arguments of incompatibility with and breaches of convention rights and the HRA 1998, sufficient to dispose of the case. However, I am conscious that I may be wrong on the first point, and accordingly I propose to deal with each of the points of law argued, including the question of promissory estoppel.

**[151]** The argument on the second point arises from the terms of paras 4(1) and (2) to Sch 3 of the Act which, again for case of reference, I will repeat:

'(1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo to which the consent is relevant.

(2) The terms of any consent to the use of any embryo cannot be varied, and such consent cannot be withdrawn, once the embryo has been used—(a) in providing treatment services, or (b) for the purposes of any project of research.'

**[152]** Mr Tolson and Miss Freeborn devoted a considerable proportion of their opening skeleton argument to this point, and conducted an extensive analysis of the Act in an attempt to demonstrate that the term 'use' in the Act in relation to an embryo did not equate either with transfer of the embryo into the woman or with some act which changed the nature of the embryo. The essence of the argument, however, was that the stored embryos in Mrs Hadley's case were likely to have been the subject of a selection process by which they were rejected from the first attempt at implantation. It was on this selection process that counsel relied to establish the proposition that the stored embryos had been 'used in providing treatment services'.

**[153]** Initially, Mr Tolson and Miss Freeborn restricted this argument to Mrs Hadley's case, on the grounds that in her case there had been a selection process which had resulted in the selection for transfer of three of the embryos, and the storage of the remaining two. However, in their closing position statement, they submitted that the argument applied to the cases of both claimants.

**[154]** For the authority, Miss Rose did not submit that the 'use' of an embryo necessarily equated with its transfer into a woman. However, she once again submitted that 'use' of an embryo was a straightforward issue of fact. In the instant case, what had happened in the case of both women was that embryos had been created and then examined to ensure that they had fertilised. In Ms Evans' case they had then been stored, and in Mrs Hadley's case, three had been selected and then used: the remainder had been stored. Creation, selection, freezing and storage were not use: they were acts which were preparatory to, and necessary for use. The stored embryos had accordingly not been used.

*Discussion and analysis*

**[155]** In my judgment Miss Rose's argument on this point represents both a compelling and a common sense analysis, which clearly fits the structure and purpose of the Act. As Mr Tolson and Miss Freeborn readily acknowledged, if they are right, every embryo which has been created, examined and then frozen will have been 'used' with the result that para 4(1) and (2) of Sch 3 would be redundant. It would simply not be possible for a gamete provider to withdraw consent. Such a construction runs so counter to the consent provisions of the Act that I would only be able to contemplate it if the statutory language drove me to it. For the reasons I have already given, it does not.

**[156]** The only case cited to me in which the question of the 'use' of an embryo as anything other than placing the embryo is a woman was the decision of the Court of Appeal in *Quintavalle (tissue typing)* [2003] 3 All ER 257, [2003] 3 WLR 878. This is an extremely important case, although it is on a quite different point from that with which I am concerned. The question in *Quintavalle (tissue typing)* was whether or not tissue typing of an embryo to exclude the hereditary

disease beta thalassaemia major (the disease) came within the definition of treatment services in s 2(1) of the Act as being 'for the purpose of assisting women to carry children'. a

**[157]** The facts can be shortly summarised. Mr and Mrs Hashmi had a child (Zain) with the disease. Mrs Hashmi had a genetic predisposition to producing children with the disease. Mr and Mrs Hashmi wanted to have another child, but wanted also to be certain that not only did that child not carry the disease, but b that the child would have tissue which matched Zain's, thereby enabling Zain's condition to be cured by a transplant of stem cells.

**[158]** As described by Lord Phillips of Worth Matravers MR (at [4]) this process involved the following stages:

> '(i) The fertilisation "in vitro" (IVF) of a number of eggs taken from Mrs c Hashmi with sperm taken from her husband to form embryos. (ii) The removal from the developing embryo of a single cell by a biopsy. (iii) The examination of that cell using molecular genetics to see whether the embryo carried the beta thalassaemia disease. This process is commonly described as "Pre-implantation Genetic Diagnosis" (PGD). (iv) Use simultaneously of d the same process to identify whether the embryo had the same tissue type as Zain. Because this process involves examination of proteins known as human leukocyte antigens (HLA), this form of PGD is described as "HLA typing". I shall refer to it by the more popular phrase of "tissue typing". (v) Jettison of embryos found by this analysis to be either disease bearing or of a different HLA type to Zain and the implantation in the womb of Mrs e Hashmi of an embryo shown to be disease free and of the same HLA as Zain.'

**[159]** The authority granted a licence for the process described in the preceding paragraph. The lawfulness of the licence was then challenged by judicial review. Before the judge, the question identified in the final sentence of f para [156] was broken down into two parts, namely (1) did genetic analysis of a cell taken from an embryo involve the 'use' of an embryo, and (2) was genetic analysis for the purpose of tissue typing necessary or desirable for the purpose of providing treatment services?

**[160]** The first question arose because the authority submitted before the judge that tissue typing did not require a licence since it was performed on a cell g extracted from an embryo rather than the embryo itself. The authority accepted that the removal from the developing embryo of a single cell by a biopsy (stage (ii) as set out at [158], above) was 'use', but submitted that testing the cell thereafter did not constitute such use. The case for the applicant before the judge was that tissue typing did constitute use of an embryo and therefore required a h licence. The judge found against the authority on this point.

**[161]** In the Court of Appeal the focus of the argument shifted. It became common ground that the removal from the developing embryo of a single cell by a biopsy constituted use of the embryo, and the authority did not pursue its argument that tissue typing did not require a licence. The question became j whether the process was treatment 'for the purpose of assisting a woman to carry a child'. The Court of Appeal held that it was.

**[162]** In his judgment, Mance LJ (at [110]–[111]) expressly distinguished between the biopsy and the subsequent examination of the embryonic cell material. He took the view that the judge had been wrong to hold the latter to be 'use' of the embryo. However, what mattered was that the entire process

required a licence, and the question was, accordingly, whether the process complied with the terms of the Act.

**[163]** The relevance of *Quintavalle (tissue typing)* for my purposes is that the authority accepts that the 'use' of an embryo is not limited to its transfer into a woman. Miss Rose did not resile from the authority's acceptance in *Quintavalle (tissue typing)* that the removal from the developing embryo of a single cell by biopsy constituted 'use'. She maintained her position, however, that in the instant case there had been no such biopsy, and no 'use' of the embryos. All that had happened in the cases of both Ms Evans and Mrs Hadley was that the embryos had been created, examined and stored. Three of Mrs Hadley's embryos had been used (transferred into her) the remaining two had been examined and stored. The latter had not been used. On the same basis, none of Ms Evans' embryos had been used.

**[164]** Consequent upon their extensive review of the legislation, Mr Tolson and Miss Freeborn submitted that the concept of using embryos must be found in the other activities there listed, including Sch 2, para 1(d) 'practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose'. With respect, I do not think this advances the argument. Paragraph 1(d) of Sch 2 is equally apt to describe the process of examination and selection prior to use. Indeed, in my judgment, this is what, in the context of this case, it is describing.

**[165]** In my judgment, this is a simple point, and another issue of fact. The language of the Act is clear, and in the context of this case, 'use' can only mean the transfer into either claimant. In my judgment, therefore, none of the frozen embryos in this case has been 'used in providing treatment services' within Sch 3, para 4(2) and there is no impediment to Mr Johnston and Mr Hadley withdrawing their consent on this ground.

## THE CLAIMS UNDER THE HUMAN RIGHTS ACT 1998

### *Introduction*

**[166]** My conclusions so far mean that both claims must fail unless in some material respects the claimants' rights under the convention are engaged and breached or, in Ms Evans' case that the doctrine of promissory estoppel prevents Mr Johnston withdrawing his consent to treatment. I will deal with the arguments under the convention first, as the existence or otherwise of breaches of convention rights and the compliance or otherwise of the Act with the convention may well be material factors in the estoppel argument.

**[167]** I regard this part of the case as being the most important, since, as my decisions on 'use' and 'treatment together' demonstrate, both the language and the purpose of the legislation itself seem to me very clear. The structure of regulation and licensing contained in the Act; the definition of treatment services and the clear terms of Sch 3 relating to consent do not seem to me capable of more than one interpretation. The question therefore is whether they breach the claimants' convention rights.

**[168]** The proper approach to this question, as identified by Lord Steyn in *R v A* [2001] UKHL 25 at [37], [2001] 3 All ER 1 at [37], [2002] 1 AC 45 is, firstly, to consider whether the legislation interferes with a convention right: if it does, then it is at the stage of justification that legislative purpose or intent becomes relevant, and the principle of proportionality will be applied.

**[169]** The bulk of the argument under the convention has, unsurprisingly, centred on art 8, although the claimants assert that arts 2, 12 (Ms Evans only) and 14 are also engaged. The argument on art 8 ranged very widely, principally, I think, because Mr Tolson and Miss Freeborn sought to set up a positive obligation on the state to allow Ms Evans to have the embryos created by her and Mr Johnston released from storage and transferred into her. This led Mr Coppel, for the Secretary of State to set out in considerable detail the law on positive and negative obligations, as well as providing, with the assistance of Mr Webb (an official in the Department of Health whose evidence I record at [186]–[188], below) a comprehensive rationale of the policy considerations underlying the Act. Inevitably, in dealing with these arguments I will be selective of the points which most impressed me. I will, however, need to set out the material in some detail.

**[170]** I am assuming for this part of the argument that the case is proceeding on the basis that the consents given by Mr Johnston and Mr Hadley have been withdrawn, not that the consents originally given no longer have any effect because neither couple is any longer being treated together.

**[171]** In their opening skeleton argument, Mr Tolson and Miss Freeborn formulated the human rights issues in the following way. (1) Would it be unlawful in terms of the convention for the court to bar implantation and/or continued storage of the embryos? (2) If it would, does the Act require that the court bar implantation and/or storage; or can the Act be read and given effect to in a way which is compatible with the convention (ss 3(1) and 6(2) of the HRA 1998)?

**[172]** Counsel went on to argue that if the Act could not be read as convention compatible, a declaration of incompatibility should be made. For this purpose, the relevant provisions of the Act which they sought to have declared incompatible were: s 12(c) (the condition of any licence granted under the Act that Sch 3 shall be complied with); and paras 6(3) (no use of embryos without effective consent of both parties); 8(2) (consent by both parties to storage) and 4(1) (power to vary or withdraw terms of any consent) of Sch 3.

**[173]** I propose to deal with the articles of the convention relied upon in numerical order.

*Article 2: the right to life*

**[174]** I can, I think, deal with this submission quite shortly. The first nine words of art 2 read: 'Everyone's right to life shall be protected by law.' Mr Tolson and Miss Freeborn accepted that an embryo is not a human life. They submitted, however, that it has a sufficiently 'special' status to attract what they describe as a 'qualified' right to life. Two aspects of that limited, qualified right were: (1) to continue in being whilst one or other of the gamete providers wished; and (2) to be available for implantation if its mother wished.

**[175]** Although the argument was developed with considerable ingenuity over several pages of Mr Tolson and Miss Freeborn's skeleton argument, I am quite unable to accept that art 2 is engaged in this case. Counsel's proper concession that an embryo is not a human life seems to me fatal to the engagement of art 2. There is no direct authority on the point in relation to embryos, but there is abundant domestic authority, binding on me, that a foetus, at whatever stage of its development, has no existence independent of its mother. If a foetus has no right to life under art 2, it is difficult to see how an embryo can have such a right.

[176] Two citations will suffice. In *Re F (in utero)* [1988] 2 All ER 193, [1988] Fam 122 a local authority tried to make foetus a ward of court, in order to protect it against its mother's damaging lifestyle. The attempt failed. Counsel for the local authority sought to rely on art 2, although it was not of course at that point incorporated into English law. Balcombe LJ dealt with art 2 in the following way ([1988] 2 All ER 193 at 199, [1988] Fam 122 at 142):

> '(Counsel for the local authority) also sought to rely on art 2(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71(1953); Cmd 8969): "Everyone's right to life shall be protected by law." However, in *Paton v UK* (1980) 3 EHRR 408, on a complaint by the unsuccessful plaintiff in *Paton v Trustees of BPAS* the European Commission of Human Rights ruled that on its true construction art 2 is apt only to apply to persons already born and cannot apply to a foetus (at 413 (para 8)). They continued (at 415):
>
> "The 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. If article 2 were held to cover the foetus and its protection under this article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman. The 'right to life' of a person already born would thus be considered as subject not only to the express limitations mentioned in para. 8 above but also to a further, implied, limitation."
>
> Thus, far from assisting (counsel's) submission, art 2 of the convention, as interpreted by the European Commission, is in my judgment against him.'

[177] Balcombe LJ added a warning, recently reinforced by Butler-Sloss LJ (as she then was) in one of the cases dealing with the autonomy over her body of a woman in labour who refused a caesarean section. In *Re MB (an adult: medical treatment)* [1997] 2 FCR 541 at 561 she said:

> 'The law is, in our judgment, clear that a competent woman who has the capacity to decide may, for religious reasons, other reasons, or for no reasons at all, choose not to have medical intervention, even though, as we have already stated, the consequence may be the death or serious handicap of the child she bears or her own death. She may refuse to consent to the anaesthesia injection in the full knowledge that her decision may significantly reduce the chance of her unborn child being born alive. The foetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a Caesarian section operation.'

We respectfully agree with Balcombe LJ in *Re F* who also considered the possibility of the court being asked to order delivery of the baby by caesarean section. He said ([1988] 2 All ER 193 at 200–201, [1988] Fam 122 at 144):

> 'If Parliament were to think it appropriate that a pregnant woman should be subject to controls for the benefit of her unborn child, then doubtless it will stipulate the circumstances in which such controls may be applied and the safeguards appropriate for mother's protection. In such a sensitive field,

affecting as it does the liberty of the individual, it is not for the judiciary to extend the law.'

**[178]** A foetus, of course, exists only within the womb of its mother. She has autonomy over her body and over the foetus. An embryo created by IVF exists initially outside the womb, and so far as the Act governs the creation of an embryo, it applies only to embryos created outside the human body—see s 1(2). There is no property in an embryo, but in contrast to a foetus, both gamete donors have an interest in, and rights over, the embryos they have created. Those rights are governed by the Act. The embryo, however, cannot be considered a person, or to have a 'qualified' right to life. The introduction of art 2 into the argument is, in my judgment, an unhelpful diversion from the important issues raised in the case.

**[179]** I would not, however, want it to be thought by my rejection of the argument that art 2 is engaged that I regard the fate of embryos created by IVF as an insignificant question. To the contrary, it is one of the most important questions posed by the Act. It is simply that art 2 is the wrong medium to address it. Embryos created through IVF self-evidently contain life in an embryonic form. The questions are how those embryos should be treated; when and in what circumstances they can be stored; when for what purposes they can be used; and when they should be allowed to perish. The fact that they have no independent right to life does not either diminish the importance of these questions or mean that they are not fully addressed by the Act.

ARTICLE 8: THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

*Is art 8 engaged?*

**[180]** The next article upon which reliance is placed is art 8. As is well known, this provides:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

**[181]** The first question which arises on the facts is whether or not art 8 is engaged at all. There is, in my judgment no 'family' life engaged here. The four adults are living separate lives, and—for reasons which are, I hope clear from my discussion of art 2—an embryo is not a person or an individual with rights under the convention.

**[182]** However, each of the four protagonists has a right to respect for his or her private life, and although the private and the family elements of life are conjoined in the article, each, plainly, can reflect a distinct area of life. In my judgment, therefore, the wishes of Ms Evans and Mrs Hadley to continue with IVF treatment and to have the embryos released from storage and transferred into them engage their right to respect for their private lives under art 8, which is also engaged by Mr Johnson's and Mr Hadley's opposition to that course.

*Is there an interference with the right to respect for private life in this case?*

**[183]** I do not regard this as an altogether straightforward question, but in the end I am persuaded that, having engaged in the consensual process of IVF treatment, including the consensual creation and storage of the embryos, it is open to Ms Evans and Mrs Hadley to argue that the provisions of Sch 3 which permit their former partners to refuse to allow them access to the embryos for the purpose of transfer into them can properly be said to be an interference by the state with their right to respect for their private lives.

**[184]** Mr Tolson and Miss Freeborn describe this as the 'male veto', which they argue is both unwarranted and disproportionate. It is, however, I think worth bearing in mind at the outset of the argument that the right to respect for private life applies equally to both Mr Johnston and Mr Hadley. An unfettered right on the claimants' part to have the embryos transferred into them would, by parity of reasoning, constitute an interference with respect of the men's art 8 rights, in the same way that any attempt on their part to insist that the claimants have the embryos transferred into them against their will would undoubtedly constitute an interference both with the claimants' right to autonomy over their own bodies, and with respect for their private lives.

**[185]** As, following *R v A*, the issue of legislative policy is now raised, and as the question of the Act's compliance with the convention seems to me a matter of general public importance, I propose to approach it by setting out, firstly, a summary of the evidence filed by the Secretary of State on the issue; secondly by setting out in some detail the way in which the case was advanced for the claimants, and then by examining the arguments of the Secretary of State before turning to the defences of Mr Johnston and Mr Hadley.

*The evidence filed on behalf of the Secretary of State*

**[186]** Evidence on behalf of the Secretary of State was filed by Mr Edward Webb, head of the section in the Department of Health that has responsibility for policy on assisted conception and embryology. Mr Webb set out the legislative history of the Act in some detail, with particular reference to the White Paper and the parliamentary progress of the Bill. He then identified a number of particular policy considerations underlying the consent regime contained in Sch 3 to the Act. I summarise them as: (1) the female right of self-determination in relation to a pregnancy; (2) the primacy of consent accorded in the modern age to the need for freely given and informed consent to medical interventions; (3) the period over which IVF takes place; (4) the special significance of parenthood; (5) the interests of the child; (6) equality of treatment between the parties; (7) the promotion of the efficacy and use of IVF and related techniques; and (8) clarity and certainty in the relations between partners.

**[187]** Having briefly discussed each of these policy issues, Mr Webb adds:

> 'Once it was decided in principle that it would be appropriate to legislate in this field, and to enshrine within legislation the principle of consent to treatment services, it was, in the Secretary of State's view, entirely legitimate, and consistent with the underlying objective, to favour clear or 'bright line' rules which serve to produce certainty in all cases, and do not depend upon the circumstances of individual cases. Therefore, it was considered appropriate to permit male partners to withdraw their consent to treatment services prior to the use of an embryo in all cases, rather than to make that permission dependent upon the facts of the individual case: the

circumstances, financial and otherwise, of the male, and of his partner or ex-partner, whether she was already a mother, whether she would be able to have recourse to IVF in the future, etc. A fact-sensitive rule would, in this situation, give rise only to uncertainty and to litigation. The fact that the present cases are perhaps the first major example of litigation between parties to IVF treatment (in contrast to the US, where there are several examples) demonstrates the success of the Act in regulating this very sensitive area. The position of the claimants is undoubtedly deserving of sympathy, but the consequences of Sch 3 in an individual case cannot, in the Secretary of State's view, negate the legitimacy and the legality of the policy of adopting clear rules which can govern all cases.'

**[188]** In construing the Act, I not only have regard, of course, to the HRA 1998, s 3(1) which requires me, so far as it is possible to do so, to read and give effect to the Act in a way which is compatible with convention rights; I also respectfully adopt the approach set out in the speech of Lord Bingham of Cornhill in *Quintavalle CNR* [2003] 2 All ER 113 at [8], [2003] 2 WLR 692 at [8], which I have already set out at [18], above.

*The case for Ms Evans and Mrs Hadley under art 8*

**[189]** In relation to 'interference', Mr Tolson and Miss Freeborn argued that the interference begins when the state permits treatment by the clinics only on terms that a withdrawal of consent by the male partner in the future is conclusive and continues during any effective prohibition on treatment as a result of the terms of the licensing regime. In the alternative, they argued that until the point at which the partners withdraw consent, the state has permitted both claimants to develop their private and family lives as they, and their partners, saw fit. The state had licensed (and not banned) an assisted conception regime which met the claimants' needs. Accordingly, there had been no interference. However, interference occurred when the state require the clinics not to treat on the withdrawal of consent by the male partners.

**[190]** Strict rules of interpretation applied to the phrase 'necessary in a democratic society for the protection of ... morals, or ... the rights and freedoms of others'. The criteria must be understood in such a way that the language is not extended beyond its ordinary meaning. Furthermore, the phrase 'necessary in a democratic society' meant that there had to be a 'pressing social need' for the restriction in question; the restriction had to correspond to that need; as a response the restriction had to be proportionate (ie do no more than is necessary); and the reasons advanced by the state had to be relevant and sufficient. It was, moreover, for the state to establish the pressing social need and the proportionality of the response.

**[191]** Applying these principles, Mr Tolson and Miss Freeborn summarised the argument by submitting that it was not necessary to impose a power of veto, applicable in all circumstances, over an embryo to the male gamete provider so as to prevent implantation. To do so excluded all consideration of the female's interest and investment in the embryo, the interests of the embryo and the interests of what counsel described as the 'pro-life' argument. Most importantly, they argued, it did not recognise the possibility of hard cases in an area in which there are bound to be such.

**[192]** So far as storage was concerned, there was no significant disadvantage to continuing storage whilst one of the gamete providers wished it and respect

for the embryo and the gamete provider's 'investment', wishes and feelings required it.

[193] Whilst inviting the court to note that there are a number of states which do not legislate at all in this area (which, it was submitted, should prompt a cautious approach to any plea by the United Kingdom to 'necessity'), Mr Tolson and Miss Freeborn accepted that in licensing human fertilisation and embryology there would be a generous margin of appreciation as to the means permitted to a state which seeks to balance public and private interests (and competing private interests) in this area by a legislative regime. They acknowledged that no one licensing scheme would be required by the European jurisprudence. What amounts to a 'pressing social need' domestically was, within the margin of appreciation, for the state to judge—as was the choice of means to address that need.

[194] Consequently, the claimants could and did concede that it was legitimate for a state to conclude (as the United Kingdom had concluded) that there were necessary interferences in this general area. The first was that a state permitted assisted conception. Having taken that step, a state might legitimately conclude that a number of matters required restrictions—for example, ensuring standards of treatment and record-keeping; limiting research; prohibiting cloning; and limiting the numbers of children born to any one gamete provider. The state might also choose to limit the 'age' of the embryo—both 'fresh' (in the United Kingdom by the 14-day primitive streak period) and 'frozen' (in the United Kingdom by the ten-year storage period). All these were areas in which the state might interfere.

[195] Narrowing the focus, Mr Tolson and Miss Freeborn submitted that the state might legitimately identify a need to balance the freedom to procreate against the freedom not to procreate. For example, the state should no more require a male to provide sperm to father a child than it should require a female to provide the egg, or to become pregnant. The consent of the gamete provider must be required, no matter how deserving the partner.

[196] However, they submitted, the issue central to Ms Evans' case had a still narrower compass. It did not concern the lawfulness of a licensing scheme in general; or even the lawfulness of requiring consent. It concerned the circumstances in which consent already given could be withdrawn to the use of embryos lawfully created for the purposes of having a child. It was in this context, and not in any wider area, that the necessity for a particular set of rules must be examined. Thus, it was submitted, respect for both (i) the couple's private rights; and, (ii) the embryo, produce very different requirements once an embryo has been created.

[197] Mr Tolson and Miss Freeborn argued that before reaching this area of 'state interference', a couple will have moved through many of the areas in which they acknowledged the state had a legitimate reason to balance public and private interests (and a wide margin of appreciation as to means) to an area which they described as 'more personal' and in which they submitted there was a lesser public interest. They will have attended a state-licensed clinic which complies with treatment standards, they will have provided relevant consents and produced no more than the maximum number of embryos.

[198] What all couples will in fact have done is to take a personal decision to have their children in a particular way—a decision made all the more personal because it will have been forced upon them in what will always be difficult circumstances. Their personal circumstances will vary, as would (absent state

control) the arrangements made between them as to precisely how (ie on what terms) they wished to be treated. Properly characterised, whilst there may be a public interest in balancing the private interests in the embryo, Mr Tolson and Miss Freeborn submitted that there was no public interest as such in embryos created in these circumstances being permitted to perish.

**[199]** In whatever other areas there may be 'huge practical and ethical difficulties' (see, for example, *Centre for Reproductive Medicine v U* [2002] All ER (D) 213 (Apr) at [24]) Mr Tolson and Miss Freeborn submitted there were none here which required state interference to resolve in favour of a veto for the male gamete provider—recalling that it is not enough for the state to say that there is another point of view; it must demonstrate that its existing rules are necessary.

**[200]** Mr Tolson and Miss Freeborn then addressed Mr Webb's evidence. The first point was 'the female right of self-determination in pregnancy'. They agreed that the biological and social reality which lies behind the science, or which the science attempts to mimic, was important as a guide to the nature of the public interest and any balance. However, it pointed, they argued, to a different conclusion. During sexual intercourse, the male will have a role in fertilising the egg (and a free choice as to whether to attempt to do so or not), and a role in raising any child born. But in between, the fate of the embryo lies with the female. Before IVF, no male had ever been able by lawful means to prevent a female from developing and in due course giving birth to her embryo if she wished to do so. In any event, the Act did not promote 'the right of the male to withdraw consent ... at the point of transfer' as Mr Webb claimed: moreover 'use' of an embryo in providing treatment services could occur well before this point, as *Quintavalle* (*tissue typing*) demonstrated.

**[201]** As to the primacy of consent, Mr Tolson and Miss Freeborn submitted that if the primacy of consent means anything it was that the parties should be free to consent on the terms that they wished, not those imposed upon them by the state. This was not a question of a consent to medical intervention: Mr Johnston had consented to all the treatment which he needed to receive and he had received that treatment.

**[202]** As to the length of time over which IVF treatment can be given, Mr Tolson and Miss Freeborn accepted that because of this it was important for the law to offer the power to a male to change his mind. But it was important not to refuse him the power to do anything else. If a man wished to reassure a woman whom he loved that her embryos would always be available for her then why should he not be free to do so because of the 'primacy of consent'? Mr Webb argued that it would be undesirable and unfair to insist on holding a male to his consent. Mr Tolson and Miss Freeborn submitted that fairness pointed in a quite different direction in Ms Evans' case.

**[203]** As to the special significance of parenthood, Mr Tolson and Miss Freeborn argued that it was a commonplace for a child to be born against its father's wishes. As to the welfare of the child, the interests of any child to be born—or the interests of the embryo if any—pointed in only one direction—birth. Whilst it could be argued that a child may have a right not to be born (for example a severely congenitally disabled embryo) no such argument applied here. The state was permitted to interfere in situations which were 'potentially damaging' for the living child only in strictly defined circumstances—see Pt IV of the Children Act 1989. Was it to be suggested that the state has a policy to prevent a child being born because its father did not wish it where there is no suggestion that that child is likely to suffer (at least) significant harm?

[204] Mr Tolson and Miss Freeborn submitted there was no legitimate public interest in whether a given male fathers a child or not, other than the public financial interest in who will provide for the child born. The power of the clinic to consider the welfare of the child under s 13(5) of the Act (which counsel described as itself of dubious validity) is more than enough protection for that public interest which, in the modern United Kingdom ought in any event to count for little.

[205] As to equality of treatment between the parties, Mr Tolson and Miss Freeborn submitted that it did not follow that because a woman could not be compelled to be impregnated with an embryo, a man should not be held to his consent to permit her to be impregnated. The more important argument, they submitted, was the following. A man should be free to withdraw his consent if he wished for the reasons advanced by Mr Webb. But if he, at least, can give an irrevocable consent he should be free to do so. It will always be apparent to the man that in doing so, there could be no quid pro quo from the woman because it will be impossible to require her to submit to the medical treatment necessary for implantation. There is a natural imbalance here which it would be artificial for the law to try to correct.

[206] As to clarity and certainty in relations between partners, Mr Tolson and Miss Freeborn submitted that there was a great danger in 'bright line' rules in the area of private and family life. It was an area in which individual circumstances will vary greatly and where any policy in the law should, at the very least, be capable of admitting of exceptions. In any event a number of points in particular should be made. First, a freedom to agree an irrevocable consent is clear and 'bright line' enough. Secondly (to anticipate the argument on 'storage') a rule which provided that there should be continued storage of embryos already created with consent unless both gamete providers determined otherwise was every bit as 'bright line' as the present law. Thirdly, however 'bright line' a law may be, if it contravenes any individual's human rights then it cannot be maintained. Fourthly, certainty did not make a bad law better.

[207] As a guide to how arbitrary the Sch 3 requirement was, Mr Tolson and Miss Freeborn submitted that it drew no relevant distinction between the sperm of a partner and the sperm of an anonymous donor. It permitted the sperm donor to act on a whim by withdrawing his consent before 'use', no matter what the circumstances of the woman whose eggs had been fertilised. It appeared to make no allowance for irrevocable consent even in this context. This was the case notwithstanding that, if the donor maintained his consent he was not as a matter of law the father of the child (s 28(6) of the Act).

[208] Counsel submitted that Ms Evans' case was stark enough, but if the sperm used had been donor sperm the position would raise other different and in their own way starker points. Assuming that all young victims of ovarian or similar cancers would at least be offered the opportunity to store fertilised eggs, the present position on the consent of the male gamete provider left them very vulnerable indeed. Counsel submitted that it was a bad law which would permit a donor to deprive a young cancer victim from bearing a child from an embryo fertilised with his sperm when he might do so for no good reason, or no reason at all and perhaps years after he had made the donation (for which he might have been paid).

[209] There were, however, two more fundamental objections to the policy arguments advanced on behalf of the Secretary of State. First, assuming there was some merit in the policies identified, none addressed the question of

proportionality. An interference, even on permitted grounds, must be proportionate in art 8 terms. In present circumstances, counsel submitted this requires, at least, that cases such as Ms Evans are recognised. More may be required, but what proportionality outlawed was the absolute nature of the present structure in Sch 3.

**[210]** To adopt the narrowest submission of all which would still permit Ms Evans to succeed, Mr Tolson and Miss Freeborn argued that if the state adopted any policy making continuing consent necessary, it must also admit of exceptions in cases such as hers. Whilst certainty and clarity in public policy terms were acceptable in the area of issues where the state is legitimately involved, such policies must permit/include a consideration of the specific features of any given case so that it can be determined whether an exception should be made.

**[211]** Mr Tolson and Miss Freeborn accepted that polices had been upheld where sufficient regard was paid to the individual facts of the case. They cited the challenge in *R (on the application of Mellor) v Secretary of State for the Home Dept* [2001] EWCA Civ 472, [2001] 2 FCR 153, [2002] QB 13. The Prison Service policy on not granting artificial insemination facilities to prisoners unless there were exceptional circumstances was upheld as each request was considered on its merits and a highly subjective assessment was undertaken.

**[212]** By contrast, they submitted that successful challenges had been made in respect of prison policies of separating mothers and babies in prison in *R (on the application of CD) v Secretary of State for the Home Dept* [2003] EWHC 155 (Admin), [2003] 1 FLR 979 and *R (P) v Secretary of State for the Home Dept, R (Q) v Secretary of State for the Home Dept* [2001] EWCA Civ 1151, [2001] 3 FCR 416, [2001] 1 WLR 2002. In the latter the Court of Appeal had emphasised (at [78]) that convention law required of a general rule that its application to a particular case must be considered to determine whether in that particular case the interference is proportionate to the particular legitimate aim being pursued.

**[213]** The same considerations, Mr Tolson and Miss Freeborn submitted, had been applied in relation to the treatment of transsexuals in *R v North West Lancashire Health Authority, ex p A* [2000] 2 FCR 525, [2000] 1 WLR 977, where a policy was not enforceable which failed to take account of individual assessment with due recognition of exceptional circumstances capable of constituting an overriding clinical need. They also relied upon the successful challenge to policy re transsexuals in *Goodwin v UK* [2002] 2 FCR 577, where the Department of Social Security's policy in relation to the marking of records and the issue of only one National Insurance number was held to be a breach of art 8. Likewise, the issuing of certificates by the Secretary of State for the Home Department in relation to disclosure of information held by the Security Services was held in *Baker v Secretary of State for the Home Dept* [2002] EWHC Admin 381 to be an interference with art 8 that was too all encompassing to be proportionate.

**[214]** Mr Tolson and Miss Freeborn also pointed out that the European Court of Human Rights was equally concerned to ensure that any policy applied to asylum seekers, for example, was applied with sufficient regard for the individual facts and not inflexibly—see *Jabari v Turkey* (2000) 9 BHRC 1.

**[215]** Mr Tolson and Miss Freeborn accordingly submitted that any policy in relation to assisted conception and consent must have the same regard for exceptional, individual circumstances to comply with the convention as interwoven with domestic jurisprudence.

[216] The second objection to the argument advanced on behalf of the Secretary of State was that it did not address the wording or particular requirements of art 8. The state must show necessity on the specific grounds set out in art 8(2). In present circumstances the interference must be necessary for 'the protection of ... morals or ... the rights and freedoms of others'.

[217] Mr Tolson and Miss Freeborn argued that in the case of Ms Evans (and depending, of course, on the facts found by the court) there was no protection for 'morals' in denying her the chance of motherhood. Mr Johnston's 'freedom' not to procreate was so restricted by his decision to permit Ms Evans to use his sperm (and further by his reassurance in whatever terms it was given) that it would be offensive for the state to protect it. This was his (not the state's or the public's) freedom and he, effectively, chose to exercise it in a particular way. Furthermore, there was no pressing social need to prevent Ms Evans attempting to have a child. Just because there may be a pressing social need in other cases to prevent implantation without consent did not mean that Ms Evans' human rights have not been infringed. Consequently, it was not necessary, counsel submitted, for the state to prevent the clinic treating Ms Evans by implanting the embryos.

[218] Mr Tolson and Miss Freeborn acknowledged that in Mrs Hadley's case there was much more of a balance to be made. The court would recognise her lesser 'interest' and 'investment' in the embryos. There was no estoppel argument in her case. However, for so long as the clinic is or may be willing to treat, then if the 'veto' is not a necessary state interference Mrs Hadley should be entitled to rely on the clinic's discretion.

[219] As to the storage of the embryos, Mr Tolson and Miss Freeborn submitted that the focus for 'necessity' was narrower still in this area and the issue very different from implantation. Embryos were on any view 'special' and deserved special protection under the law. That was the rationale of the Act. They are different from mere property. 'Specialness' alone would be a good reason not to give a veto over continued storage to one gamete provider alone. There were, however, other reasons. Mr Johnston and Mr Hadley had already changed their mind once. They may do so again. If the status quo is continued they would be able to do so. If the embryos have been permitted to perish, they will not.

[220] Mr Tolson and Miss Freeborn submitted that none of Mr Webb's comments concerning prejudice to the male gamete provider, or the welfare of the child to be born applied to this part of the argument. The embryos could continue in storage without affecting the position of the male gamete providers at all (provided the women agreed to pay the cost of storage). The emotions of the party against storage on contemplating the continued existence of the embryos, though valid, must be weighed against the emotions of the party who did not want to see the demise of the embryos. Permitting the embryos to perish was offensive to the claimants, as it would no doubt be offensive to the pro-life lobby.

[221] So far as the public interest in this area is concerned, Mr Tolson and Miss Freeborn submitted there was a clear interest in the law being fair and being seen to be fair. It was submitted that in present circumstances fairness between the parties (ignoring the embryos for this purpose) pointed to Ms Evans being treated and to Mrs Hadley at least being able to secure the continued storage of her embryos. To risk a blunt submission, it was difficult to think of examples in domestic law in which the law permitted the destruction even of mere property on the whim of one of two co-owners. It would not do so in the case of a family pet.

[222] Accordingly, Mr Tolson and Miss Freeborn submitted that the law should not grant a veto to the male gamete provider to prevent continued storage. However, the claimants did not have to put their case so high: the submission was simply that there is no necessity for such an interference in the claimants' private lives.

[223] As to the history of the legislation, Mr Tolson and Miss Freeborn submitted that the veto on continued storage was not suggested by Warnock nor the subsequent Green Paper, nor the White Paper. It simply appeared in the Bill. It also appeared to be contrary to the eighth principle set out in the *Report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences* as relied on by Mr Webb *'the destination of embryos stored for the use of a couple for procreation but not used by them may be decided upon only with the consent of both members of the couple'* (my emphasis). In other words, absent agreement the status quo continued.

[224] The defendants' case, Mr Tolson and Miss Freeborn argued, was that the regime 'strikes a reasonable and proportionate balance between the interests of each of the parties to a disagreement as to the future of an embryo, and of any child who may be born as a result of the use of that embryo'. In short, the regime was said to be within the margin of appreciation. Counsel submitted that in fact the Sch 3 scheme on consents was not a balance of the interests of the parties in the embryos at all. If the male gamete provider did not consent, there would be no treatment. As to the interests of the child who may be born, no child will ever be born.

[225] On positive obligations, the need for the state to take positive action in this area sprang from the concept of 'effective' respect for private and family life: see *Marckx v Belgium* (1979) 2 EHRR 330 at 342 (para 31): 'When the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child it must act in a manner calculated to allow those concerned to lead a normal family life.' Reference was also made to *Airey v Ireland* (1979) 2 EHRR 305 at paras 32 and 33.

[226] Here, counsel submitted, the state had implemented a licensing regime which restricted the freedom of medical professionals and individuals to treat and be treated. It did so in an area in which the principal effect will be upon private and family life. It was therefore incumbent upon the state in doing so to act in such a way that its restrictions—whatever they may be—continued to provide effective respect for that private and family life. There could be no effective respect unless (i) it was possible for Ms Evans to be implanted with her embryos in the circumstances in which she found herself; and/or (ii) both women could secure the continued storage of their embryos.

[227] As to implantation, Mr Tolson and Miss Freeborn submitted that it was an essential feature of private and family life that personal circumstances may vary greatly. It was an area in which choice and freedom of action are to be maintained where possible, precisely because a dogmatic inflexible approach by the state may produce great hardship. Therefore, at the very least in Ms Evans' case the policy of the law must admit of exceptions. If it did not, there was no effective respect for the difficult situations and hard cases which may arise.

[228] As to storage, the disadvantages of continued storage were so few and the arguments for respect of the embryo so great that it was submitted there could be no effective respect for private or family life in a system which permits unilateral decisions to permit to perish at all, still less unilateral decisions to permit to perish without regard to the circumstances.

*The argument for the Secretary of State*

[229] Mr Coppel began by identifying the well-established distinction in the Strasbourg case law between the negative obligations of the state not to take action which restricts convention rights, and positive obligations, which may require the state to take positive action so as to promote convention rights. He gave as examples *Gaskin v UK* (1989) 12 EHRR 36 and *X v Netherlands* (1985) 8 EHRR 235. He argued that the distinction between positive and negative obligations under art 8 was important for two reasons. Firstly, positive obligations arose under art 8(1), and if they had been breached, there was no question of justification under art 8(2) although the factors enumerated in relation to justification under art 8(2) would be relevant to the question of whether any positive obligations arise at all.

[230] Secondly, he argued, contracting states were accorded a particularly broad margin of appreciation when assessing the extent to which art 8 creates positive obligations on the state to take action. For this proposition he cited *Abdulaziz v UK* (1985) 7 EHRR 471 at 497 (para 67); and *Botta v Italy* (1998) 4 BHRC 81 at 88 (para 34).

[231] Mr Coppel argued that the issues raised by the Act were a classic example of an area of controversy where the courts would be reluctant to question the approach adopted by the legislature. Hence, in *Quintavalle CNR*, Lord Bingham of Cornhill had noted the strong views on both sides of the debate surrounding IVF and held that the merits of the approach adopted by Parliament in the Act were not a matter for the House of Lords in its judicial capacity: see [2003] 2 All ER 113 at [12], [13], [2003] 2 WLR 692 at [12], [13], which I have set out at [17], above. Similarly, he argued, in *R (on the application of Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority* [2002] EWCA Civ 20, [2003] 1 FCR 266, a case in which both common law and convention claims were made, the Court of Appeal was concerned only to ensure that the authority had made a rational decision and would not trespass any further into the merits of that decision (see, in particular, para [65] of the judgment of the court).

[232] Mr Coppel submitted that the position is no different under the HRA 1998. He relied on the classic statement of principle regarding the discretionary area of judgment—the domestic equivalent of the margin of appreciation—in the speech of Lord Hope of Craighead in *R v DPP, ex p Kebeline, R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 381:

> 'In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the convention. This point is well made in *Human Rights Law and Practice* (1999) p 74, para 3.21, of which Lord Lester of Herne Hill QC and Mr David Pannick QC are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the "discretionary even of judgment". It will be easier for such an area of judgment to be recognised where the convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic

policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.' a

**[233]** Mr Coppel submitted that the Act in general, including the issue of consent under it and, in particular, the circumstances in which it may be withdrawn, was clearly within an area where the state will be accorded a broad b discretion. There were, he argued, four reasons for this. (1) It is within the area of social policy (see also *Greenfield v Irwin (a firm)* [2001] EWCA Civ 113 at [36], [2001] 1 WLR 1279 at [36] where there is a wide margin of discretion for the state in the area of family life). (2) The issue of consent requires a balance to be struck between competing rights and interests (and see *Chassagnou v France* (2000) 7 BHRC 151 at 184–185 (paras 112–113) where the Strasbourg court held that the c margin of appreciation would be particularly broad where it was necessary to strike a balance between competing convention rights—here the rights of the women and of their respective former partners). (3) A high degree of respect is to be accorded to the balance struck by the Act precisely because it is embodied in an Act of Parliament, passed by the democratic legislature (as compared with, d say, an act of administrative discretion): see *R v Lichniak, R v Pyrah* [2002] UKHL 47 at [14], [2002] 4 All ER 1122 at [14], [2003] 1 AC 903. (4) A further factor which militates in favour of a particularly broad margin of discretion in this case is that there is no European consensus in favour of the position advocated by the claimants (and therefore, it is more difficult for them to say that the approach of the Act is not 'necessary'). Indeed, the position is to the contrary: to the extent e that there is consensus, it is strongly against the idea that an embryo should be available for the use of a female participant in IVF treatment in circumstances where her former partner, whose gametes were used in the creation of the embryo, does not consent.. It is well-established that the Strasbourg court will have regard to the existence or otherwise of a consensus amongst contracting f states when determining the breadth of the margin of appreciation in a particular case: see *Rasmussen v Denmark* (1984) 7 EHRR 371 at 380 (para 40); and *Petrovic v Austria* (1998) 4 BHRC 232 at 238–239 (paras 38–43).

**[234]** The case for the Secretary of State, accordingly was that, given the broad margin of discretion which must be accorded in the present case, the state may legitimately say that if there are a range of reasonable views on a particular issue, g it cannot be criticised for having opted for one reasonable view over another.

**[235]** Turning to the grounds of justification, Mr Coppel submitted that there was no breach of positive obligations, alternatively that any breach of art 8(1) was justified under art 8(2), on the grounds of the policy objectives set out in the statement of Mr Webb which I have set out at [186]–[188], above. Mr Coppel h argued that the overall beneficial effects of Sch 3 to the Act were not outweighed by the particular facts of the claimants' cases.

**[236]** Mr Coppel addressed the arguments advanced on the claimants' behalf by reference to the policy issues Mr Webb had identified. Thus, he submitted, the female right of self-determination in pregnancy dictated that the point at j which an embryo is implanted in a woman (which will be the point of 'use' in the vast majority of cases) is, in practice, the last possible moment at which consent to transfer could be withdrawn. No later point could be chosen. The claimants, he noted, did not dispute that but argued that the same rule should be applied to a frozen embryo stored outside the womb. However, that argument did not address the fundamental point that a woman who becomes pregnant following

IVF treatment is in the same position as a woman who becomes pregnant following sexual intercourse only once she is pregnant.

**[237]** Furthermore, Mr Coppel argued, it was indisputable that prior to the point of transfer of an embryo consent may be withdrawn without the need for a distressing medical intervention. The claimants' use in argument of the female personal pronoun ('her embryo') was, he submitted, instructive, and ran contrary to the whole scheme of the Act, which gave gamete providers equal rights and did not treat an embryo as belonging to one party or the other.

**[238]** As to the primacy of consent, the approach of Sch 3 was that participants in IVF treatment should be able to give and withhold consent to the greatest extent possible, having regard to the potentially very lengthy period of time over which treatment might run and the special significance of parenthood which was the intended result of the process. Schedule 3 recognised the reality that people's situations can change over the course of a period of years, perhaps quite unexpectedly; and, in the Secretary of State's view, it would be undesirable and unfair to hold people (both men and women, since the rules apply equally to both) to consents which they may have given several years earlier.

**[239]** As to the interests of any child who would be born as a result of IVF treatment, Mr Coppel did not disagree with the proposition advanced by the claimants that it was commonplace for a child to be born against its father's wishes. That, however, did not establish that it was impermissible to consider this to be undesirable state of affairs. Further, the Secretary of State simply did not agree with the claimants that the only public interest in whether or not a father consented to the birth of a child was a financial one; nor, patently, did Parliament.

**[240]** Mr Coppel submitted that equality of treatment between the parties to IVF treatment was an important point. Nobody, he suggested would argue that a male progenitor should be able to compel the use of an embryo by transfer into an unwilling female, but the claimants were arguing for a position whereby transfer can be enforced against an unwilling male. The claimants' argument that this was merely an imbalance which was created by nature which the law should not seek to correct did not meet the point. The law must strive to avoid sex discrimination in the enjoyment of convention rights (art 14 of the convention) regardless of its underlying cause. The regime contended for by the claimants, whereby a frozen embryo would be treated as belonging to a woman who would have the sole power to determine its future would, he submitted, amount to a very serious form of sex discrimination, which it would not be open to the court to countenance as result of its own duties under the HRA 1998, s 6(1).

**[241]** Mr Coppel also relied on the promotion of clarity and certainty by putting in place a 'bright line' rule governing the withdrawal of consent rather than a fact-sensitive rule. He accepted that this was not an argument for fixing the 'point of no return' in any particular place, but rather for making it a firm line wherever it is fixed, and which did not depend upon the facts of individual cases. As already noted, it was fundamental to the intention of Parliament when passing the Act to instigate a system of firm and clear statutory regulation in preference to a 'free for all' governed only by the common law and equitable rules. The instant cases were, he submitted, very good examples of the difficulties which could arise both for the parties to IVF treatment and for licence holders providing treatment, if the fate of frozen embryos had to be decided on grounds of fairness in the particular case. The need for certainty in this particular context answered the submission made by the claimants that a policy is per se disproportionate if it

does not admit of exceptions. Everything depended upon the context: there may be a very good reason in a particular case for a 'bright line' rule.

[242] Thus, Mr Coppel submitted, the need for certainty in the law was the main reason why the policy objectives identified by Mr Webb were not outweighed by the facts of these particular cases. In each case there was an unwilling male former partner who did not want the interference with his right to respect for private life which use of the embryos would entail. Moreover, the effect of Sch 3 was not to deny parenthood to the claimants. In Ms Evans' case, a prohibition on the use of the embryos deprived her of a less than 30% chance of conception, and a possibly lower chance of a live birth. However, she also had the possibility of becoming a parent in other ways, by conception using donor eggs, and/or by adoption. In Mrs Hadley's case, the claimant was already a parent, and had a far greater prospect of conceiving another child of her own through the use of other techniques not involving the disputed embryos.

[243] Mr Coppel submitted that the same essential arguments applied to the question of continued storage of frozen embryos, which the claimants treated as a separate point. If the parties did not consent to continued storage of embryos created with their gametes, then, in the Secretary of State's view, that should not be imposed upon them. There were considerable benefits for a non-consenting party in resolving the situation once and for all, by removing the embryos from storage. This would put an end to any lingering doubts as to their fate, and obviate the possibility of pressure to change his/her mind being brought to bear upon the non-consenting party during the remainder of the storage period (for example, as had occurred in this case, through the media).

[244] For all these reasons, the Secretary of State submitted, in summary, that the provisions of Sch 3 were justified in the public interest and did not amount to an unlawful interference with the claimants' art 8 rights.

*The case for Mr Johnston and Mr Hadley on art 8*

[245] Unsurprisingly, counsel for both Mr Johnston and Mr Hadley adopted the arguments of the Secretary of State. Each pointed out that the two men also had a right to respect for their private lives, and that if Ms Evans' and Mrs Hadley's rights were engaged, so were theirs. There needed, accordingly, to be a balance of the competing rights. The interference by the state in the rights of Ms Evans and Mrs Hadley was, they submitted, justified on the basis that it sought to protect the rights and freedoms of the male gamete holders.

[246] Both took issue with Mr Tolson's and Miss Freeborn's proposition that Sch 3 of the Act breached art 8 of the convention by providing the male gamete providers with a veto against removal from storage and use of the embryos. The true position was that the Act was based on the fundamental policy of informed consent to treatment. It treated all four gamete providers equally, and provided each of them with a veto. All four had an equal right to withdraw from treatment at any point up to transfer/implantation.

[247] Neither Mr Johnston nor Mr Hadley wished to father a child by a partner with whom neither now had anything in common, and in circumstances in which neither could play a full or proper part in the life of the child. The withdrawal of their consent to treatment and/or the continued storage of the embryos was, accordingly, a reasonable exercise of their rights to respect for their private lives.

*Conclusions on art 8*

[248] I am in no doubt that on this part of the case, I prefer the arguments of the Secretary of State and of Mr Johnston and Mr Hadley. I am satisfied the interference in the private lives of the parties contained in Sch 3 of the Act is both necessary for the protection of the rights of all four gamete providers and proportionate.

[249] In my judgment, this is pre-eminently an area in which it is for Parliament to legislate, and in relation to which a generous margin of appreciation is appropriate. I am satisfied that a regime of treatment based on the twin pillars of consent and the interests of the unborn child is an entirely rational and appropriate foundation for the legislation, the more so when the Act itself is the product of a report of the quality of Warnock, followed by extensive consultation, a White Paper and careful parliamentary scrutiny.

[250] It is, in my judgment, entirely appropriate for the state to require that couples embarking on IVF treatment are in agreement about the treatment, and that it should be possible for either party to withdraw from it at any time before the created embryos are 'used'—which, on the facts of these cases I have found plainly means transferred into the female gamete provider.

[251] Consistent with the need for consent to treatment is, of course, the principle of equality between the gamete donors. Mr Tolson and Miss Freeborn frequently referred to the 'male veto'. In my judgment, as I pointed out in [184], above, that is an incomplete analysis. As Mr Johnson and Mr Hadley pointed out, each of the four parties has a veto. I have no doubt—indeed Mr Tolson and Miss Freeborn accept that were there a provision in the Act which permitted either of the men to insist that either of the women had the embryos transferred into them against their will, both Ms Evans and Mrs Hadley would regard that as a gross interference with their right to respect for their private lives, and that they would be correct to so to regard it. By like token, it seems to me that a regime which permitted the women to override the men's withdrawal of consent (which is what the claimants seek) would be a clear interference with the men's right to respect for their private lives.

[252] Mr Tolson and Miss Freeborn are dismissive of s 13(5) of the Act. But the policy behind it is surely sound—or, to put the matter at its lowest, one which the state is entitled to promote. Since the object of consensual IVF treatment is to produce a child for a couple, it is in my judgment not unreasonable, where the couple has separated prior to the transfer of the embryos, for each to be able to say that they wish the treatment to be discontinued because any child born as a result of the treatment will not be brought up by the couple. To put the matter another way, it is not unreasonable for either Mr Johnston or Mr Hadley to say, given the break-up of their respective relationships, that they do not wish to be the father of a child by a woman with whom they no longer have anything in common; by whom they would not wish now to have a child; and in circumstances in which, once any such child was born, they would not be in a position to play a full or proper paternal role, whilst at the same time remaining financially liable to maintain the child.

[253] I note in passing that any agreement between separated spouses or former spouses who have a child that the non-resident or absent parent will not be financially responsible for the child's support is void under s 34 of the Matrimonial Causes Act 1973. I also agree with Mr Coppel that it is not open to parents—whether married or not—to contract out of the Child Support Act 1991. Mr Johnston and Mr Hadley would be the fathers of any children born

consequent upon the transfer of embryos in this case, and under s 1(1) of the 1991 Act each would be responsible for maintaining his child. Were either of the claimants to be in receipt of benefit, the Secretary of State would be entitled to require her to authorise him to take action to recover child support maintenance from the child's father—see s 6 of the 1991 Act—irrespective of any agreement between the parents. It is for these reasons that I stated in [90], [98], above, that any agreement between the parties in this case would not be binding.

**[254]** In my judgment, in this sensitive area of the law, it is for Parliament to legislate. It is an area in which the courts have only a limited role to play. Parliament has chosen a carefully structured system of regulation, with clear rules based on mutual consent and the interests of the unborn child. The approach to statutory construction set out by Lord Bingham of Cornhill in *Quintavalle CNR* (set out at [18], above) and Lord Hope of Craighead in *Ex p Kebeline* (set out in [232], above) applies. If any changes in the law are appropriate, it is for Parliament to make them.

**[255]** It follows, in my judgment, that the scheme chosen by Parliament is legitimate and does not breach any of the parties' convention rights. Consistent with the scheme, the consent provisions appropriately provide that if either of the parties wishes to terminate what has begun as consensual treatment prior to use of the embryo, he or she should be entitled to do so. In these circumstances it is, once again, entirely appropriate, in my judgment, that the licensing system created by Parliament should provide clear and non-fact specific rules for any clinic which the authority licences, which stand to lose its licence if it breaches its terms.

**[256]** In this context, I do not derive any assistance from the authorities cited by Mr Tolson and Miss Freeborn which I have identified in [211]–[214], above. Whilst they address art 8 in the context of the administration of policies adopted by the state, they do not address the fundamental issue raised in the two preceding paragraphs.

**[257]** This is not a case of IVF using donor sperm. The careful argument advanced by Mr Tolson and Miss Freeborn, which I have endeavoured to set out in full, accepts that the state has the right to regulate fertility treatment and that a generous margin of appreciation must be given to the means permitted to the state in doing so. They do not challenge the lawfulness of a scheme of treatment which requires consent. Their argument, it seems to me, boils down to the proposition that it should be possible for the male gamete provider, if he wishes, to give an irrevocable consent to the use of the embryos created with his gametes, and that there is no legitimate public interest in permitting embryos created in these circumstances to be allowed to perish. For the policy reasons set out by Mr Webb and elaborated by Mr Coppel I am unable to accept this approach.

**[258]** I find myself also unable to accept the analogy with the threshold criteria under s 31 of the 1989 Act, which is designed to protect a child from significant harm. That, in my judgment, is quite different from a gamete provider withdrawing his or her consent to the use of embryos created from those gametes. The question which counsel pose at the conclusion of [203], above, seems to me the wrong one. The correct question, in my view, is whether or not it is legitimate for the state to allow gamete providers to withdraw their consent to the use/continued storage of subsequently created embryos In a regime based on mutual consent and s 13(5) the answer to this question must be Yes.

**[259]** In my judgment, therefore, the interference from the state identified in art 8 is necessary for the protection of the freedom of others, and entirely

proportionate to the policy objectives identified. There is, accordingly, no breach of art 8 on the facts of this case.

**[260]** I recognise, of course, that from her perspective, and because the Act cannot admit of exceptions, Ms Evans is what her counsel described as a 'hard' case. Ms Evans is the victim of her physical condition and has had the misfortunate to suffer relationship breakdowns both with her former husband and Mr Johnston. She was also obliged to enter into IVF in dramatic and hurried circumstances. It has to be said, however, that nobody can legislate for relationship breakdown, only for its consequences. In the field of IVF treatment, as the quotation from Hale LJ's judgment in *Centre for Reproductive Medicine v U* (set out at [37], above) makes clear, I cannot allow my sympathy for Ms Evans' position to outweigh my respect for the scheme which Parliament has put in place.

ARTICLE 12: THE RIGHT TO MARRY

**[261]** Article 12 provides that 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

**[262]** I can take this shortly. Mr Tolson and Miss Freeborn accepted the proposition that any interference with private and family which is justified under art 8(2) cannot at the same time constitute a violation of art 12: see the review of the European jurisprudence carried out by Lord Phillips MR in *R (on the application of Mellor) v Secretary of State for the Home Dept* [2001] 2 FCR 153 at [22]–[38] and the first conclusion derived from that jurisprudence namely that 'the qualifications on the right to respect for family life that are recognised by art 8(2) of the Convention apply equally to the art 12 rights'.

**[263]** As their principal allegation was that Ms Evans' convention rights under art 8 were breached by the denial of access to the embryos because of the provisions of Sch 3 to the Act, Mr Tolson and Miss Freeborn very properly accepted there was no separate argument under art 12.

**[264]** The two rights identified in art 12 are expressed conjunctively. However, even if I were able to read them disjunctively, as Mr Tolson and Miss Freeborn invited me to, and assume that the right to found a family can exist independently of the right to marry (which is plainly not engaged) it does not seem to me that they benefit either claimant in the instant case. The right to found a family through IVF can only, put at its highest, amount to the right to have access to IVF treatment. Self-evidently, it cannot be a right to be treated successfully. Furthermore, it is a right which is qualified by availability, suitability for treatment and cost. Once it is clear, as in my judgment it is, that the consensual scheme for IVF treatment contained in the Act (and to which both claimants have had access) is lawful and does not breach art 8 of the convention, it must follow that there is no breach of art 12.

**[265]** In these circumstances I need not deal with the arguments addressed to me on *Goodwin v UK* [2002] 2 FCR 577, and *Cossey v UK* [1993] 2 FCR 97. In my judgment, art 12 is not engaged on the facts of this case; alternatively, it is not breached for the reasons which I have given in relation to art 8.

ARTICLE 14: PROHIBITION OF DISCRIMINATION

**[266]** Article 14 provides:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,

colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' a

[267] The discrimination alleged is not addressed to any disproportionate enjoyment by men (as against women) of their rights and freedoms set out in the convention, but seeks to compare the position of the claimants with that of healthy women conceiving naturally who enjoy convention rights which protect their embryos and themselves. The rights identified are those under arts 3, 5, 8 and 12. These articles, Mr Tolson and Miss Freeborn argue, serve to give healthy women effective control over their embryos, subject to the laws on abortion. I have, of course, already found that there is no breach of arts 8 and 12. b

[268] The claimants, counsel argue, have both undergone assisted conception procedures as a result of a disability relating to their health. Such disability, they argued, was a relevant status for the purposes of art 14. If the claimants had not had the relevant disability, they would not have had the treatment. c

[269] Mr Tolson and Miss Freeborn argued that there are many similarities between women who conceive naturally and women who conceive artificially, in particular in this case through IVF. Both are attempting to have a child, both are having their eggs fertilised and so on. There are also differences. Moreover, these differences (the creation and existence of an embryo outside as opposed to inside the womb) justify differences in treatment in terms of convention rights. A woman if only as a matter of practicality cannot have the same exclusive control over her embryos outside her body as inside her body. d

[270] But, counsel argued, there is no justification for the particular difference in treatment of which complaint is made in this case, namely the conferring on the male partner of the power to withdraw consent to implantation after fertilisation. They submitted that this was not a proportionate response to the (real) differences between the naturally conceiving woman and the woman receiving IVF treatment, or to the differences between an embryo in the woman's body and an embryo outside the body. Permitting a unilateral withdrawal of consent without regard to the circumstances not only failed to reflect nature and the 'veto' which the female has, but did not attempt to address any balance of interest in the embryos. e f

[271] Mr Tolson and Miss Freeborn argued that all young victims of ovarian or similar cancers who can no longer conceive naturally are very vulnerable under the United Kingdom system as it is at present, and submitted that the present imbalance was a breach of their art 14 rights. g

[272] For the Secretary of State, Mr Coppel identified the correct approach to art 14 challenges as being that set out in the judgment of the Court of Appeal in *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813 at [85], [2003] 3 All ER 673 at [85]: h

'In the leading judgment in *Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136 Brooke LJ recommended the following structured approach to consideration of an art 14 claim. The court should ask, sequentially, four questions. If any one is answered in the negative it will normally follow that the claim is ill-founded. The questions (at [20]) are: j

"(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions (for the relevant Convention rights see s 1(1) of the 1998 Act)? (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward

for comparison ("the chosen comparators") on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?"

We agree with Brooke LJ that this structured approach is helpful.'

[273] Mr Coppel submitted that quite apart from the fact that the claim must fail at the stage of justification (stage (iv)) for essentially the same reasons as the claim under art 8, there were also, as in the case of art 12, threshold objections (at stages ii and iii) which operated to dispose of the claim before the stage of justification was reached.

[274] Mr Coppel accepted that the facts of the claims fell within the ambit of art 8. Problems, however, arose at stage (ii). The first difficulty with the claimants' argument that 'healthy women conceiving naturally [have] effective control over their embryos, subject to the laws on abortion whereas disabled women who undergo assisted conception procedures do not' was that there is no relevant difference in treatment between women who become pregnant through sexual intercourse, and women who become pregnant following assisted conception procedures. Once pregnant—that is, once an embryo is implanted in the womb, all women have a right of self-determination, subject to the criminal law, no matter what techniques have been used in order to assist in conception.

[275] Mr Coppel argued that the second difficulty at stage (ii) was that Sch 3 to the 1990 Act which contains the provisions about which the claimants complain, does not distinguish between women on the grounds of whether or not they are disabled. It distinguishes between men and women whose partners have changed their minds about undergoing IVF treatment based on whether or not that change occurred before or after the relevant use of an embryo. That, however was not the burden of the complaint under art 14. The fact that a woman who is disabled may suffer adversely as a result of the provisions of the Act (and not all women undergoing IVF treatment are disabled—see, for example, *Quintavalle (tissue typing)*) did not mean that they have been discriminated against on grounds of their disability.

[276] As for stage (iii), Mr Coppel argued that a woman whose gametes have been used in the creation of a frozen embryo and who hopes that it will be implanted in due course is simply not in the same position as a woman who has become pregnant through sexual intercourse. Quite simply, the latter is pregnant and the former is not. If the former becomes pregnant, she will be treated in exactly the same way.

[277] I accept the arguments advanced by the Secretary of State as set out above. In my judgment the claimants' arguments on this point cannot stand in the light of my conclusions under art 8. In my judgment the Act does not discriminate against women undergoing IVF treatment.

CONCLUSIONS UNDER THE HRA 1998 AND THE CONVENTION

[278] In my judgment, the Act breaches none of the claimants' convention rights which are engaged. It follows that the Act is HRA 1998 compliant, and no question of a declaration under the HRA 1998, s 4(2) arises.

ESTOPPEL

*Can an estoppel exist in the face of the Act?*

**[279]** In my judgment, the estoppel argument faces a number of insuperable obstacles. The first is the point taken by the Secretary of State that, regardless of the facts underlying the plea of estoppel, and regardless of whether the usual requirements for a promissory estoppel are made out, the Act itself excludes the operation of any estoppel which would prevent Mr Johnston from withdrawing his consent prior to the use of the embryos.

**[280]** Mr Coppel submitted, firstly that promissory estoppel is dependent upon there being some pre-existing legal relationship between the party allegedly estopped, and the party for whose benefit the estoppel is said to operate. He submitted that the Act prevented any such relationship from arising. In particular, of course, there was no 'property' in the embryos created and as Mr Webb explained, the Act embodied a conscious decision by Parliament to impose statutory regulation in this area, in preference to leaving matters to be determined by the terms of contracts between individuals—see s 29 of the Act.

**[281]** So far as the issue of consent was concerned, Mr Coppel submitted that the legal framework superimposed by the Act posited a legal relationship between participants in IVF treatment and the licence holder providing treatment services to them (in addition to the contractual relationship which may exist between patients and clinic, depending upon whether treatment was private or NHS), and between the licence holder and the Human Fertilisation and Embryology Authority, rather than between the participants themselves.

**[282]** The correct analysis, accordingly, was not that Mr Johnston had, under Sch 3, a right as against Ms Evans to withdraw his consent to the use of the embryos. It was, rather, that the clinic was only permitted to store and use the embryos if Mr Johnston consented, which consent was contingent up until the point at which the embryos were used in the material sense. It should be noted, Mr Coppel argued, that in this context consent must be given to the licence holder, and could only be withdrawn by notice to the licence holder, regardless of what had passed between the participants themselves. The scheme of the Act therefore removed one of the essential pre-requisites for promissory estoppel.

**[283]** Secondly, Mr Coppel submitted that just as a contract which is contrary to public policy is void and/or unenforceable, so equity would not recognise an estoppel which would operate contrary to public policy as set out in a statute. The contradiction here was created by para 4(1) of Sch 3, which permitted consent to be withdrawn merely by giving notice to the person providing treatment services, regardless of anything which may have passed beforehand between male and female partners.

**[284]** Mr Coppel accepted that that not every apparently contradictory statutory provision barred an estoppel, and relied on the proposition contained in the judgment of Beldam LJ in *Yaxley v Gotts* [2000] 1 All ER 711 at 734, [2000] Ch 162 at 191:

> 'The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it.'

**[285]** The relevant test, he submitted was formulated in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 All ER 300 at 308, [1964] AC 993 at 1016, in the following terms namely 'whether the law that confronts an estoppel can be seen

to represent a social policy to which the court must give effect in the interests of the public'.

[286] The point, Mr Coppel argued, was that the benefit of statutory provisions may be waived by an individual where they were intended by Parliament to operate solely for the benefit of that individual and others in his position, but not where there is any wider interest at stake. If there is a wider interest in upholding the statutory provisions, estoppel cannot operate. There was, he argued, as might perhaps be expected, a strong identity between this rule, and the rule which applied to the issue of whether a party may waive statutory rights by contract (as opposed to conduct). The question in that context is whether the right conferred is exclusively personal (in which case waiver will be permitted) or is designed to serve other, broader public purposes and so, compendiously, whether to permit a waiver would undermine or frustrate the purposes of the statute: see *Johnson v Moreton* [1978] 3 All ER 37 at 42, 47, 55, [1980] AC 37 at 51, 58, 68.

[287] Mr Coppel argued that the claimants were wrong to contend that the consent provisions of the Act were not underpinned by any public policy. In so arguing, they ignored the evidence of Mr Webb who identified a number of such policies. The most relevant in the present context was that of promoting clarity and certainty in relations between parties in this field: see [186], above. Against the background that IVF and other techniques were being practised in this country before the Act, the enactment of the Act constituted in itself a recognition that common law and equitable rules were inadequate to regulate this field.

[288] Furthermore, Mr Coppel argued, para 4 of Sch 3 contained a clear or 'bright line' rule to the effect that consent may be withdrawn up to the point of use, in contrast to a fact-sensitive rule which would give rise to uncertainty and litigation. Certainty was an important policy in the general public interest. The effect of the claimants' estoppel argument would be to superimpose a fact-sensitive rule, the operation of which would depend upon the contents of unminuted discussions between participants in IVF treatment, occurring perhaps at a time of great stress, and upon the whole range of factors which affect whether the courts will recognise an 'equity' (fairness, clean hands etc).

[289] It was also important, Mr Coppel submitted, to consider the position of licence holders, who faced revocation of their licence and possible criminal prosecution if embryos were used in circumstances where Sch 3 had not been complied with. The bright line rule obviously enabled licence holders to be sure about what they could and could not do. If estoppel could operate so as to overlay the provisions of para 4 of Sch 3, licence holders would be placed in the invidious position of having to investigate and make findings of fact in relation to what was said between male and female partners, and whether it was equitable to permit consent to be withdrawn. The livelihood of those working on behalf of licence holders would be at risk if their judgment of the facts was found by the courts to have been incorrect.

[290] There were, in short, substantial reasons of social policy underpinning the provisions of Sch 3 to the Act, which militated strongly against the operation of any estoppel in this case.

[291] Mr Tolson and Miss Freeborn's response to this argument was that there was no threat to the 'bright line' policy. Schedule 3 created a regime, the core aim of which was to protect the clinics. It was accepted that an estoppel could not bind the clinic, but this did not affect the position as between the

patients themselves. Estoppels were not therefore prevented by any form of policy considerations.

**[292]** There was, however, a second point. The clinics were protected from patient/clinic estoppels by the consent regime itself; clinics obtained effective consent, relied on it and maintained it until written notice of withdrawal. They were not bound by any equities purely between third parties on the usual principles. Thus if the notice of withdrawal may be avoided as a result of undue influence, duress or estoppel between the gamete providers, that did not affect the clinics in any way. They could carry on regardless unless and until they received notice. At that point they did not have to do anything other than continue to store the embryos.

**[293]** The remedy sought in this case was an injunction requiring Mr Johnston to maintain his consent and a declaration as to lawful treatment. The remedy affects the effective consent, and there could, Mr Tolson and Miss Freeborn argued be no public policy bar to such a remedy.

**[294]** Once again, I find the argument of the Secretary of State on this point compelling. I am particularly impressed by the consequences of Mr Tolson and Miss Freeborn's argument for the clinics. Neither the gamete providers nor the clinics can opt out of the statutory scheme. The clinics depend both for their livelihoods and their reputations on strict compliance with the terms of the licences granted to them. The importance of fulfilling the terms of the licence was at the forefront of the evidence of both Dr Sharp and Dr Lockwood and, in my judgment, rightly so.

**[295]** Thus any agreement or understanding between those receiving IVF treatment must be unenforceable unless it complies fully with the scheme. The Act gives Mr Johnston an unequivocal right to vary or withdraw his consent both to treatment and the storage of the embryos at any point prior to their use. That right must be seen in its context, namely the structure of the scheme of licensed treatment operated under the Act, and as part of the policy of mutual consent discussed earlier under art 8 of the convention. The statutory scheme is clear and, as I have found, convention compliant. It exists for the benefit of all gamete providers. In such circumstances it seems to me that Mr Coppel must be right to submit that there is a wider interest in upholding the provisions of Sch 3, and that they cannot be waived for the benefit of an individual. These include, of course, the welfare of the unborn child.

**[296]** To put the matter another way, Mr Johnston cannot give an unequivocal consent to the use of the embryos irrespective of any change of circumstances. In the wider public interest of the proper operation of the scheme under the Act, Parliament does not permit him to give such a promise.

**[297]** I therefore agree with Mr Coppel that the estoppel for which Ms Evans argues cannot take effect on the face of the Act, even if the representations made to Ms Evans were in explicit terms. However, in case I am wrong on that point, I propose to examine the question in the overall context of the law relating to promissory estoppel as I perceive it to be.

*The ingredients and parameters of promissory estoppel*

**[298]** One of the difficulties I have in this area is in defining the parameters of equitable or promissory estoppel, and distinguishing it (where it is necessary to do so) from proprietary and other forms of estoppel. Thus, for example, although the legal rights between the person making the representation and the person who acts on it frequently arise out of a contract between them, in some

circumstances it does not seem to be fatal to the existence of an estoppel for there to be no legal relationship between representor and representee.

**[299]** Thus in *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501, a case of proprietary estoppel the claimant did odd jobs for the deceased, latterly without payment, provided her with personal care out of compassion for her, and stayed in her house overnight to provide her with security. She had also promised him that she would 'see him right'. The judge decided that the claimant had believed he was going to receive all or part of the deceased's property on her death; that he acted to his detriment in caring for her unpaid; and that it would be unconscionable for the deceased to go back on her assurances to him. The judge awarded him £200,000 out of a net estate of £1·285m. The case in the Court of Appeal was concerned with the extent of the relief to which the claimant was entitled having established the estoppel. There was no appeal against the judge's finding that the claimant had established a claim.

**[300]** Although the case is concerned with proprietary estoppel, it seems to me that the judgments are helpful in the instant case. The Court of Appeal was referred to an article by Dr Simon Gardner 'Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438. In his judgment in the case, Robert Walker LJ (as he then was) said:

> '[43] It cannot be doubted that in this as in every other area of the law, the court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case. Dr Gardner's fourth hypothesis ('the approach is for the court to adopt whatever style and measure of relief it thinks fit, for whatever reason it thinks fit') cannot be right. I do not think that the judgment of Hobhouse LJ in *Sledmore v Dalby* (to which I shall return) can possibly be regarded as adopting or advocating an unfettered judicial discretion.
>
> [44] The need to search for the right principles cannot be avoided. But it is unlikely to be a short or simple search, because (as appears from both the English and the Australian authorities) proprietary estoppel can apply in a wide variety of factual situations, and any summary formula is likely to prove to be an over-simplification. The cases show a wide range of variation in both of the main elements, that is the quality of the assurances which give rise to the claimant's expectations and the extent of the claimant's detrimental reliance on the assurances. The doctrine applies only if these elements, in combination, make it unconscionable for the person giving the assurances (whom I will call the benefactor, although that may not always be an appropriate label) to go back on them.'

**[301]** I find that an extremely helpful passage. It helps to explain why, when one looks back at the cases to which I was referred, it is not always possible to find a formula which fits the facts of this particular case. The first classic expression of the concept is in the speech of Lord Cairns LC in *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439 at 448, [1874–80] All ER Rep 187 at 191. The question in that case was whether a lessor could obtain an order of ejectment against a lessee when work under a notice of repair to leasehold premises was suspended following the lessee instituting negotiations for the lessor to purchase the lessee's interest in the premises. Lord Cairns, giving the leading speech said:

'It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.'

**[302]** Following the decision of Denning J (as he then was) in *Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256n, [1947] KB 130, Denning LJ (as he had by then become) articulated the concept in *Combe v Combe* [1951] 1 All ER 767, [1951] 2 KB 215. In that case, a divorced wife relied on a promise by her former husband to pay her maintenance of £100 a year. He did not pay. She did not apply for maintenance in the divorce proceedings, but issued a writ several years later relying on her former husband's promise to pay, and arguing (inter alia) that it would be inequitable for the court to relieve him of his obligations. Having referred to a series of cases in which promissory estoppel had arisen, Denning LJ said ([1951] 1 All ER 767 at 770, [1951] 2 KB 215 at 220–221):

'In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself. He was sued for some other cause, for example, a pension or a breach of contract, or possession, and the promise, assurance, or assertion only played a supplementary role, though, no doubt, an important one. That is, I think, its true function. It may be part of a cause of action, but not a cause of action in itself. The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word. Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, although not of its modification or discharge. I fear that it was my failure to make this clear in *Central London Property Trust Ltd v High Trees House Ltd* which misled Byrne J in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce the promise if there was consideration for it. That is, therefore,

a the real question in the case: Was there sufficient consideration to support the promise?'

[303] From these cases, a number of conditions appear to be necessary for the concept of promissory estoppel to operate. Firstly, there must be a legal relationship between the parties. Secondly, the estoppel is not, of itself, the cause b of action, although it may be an element in it. Thirdly, there must be a clear and unequivocal promise or representation which is designed to affect the legal relationship between the parties. Fourthly, there must be reliance on that promise or representation by the other party and, fifthly, it must be unconscionable for the person making the representation to be allowed to resile from it.

c [304] In the instant case, the first three elements identified in [303], above, are undoubtedly missing and the final two depend, essentially, on my findings of fact. That said, however, it does not seem to me that the absence of any one or more of these elements is necessarily fatal to an equitable estoppel. The essence of the doctrine, as Robert Walker LJ comments in *Jennings v Rice* [2003] 1 FCR 501 at [54] d is to do what it necessary to avoid an unconscionable result. However, it does seem to me that in the instant case, the three critical elements which must be present are: (1) a clear representation by Mr Johnston; (2) reliance on that representation by Ms Evans to her detriment; and (3) a finding that it would be unconscionable to allow Mr Johnston to allow Mr Johnston to go back on the e representation.

*Application of the principles of estoppel to the present case*

[305] In my judgment the estoppel undoubtedly fails on the first and the third of the three essential ingredients I have identified in [304], above, there was, of course, no contractual, or other legal relationship between Ms Evans and Mr f Johnston. However, for the reasons I have given I do not think this fatal to the argument. In *Jennings v Rice* there was no contractual or other legal relationship between the claimant and the deceased, and the claimant succeeded in establishing a proprietary estoppel.

[306] I do not, however, agree with Mr Tolson and Miss Freeborn that the g assurances Mr Johnston gave Ms Evans amounted to a clear and unequivocal representation as to the use of the embryos and a promise that he would never withdraw his consent to their use. On 10 October 2001, Mr Johnston was doing his best to reassure Ms Evans that he loved her and that he wanted to be the father of her children. He was giving what I have no doubt was a truthful h expression of his feelings at the time. He was not—nor could he be—committing himself for all time. In the field of personal relationships endearments and reassurances of this kind are commonplace, but they do not—nor can they—have any permanent, legal effect. They certainly cannot bind Mr Johnston in what were totally changed circumstances, namely his separation from Ms Evans.

j [307] Equally, for the reasons I have set out when dealing with the claims under the convention, I cannot take the view that it would be unconscionable to allow Mr Johnston to go back on the assurances he gave. What he is now saying simply reflects the reality. He and Ms Evans have separated. He no longer loves her, and she no longer loves him. In these changed circumstances, he no longer wishes to have a child by her. Were it not for the existence of the embryos, Ms Evans would not choose to have a child by him.

[308] I find the question of Ms Evans' reliance on the assurances difficult, although the point may be academic in the light of my other findings. Ms Evans had very little time. She was given the news on 10 October 2001. Harvesting of her eggs and fertilisation of them took place on 12 November 2001. Ms Evans underwent an oophorectomy on 26 November 2001. The reality was that egg freezing was not a option, nor, I think, was the use of donor sperm. The clinic would not undertake the former. I think it highly unlikely, in the light of the evidence of Dr Sharp and Dr Lockwood that Ms Evans would have found a clinic which undertook it, even if she had had more time, and been able to afford it. Furthermore, both egg freezing and AID would have opened up the question of the durability of her relationship with Mr Johnston. The alternative clinic would have been bound to inquire into why Ms Evans wanted egg freezing or to use donor sperm; and, despite her personal circumstances, might have felt unable to provide either when Ms Evans had a partner who was capable of providing the gametes to fertilise her embryos.

[309] My acceptance of Mr Johnston's account of what occurred on 12 November 2001, combined with Ms Evans' initial difficulty about remembering the date of the conversation with Mr Johnston (she initially put it after 10 October 2001) make it difficult for me to find in terms that she relied on Mr Johnston's assurances to the extent that she now believes. She was naturally in a highly anxious state of mind. She was, I think, by undergoing IVF with Mr Johnston taking the only realistic course which was open to her. She was, I think, both aware that it was the only course, and it was one she was content to adopt. No doubt Mr Johnston's assurances played a part in what she did, but I do not think they were critical. Had Mr Johnston not given her the assurances I have found he did give her, I think she would have gone ahead with the treatment in any event. However, even if I am wrong about that, and even if an estoppel is capable of existing in the face of the Act, I do not, for the reasons I have given, think it would be unconscionable to allow Mr Johnston to withdraw his consent. It is a right which the statute gives him within the clear scheme operated by Parliament. It was the basis upon which he gave his consent on 10 October 2001. It is perfectly reasonable for him, in the changed circumstances which appertain, not to want to father a child by Ms Evans.

[310] In my judgment, therefore, there is no effective estoppel in this case. The reality, as I find it to be, is that both Ms Evans and Mr Johnston embarked on the treatment in good faith on the basis that their relationship would endure. However, it did not. In the changed circumstances of separation, it would in my judgment be quite inequitable not to allow either party to change their mind and withdraw their consent to treatment.

INFORMATION FROM OTHER JURISDICTIONS

[311] I was provided with a great deal of information, including a substantial document which Mr Webb had downloaded from the Internet prepared by the Council of Europe and entitled *Medically Assisted Procreation and the Protection of the Human Embryo Comparative Study on the Situation in 39 States*. Mr Tolson and Miss Freeborn were highly critical of the suggestion that this document should be adduced in evidence, and agreement was reached that it was to provide background information only. Apart from critical references to it in the claimants' opening, nobody sought to rely on it and I did not take it into account in reaching any of my conclusions.

[312] As Mr Tolson and Miss Freeborn readily and rightly acknowledged, the legitimate differences between practice in different jurisdictions inevitably meant that, in the absence of a powerful consensus elsewhere, the claimants' arguments stood or fell on my construction of the Act and its compliance with convention rights.

[313] I was shown four cases (one Israeli and three American) in which divorced couples had argued over the fate of frozen embryos created from their gametes. One was a decision of a specially convened sitting of 11 judges of the Israeli Supreme Court in the case of *Nachmani* decided in 1996. Unfortunately, the judgments are only, I was told, available in Hebrew, and the only discussion of the case in English is in the Texas International Journal for Winter 2000 in an article by one of the judges involved, Dalia Domer J. The others were a decision of the Supreme Court of Tennessee at Knoxville called *Davis v Davis* (1992) 842 SW 2d 588; *Kass v Kass* (1998) 673 NYS 2d 350; and *AZ v BZ* (2000) 725 NE 2d 1051, a decision of the Supreme Judicial Court of Massachusetts decided in March 2000 and provided to me in the Massachusetts Lawyers Weekly.

[314] In a judgment which is already overlong, I do not think it would assist if I set out the facts of these four cases and attempted to analyse the judicial reasoning behind them. Indeed, I doubt whether it would be a permissible exercise in the circumstances of this case. My task has been to find facts, to analyse the Act and to decide whether its terms contravene the terms of the convention. I have also had to examine the English doctrine of estoppel. None of the four cases identified in [313], above, was based on the construction of a statute, let alone a statute in the same terms as the Act. Accordingly, whilst I found the decisions interesting, they do not assist me one way or the other in deciding this case.

THE RESULT

[315] The claims of both Ms Evans and Mrs Hadley must be dismissed. No doubt counsel, to whom this judgment will be circulated in advance, will be able to draw up the appropriate form of order to enable the clinics to remove the embryos from storage and allow them to perish.

FOOTNOTE

[316] I cannot leave the case without adding two comments. The first is my appreciation for the manner in which the case was conducted in court by both the lawyers and the parties. The hearing was dignified and calm, despite the highly emotive nature of the issues. Each of the claimants and the male defendants gave evidence with dignity and courtesy. I was very impressed with the professionalism and the dedication of the two medical specialists from whom I heard. All the witnesses were of a high quality.

[317] The second is my wish to repeat my sympathy for all four of the main protagonists. All four struck me as perfectly decent people locked into a dispute not of their choosing but deriving from the incapacity of the two claimants to conceive a child. In human terms, the greatest sympathy must, of course, be extended to Ms Evans, who, as a result of this case, now lacks the capacity to give birth to a child which is genetically hers.

[318] The Family Division, unfortunately, is only too used to the fact that nature often makes most fecund those least able properly to exercise parental responsibility, whilst at the same time denying parenthood to those who would undertake it conscientiously.

**[319]** It would be easy to criticise men in the position of Mr Johnston and Mr Hadley in this case. But such criticisms would, in my judgment, be facile and unfair. As I have found, a man in the position of these men is entitled to say that he does not want to become a father by a woman from whom he has separated, and with whom he no longer has anything in common apart from the frozen embryos created from their gametes. The Act places great emphasis on considerations relating to the position of the unborn child. As I make clear in the substance of the judgment, Mr Johnston and Mr Hadley would be the biological fathers of children for whom they would be financially responsible, but with whom they could not enjoy any form of natural paternal relationship.

**[320]** Furthermore, as Miss Rose pointed out, it is not difficult to reverse the dilemma. If a man has testicular cancer and his sperm, preserved prior to radical surgery which renders him permanently infertile, is used to create embryos with his partner; and if the couple have separated before the embryos are transferred into the woman, nobody would suggest that she could not withdraw her consent to treatment and refuse to have the embryos transferred into her. The statutory provisions, like convention rights, apply to men and to women equally.

*Claims dismissed.*

Celia Fox Barrister.

# Wainwright and another v Home Office

[2003] UKHL 53

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD HUTTON AND LORD SCOTT OF FOSCOTE

30 JUNE, 1, 2 JULY, 16 OCTOBER 2003

*Tort – Cause of action – Invasion of privacy – Emotional distress – Whether there was a general common law tort of invasion of privacy – Whether damages were recoverable for intentionally causing emotional distress which did not constitute psychiatric injury – Human Rights Act 1998, Sch 1, Pt I, art 8.*

In 1997 the claimants, a mother and son, paid a visit to another son who was in prison on remand. The prison authorities suspected that the prisoner was dealing in drugs while awaiting trial, but did not know how he obtained his supplies. The governor therefore gave instructions that anyone who wished to visit the prisoner had first to allow himself to be strip-searched. In accordance with those instructions, the claimants were, with their reluctant consent, strip-searched separately by prison officers before being allowed to visit the prisoner. Although the prison officers conducted the searches in good faith, they failed to comply fully with the prescribed procedure and for that reason the searches were not protected by statutory authority. When searching the son, one of the prison officers touched his penis. There was no other physical contact and there had been no intention to humiliate, but both claimants found the experience upsetting. A psychiatrist subsequently concluded that the son, who had physical and learning difficulties, had been so severely affected by his experience as to suffer post-traumatic stress disorder. He also concluded that the mother had suffered emotional distress, but not any recognised psychiatric illness. Both mother and son brought an action for damages against the Home Office. At trial, the Home Office accepted that touching the son's penis was a tortious battery constituting a trespass to the person. The judge concluded, however, that requiring the claimants to take off their clothes was also a form of trespass to the person. In doing so, he held, inter alia, that the law of tort should give a remedy for any kind of distress caused by an infringement of the right of privacy protected by art 8[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as now set out in Sch 1 to the Human Rights Act 1998). The judge therefore awarded damages to both claimants. The Court of Appeal disagreed with the judge's extension of the notion of trespass to the person, and accordingly set aside the judgments in favour of the claimants with the exception of the portion of the son's award that was attributable to the battery. On their appeal to the House of Lords, the claimants did not seek to apply the 1998 Act retrospectively, but contended that, in order to enable the United Kingdom to conform to its obligations under the convention, their Lordships should declare that there was (and in theory always had been) a tort of invasion of privacy under which the searches of both claimants were actionable

a Article 8, so far as material, provides: '1. Everyone has the right to respect for his private ... life ... 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ...'

and damages for emotional distress recoverable. Alternatively, the claimants submitted that damages for distress falling short of psychiatric injury could be recovered if there was an intention to cause it; that the prison officers had performed acts calculated to cause distress to the claimants; and that they should therefore be liable on the basis of imputed intention. In support of their alternative submission, the claimants relied on a nineteenth century authority.

**Held** – There was no general common law tort of invasion of privacy. There was a great difference between identifying privacy as a value that underlay the existence of the rule of law (and might point the direction in which the law should develop) and privacy as a principle of law itself. Nor was there anything in the jurisprudence of the European Court of Human Rights which suggested that the adoption of some high level principle of privacy was necessary to comply with art 8 of the convention. Moreover, the nineteenth century authority provided no remedy for distress which did not amount to recognised psychiatric injury, and, so far as there might be a tort of intention under which such damage was recoverable, the necessary intention had not been established in the instant case. If a principled distinction were to be drawn which justified abandoning the rule that damages for mere distress were not recoverable, imputed intention would not do. The defendant had actually to have acted in a way which he knew to be unjustifiable and intended to cause harm or at least to have acted without caring whether he caused harm or not. Even on the basis of a genuine intention to cause distress, opinion would be reserved on whether compensation should be recoverable, but in any event the facts of the instant case supported no claim on that basis. Accordingly, the appeal would be dismissed (see [1], [31], [32], [35], [45]–[47], [53]–[56], [64], below); *Wilkinson v Downton* [1895–9] All ER Rep 267 explained and distinguished; dicta of Sedley LJ in *Douglas v Hello! Ltd* [2001] 2 All ER 289 at 320 explained.

Per curiam. Where the 1998 Act applies, art 8 of the convention may justify a monetary remedy for an intentional invasion of privacy by a public authority, even if no damage is suffered other than distress for which damages are not ordinarily recoverable. It does not follow, however, that a merely negligent act should, contrary to general principles, give rise to a claim for damages for distress because it affects privacy rather than some other interest like bodily safety (see [1], [51], [54]–[56], below).

Decision of the Court of Appeal [2003] 3 All ER 943 affirmed.

**Notes**

For personal privacy under the common law and the convention right to privacy, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 110, 149–150, and for intentionally causing physical harm, see 45(2) *Halsbury's Laws* (4th edn reissue) para 456.

For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 555.

**Cases referred to in opinions**

*Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] 1 All ER 224, [2003] QB 633, [2003] 2 WLR 80.

*Collins v Wilcock* [1984] 3 All ER 374, [1984] 1 WLR 1172, DC.

*Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL.

*Douglas v Hello! Ltd* [2001] 2 All ER 289, [2001] QB 967, [2001] 2 WLR 992, CA.

*Dulieu v White & Sons* [1901] 2 KB 669, [1900–3] All ER Rep 353, DC.
*Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65, HL.
*Hunter v Canary Wharf Ltd, Hunter v London Docklands Development Corp* [1997] 2 All ER 426, [1997] AC 655, [1997] 2 WLR 684, HL.
*Iwanczuk v Poland* [2001] ECHR 25196/94, ECt HR.
*Janvier v Sweeney* [1919] 2 KB 316, [1918–19] All ER Rep 1056, CA.
*Kaye v Robertson* [1991] FSR 62, CA.
*Khan v UK* (2000) 8 BHRC 310, ECt HR.
*Khorasandjian v Bush* [1993] 3 All ER 669, [1993] QB 727, [1993] 3 WLR 476, CA.
*Letang v Cooper* [1964] 2 All ER 929, [1965] 1 QB 232, [1964] 3 WLR 573, CA.
*Lorsé v Netherlands* [2003] ECHR 52750/99, ECt HR.
*Malone v Comr of Police of the Metropolis* [1979] 2 All ER 620, sub nom *Malone v Metropolitan Police Comr* [1979] Ch 344, [1979] 2 WLR 700.
*Malone v UK* (1985) 7 EHRR 14, [1984] 8691/79, ECt HR.
*Peck v UK* (2003) 13 BHRC 669, ECt HR.
*R v Khan (Sultan)* [1996] 3 All ER 289, [1997] AC 558, [1996] 3 WLR 162, HL.
*Spencer (Earl) v UK* (1998) 25 EHRR CD 105, E Com HR.
*Valasinas v Lithuania* [2001] ECHR 44558/98, ECt HR.
*Victorian Railways Comrs v Coultas* (1888) 13 App Cas 222, PC.
*Wilkinson v Downton* [1897] 2 QB 57, [1895–9] All ER Rep 267.
*Wilson v Pringle* [1986] 2 All ER 440, [1987] QB 237, [1986] 3 WLR 1, CA.
*Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932.

**Cases referred to in list of authorities**

*A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545, [2002] 3 WLR 542.
*A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.
*Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310, [1991] 3 WLR 1057, HL.
*Alcorn v Anbro Engineering Inc* (1970) 468 P 2d 216, Cal SC.
*Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, Aust HC.
*Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, NZ HC.
*Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, sub nom *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 AC 696, [1991] 2 WLR 588, HL.
*Chatterton v Gerson* [1981] 1 All ER 257, [1981] QB 432, [1980] 3 WLR 1003.
*Douglas v Hello! Ltd* [2003] EWHC 786 (Ch), [2003] 3 All ER 996.
*Freeman v Home Office* [1984] 1 All ER 1036, [1984] QB 524, [1984] 2 WLR 802, CA.
*Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804.
*Latter v Braddell* (1881) 44 LT 369, CA.
*Maclaine Watson & Co Ltd v Dept of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523, sub nom *Rayner (JH) (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418, [1989] 3 WLR 969, HL.
*McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] 1 AC 410, [1982] 2 WLR 982, HL.
*Morris v Beardmore* [1980] 2 All ER 753, [1981] AC 446, [1980] 3 WLR 283, HL.
*P v D* [2000] 2 NZLR 591, NZ HC.
*Page v Smith* [1995] 2 All ER 736, [1996] AC 155, [1995] 2 WLR 644, HL.
*R v Benjafield* [2002] UKHL 2, [2002] 1 All ER 815, [2003] 1 AC 1099, [2002] 2 WLR 235.
*R v Kansal (No 2)* [2001] UKHL 62, [2002] 1 All ER 257, [2002] 2 AC 69, [2001] 3 WLR 1562.

*R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, [2001] 3 WLR 206.

*R v Linekar* [1995] 3 All ER 69, [1995] QB 250, [1995] 2 WLR 237, CA.

*R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, [2002] 3 WLR 1562.

*R v Richardson* [1999] QB 444, [1998] 3 WLR 1292, CA.

*Rookes v Barnard* [1964] 1 All ER 367, [1964] AC 1129, [1964] 2 WLR 269, HL.

*Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643, [1985] AC 871, [1985] 2 WLR 480, HL.

*Stevenson v Basham* [1922] NZLR 225, NZ SC.

*Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, NZ HC.

*Venables v News Group Newspapers Ltd* [2001] 1 All ER 908, [2001] Fam 430, [2001] 2 WLR 1038.

*White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, sub nom *Frost v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455, [1998] 3 WLR 1509, HL.

**Appeal**

The claimants, Mary Jane Wainwright and her son Alan Joseph Wainwright (a patient suing by his mother as litigation friend), appealed with permission of the Court of Appeal (Lord Woolf CJ, Mummery and Buxton LJJ) from its decision on 20 December 2001 ([2001] EWCA Civ 2081, [2003] 3 All ER 943, [2002] QB 1334) whereby it (i) allowed an appeal by the defendant, the Home Office, from the order of Judge McGonigal in the Leeds County Court on 23 April 2001 giving judgment to Mrs Wainwright for damages of £2,600, and (ii) allowed the Home Office's appeal from that part of the order giving judgment to Mr Wainwright for damages of £4,500, and substituted instead an award of damages of £3,750 for battery. The facts are set out in the opinion of Lord Hoffmann.

*David Wilby QC, Iain Christie* and *Ashley Serr* (instructed by *Restons*, York) for the Wainwrights.

*Ian Burnett QC, Robin Tam* and *Anna Kotzeva* (instructed by the *Treasury Solicitor*) for the Home Office.

Their Lordships took time for consideration.

16 October 2003. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

[1] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he gives I would dismiss this appeal.

**LORD HOFFMANN.**

[2] My Lords, on 15 August 1996 Patrick O'Neill was taken into custody on a charge of murder and held at Armley Prison, Leeds. The prison authorities suspected that while awaiting trial he was dealing in drugs. They did not know how he obtained his supplies but people who visit prisoners are a common source of drugs and other contraband. So the governor gave instructions that anyone who wanted an open visit with Patrick O'Neill had first to allow himself (or herself) to be strip-searched. Rule 86(1) of the Prison Rules 1964, SI 1964/388

(consolidated 1998) confers a power in general terms to search any person entering a prison.

[3] Strip-searching is controversial because having to take off your clothes in front of a couple of prison officers is not to everyone's taste. Leeds Prison has internal rules designed to reduce the embarrassment as far as possible. They are modelled on the code of practice issued to the police. The search must take place in a completely private room in the presence of two officers of the same sex as the visitor. The visitor is required to expose first the upper half of his body and then the lower but not to stand completely naked. His body (apart from hair, ears and mouth) is not to be touched. Before the search begins, the visitor is asked to sign a consent form which outlines the procedure to be followed.

[4] On 2 January 1997 Patrick O'Neill's mother Mrs Wainwright, together with her son Alan (Patrick's half-brother) went to visit him. A prison officer told them that they would have to be strip-searched. They reluctantly agreed and prison officers took them to separate rooms where they were asked to undress. They did as they were asked but both found the experience upsetting. Some time afterwards (it is unclear when) they went to a solicitor who had them examined by a psychiatrist. He concluded that Alan (who had physical and learning difficulties) had been so severely affected by his experience as to suffer post-traumatic stress disorder. Mrs Wainwright had suffered emotional distress but no recognised psychiatric illness.

[5] Mrs Wainwright and Alan commenced an action against the Home Office on 23 December 1999, just before the expiry of the limitation period. By the time the case came to trial in April 2001, none of the prison officers could remember searching the Wainwrights. They, on the other hand, gave evidence, which the judge accepted, that the search had not been conducted in accordance with the rules. Both had been asked to uncover all or virtually all of their bodies at the same time, both were not given the consent form until after the search had been completed, the room used to search Mrs Wainwright was not private because it had an uncurtained window from which someone across the street could have seen her and one prison officer had touched Alan's penis to lift his foreskin.

[6] Judge McGonigal, who heard the action in the Leeds County Court, said that the searches could not be justified as a proper use of the statutory power conferred by r 86(1). He gave two reasons. The first was that the strip-searching of the Wainwrights was an invasion of their privacy which exceeded what was necessary and proportionate to deal with the drug smuggling problem. Although the prison officers honestly believed that they had a right under the rules to search the Wainwrights, they should not have done so because it would have been sufficient to search Patrick O'Neill after they left. The second reason was that the prison authorities had not adhered to their own rules. The Court of Appeal ([2001] EWCA Civ 2081, [2003] 3 All ER 943, [2002] QB 1334) agreed with the second reason but not the first. Lord Woolf CJ, who has considerable experience of the administration of prisons, said (at [54]) that a search of Patrick O'Neill would have been inadequate. It followed that '[o]n the findings of the judge, searching, if it had been properly conducted, was perfectly appropriate'. On the other hand, Lord Woolf CJ agreed that if there were clearly laid down restrictions on how the search was to be conducted, conduct which did not observe those restrictions could not (if otherwise actionable) be justified.

[7] The conclusion of both the judge and the Court of Appeal was therefore that the searches were not protected by statutory authority. But that is not enough to give the Wainwrights a claim to compensation. The acts of the prison

officers needed statutory authority only if they would otherwise have been wrongful, that is to say, tortious or in breach of a statutory duty. People do all kinds of things without statutory authority. So the question is whether the searches themselves or the manner in which they were conducted gave the Wainwrights a cause of action.

**[8]** The judge found two causes of action, both of which he derived from the action for trespass. As Diplock LJ pointed out in *Letang v Cooper* [1964] 2 All ER 929 at 934–935, [1965] 1 QB 232 at 243, trespass is strictly speaking not a cause of action but a form of action. It was the form anciently used for a variety of different kinds of claim which had as their common element the fact that the damage was caused directly rather than indirectly; if the damage was indirect, the appropriate form of action was the action on the case. After the abolition of the forms of action trespass is no more than a convenient label for certain causes of action which derive historically from the old action for trespass vi et armis. One group of such causes of action is trespass to the person, which includes the torts of assault, battery and false imprisonment, each with its own conditions of liability.

**[9]** Battery involves a touching of the person with what is sometimes called hostile intent (as opposed to a friendly pat on the back) but which Robert Goff LJ in *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177 redefined as meaning any intentional physical contact which was not 'generally acceptable in the ordinary conduct of daily life': see also *Wilson v Pringle* [1986] 2 All ER 440, [1987] QB 237. Counsel for the Home Office conceded that touching Alan's penis was not acceptable and was therefore a battery.

**[10]** That, however, was the only physical contact which had occurred. The judge nevertheless held that requiring the Wainwrights to take off their clothes was also a form of trespass to the person. He arrived at this conclusion by the use of two strands of reasoning. First, he said that a line of authority starting with *Wilkinson v Downton* [1897] 2 QB 57, [1895–9] All ER Rep 267, which I shall have to examine later in some detail, had extended the conduct which could constitute trespass to the utterance of words which were 'calculated' to cause physical (including psychiatric) harm. There was in his view little distinction between words which directly caused such harm and words which induced someone to act in a way which caused himself harm, like taking his own clothes off. So inducing Alan to take off his clothes and thereby suffer post-traumatic stress disorder was actionable.

**[11]** The judge recognised, however, that in the cases upon which he relied the claimant had suffered a recognised psychiatric injury. Mrs Wainwright had not. It seemed to him illogical to deny her a remedy for distress because her constitution was sufficiently robust to protect her from psychiatric injury. So the second strand of his reasoning was that the law of tort should give a remedy for any kind of distress caused by an infringement of the right of privacy protected by art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as now set out in Sch 1 to the Human Rights 1998). At the time of the incident the 1998 Act had not yet come into force but the judge considered that he was justified in adapting the common law to the convention by analogy with the principle by which, even before the 1998 Act, the courts interpreted statutes so as to conform, if possible, to the convention.

**[12]** The judge therefore found in favour of both Wainwrights. He awarded Mrs Wainwright damages of £2,600, divided into £1,600 'basic' and £1,000 aggravated damages, and Alan £4,500, divided into £3,500 basic and £1,000

aggravated. The award to Alan did not distinguish between the damages for the battery and the injury caused by having to strip.

**[13]** The Court of Appeal did not agree with the judge's extensions of the notion of trespass to the person and did not consider that (apart from the battery, which was unchallenged) the prison officers had committed any other wrongful act. So they set aside the judgments in favour of the Wainwrights with the exception of the damages for battery, to which they attributed £3,750 of the £4,500 awarded by the judge.

**[14]** The Wainwrights appeal to your Lordships' House. Their counsel (Mr Wilby QC and Mr Christie) put the case in two ways. The first was that, in order to enable the United Kingdom to conform to its international obligations under the convention, the House should declare that there is (and in theory always has been) a tort of invasion of privacy under which the searches of both Wainwrights were actionable and damages for emotional distress recoverable. This does not give retrospective effect to the 1998 Act. It accepts that the convention, at the relevant time, operated only at the level of international law. Indeed, the argument (if valid) would have been equally valid at any time since the United Kingdom acceded to the convention. Alternatively, counsel proposed that if a general tort of invasion of privacy seemed too bold an undertaking, the House could comply with the convention in respect of this particular invasion by an extension of the principle in *Wilkinson v Downton* [1897] 2 QB 57, [1895–9] All ER Rep 267.

**[15]** My Lords, let us first consider the proposed tort of invasion of privacy. Since the famous article by Warren and Brandeis ('The Right to Privacy' (1890) 4 Harv LR 193) the question of whether such a tort exists, or should exist, has been much debated in common law jurisdictions. Warren and Brandeis suggested that one could generalise certain cases on defamation, breach of copyright in unpublished letters, trade secrets and breach of confidence as all based upon the protection of a common value which they called privacy or, following Judge Cooley (*Cooley on Torts* (2nd edn, 1888) p 29) 'the right to be let alone'. They said that identifying this common element should enable the courts to declare the existence of a general principle which protected a person's appearance, sayings, acts and personal relations from being exposed in public.

**[16]** Courts in the United States were receptive to this proposal and a jurisprudence of privacy began to develop. It became apparent, however, that the developments could not be contained within a single principle; not, at any rate, one with greater explanatory power than the proposition that it was based upon the protection of a value which could be described as privacy. Dean Prosser, in his work on *The Law of Torts* (4th edn, 1971) p 804, said:

> 'What has emerged is no very simple matter ... it is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff "to be let alone".'

**[17]** Dean Prosser's taxonomy divided the subject into: (1) intrusion upon the plaintiff's physical solitude or seclusion (including unlawful searches, telephone tapping, long-distance photography and telephone harassment); (2) public disclosure of private facts; and (3) publicity putting the plaintiff in a false light; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or

likeness. These, he said, had different elements and were subject to different defences (p 814).

**[18]** The need in the United States to break down the concept of 'invasion of privacy' into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle. There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy. Sir Brian Neill's well-known article 'Privacy: a challenge for the next century' in *Protecting Privacy* (ed B Markesinis) (1999) contains a survey. Common law torts include trespass, nuisance, defamation and malicious falsehood; there is the equitable action for breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998. There are also extra-legal remedies under codes of practice applicable to broadcasters and newspapers. But there are gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle. The law of breach of confidence has in recent years undergone such a process: see in particular the judgment of Lord Phillips of Worth Matravers MR in *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] 1 All ER 224, [2003] QB 633. On the other hand, an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance in *Khorasandjian v Bush* [1993] 3 All ER 669, [1993] QB 727 was held by the House of Lords in *Hunter v Canary Wharf Ltd, Hunter v London Docklands Development Corp* [1997] 2 All ER 426, [1997] AC 655 to be a step too far. The gap was filled by the 1997 Act.

**[19]** What the courts have so far refused to do is to formulate a general principle of 'invasion of privacy' (I use the quotation marks to signify doubt about what in such a context the expression would mean) from which the conditions of liability in the particular case can be deduced. The reasons were discussed by Megarry V-C in *Malone v Comr of Police of the Metropolis* [1979] 2 All ER 620 at 642–649, [1979] Ch 344 at 372–381. I shall be sparing in citation but the whole of Megarry V-C's treatment of the subject deserves careful reading. The question was whether the plaintiff had a cause of action for having his telephone tapped by the police without any trespass upon his land. This was (as the European Court of Justice subsequently held in *Malone v UK* (1985) 7 EHRR 14) an infringement by a public authority of his right to privacy under art 8 of the convention, but because there had been no trespass, it gave rise to no identifiable cause of action in English law. Megarry V-C was invited to declare that invasion of privacy, at any rate in respect of telephone conversations, was in itself a cause of action. He said ([1979] 2 All ER 620 at 642, [1979] Ch 344 at 372):

> '... I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and, if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another.'

[20] As for the analogy of construing statutes in accordance with the convention, which appealed to the judge in the present case, Sir Robert said ([1979] 2 All ER 620 at 647–648, [1979] Ch 344 at 379):

> 'I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the convention, the court would readily seek to construe the legislation in a way that would effectuate the convention rather than frustrate it. However, no relevant legislation of that sort is in existence. It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed.'

[21] Megarry V-C pointed out ([1979] 2 All ER 620 at 649, [1979] Ch 344 at 380) that the problem about telephone tapping was not in formulating the generalisation that the state should not ordinarily listen to one's telephone calls but in specifying the circumstances under which it should be allowed to do so. This required detailed rules and not broad common law principles:

> 'Give full rein to the convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.'

[22] Once again, Parliament provided a remedy, subject to a detailed code of exceptions, in the Interception of Communications Act 1985. A similar problem arose in *R v Khan (Sultan)* [1996] 3 All ER 289, [1997] AC 558, in which the defendant in criminal proceedings complained that the police had invaded his privacy by using a listening device fixed to the outside of a house. There was some discussion of whether the law should recognise a right to privacy which had been prima facie infringed, but no concluded view was expressed because all their Lordships thought that any such right must be subject to exceptions, particularly in connection with the detection of crime, and that the accused's privacy had been sufficiently taken into account by the judge when he exercised his discretion under s 78 of the Police and Criminal Evidence Act 1984 to admit the evidence obtained by the device at the criminal trial. The European Court of Human Rights subsequently held (*Khan v UK* (2000) 8 BHRC 310) that the invasion of privacy could not be justified under art 8 because, in the absence of any statutory regulation, the actions of the police had not been 'in accordance with law'. By that time, however, Parliament had intervened in the Police Act 1997 to put the use of surveillance devices on a statutory basis.

[23] The absence of any general cause of action for invasion of privacy was again acknowledged by the Court of Appeal in *Kaye v Robertson* [1991] FSR 62, in which a newspaper reporter and photographer invaded the plaintiff's hospital bedroom, purported to interview him and took photographs. The law of trespass provided no remedy because the plaintiff was not owner or occupier of the room and his body had not been touched. Publication of the interview was restrained by interlocutory injunction on the ground that it was arguably a malicious falsehood to represent that the plaintiff had consented to it. But no other remedy

was available. At the time of the judgment (16 March 1990) a committee under the chairmanship of Sir David Calcutt QC (the Calcutt Committee) was considering whether individual privacy required statutory protection against intrusion by the press. Glidewell LJ said (at 66):

> 'The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.'

[24] Bingham LJ likewise said (at 70):

> 'The problems of defining and limiting a tort of privacy are formidable, but the present case strengthens my hope that the review now in progress may prove fruitful.'

[25] Leggatt LJ (at 71) referred to Dean Prosser's analysis of the development of the law of privacy in the United States and said that similar rights could be created in England only by statute: '... it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed.'

[26] All three judgments are flat against a judicial power to declare the existence of a high-level right to privacy and I do not think that they suggest that the courts should do so. The members of the Court of Appeal certainly thought that it would be desirable if there was legislation to confer a right to protect the privacy of a person in the position of Mr Kaye against the kind of intrusion which he suffered, but they did not advocate any wider principle. And when the Calcutt Committee reported in June 1990, they did indeed recommend that 'entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication' should be made a criminal offence: see *Report of the Committee on Privacy and Related Matters* (Cm 1102) para 6.33. The Calcutt Committee also recommended that certain other forms of intrusion, like the use of surveillance devices on private property and long-distance photography and sound recording, should be made offences.

[27] But the Calcutt Committee did not recommend, even within their terms of reference (which were confined to press intrusion) the creation of a generalised tort of infringement of privacy (para 12.5). This was not because they thought that the definitional problems were insuperable. They said that if one confined the tort to 'publication of personal information to the world at large' (para 12.12) it should be possible to produce an adequate definition and they made some suggestions about how such a statutory tort might be defined and what the defences should be. But they considered that the problem could be tackled more effectively by a combination of the more sharply-focused remedies which they recommended (para 12.32). As for a 'general wrong of infringement of privacy', they accepted (para 12.12) that it would, even in statutory form, give rise to 'an unacceptable degree of uncertainty'. There is nothing in the opinions of the judges in *Kaye*'s case which suggests that the members of the court would have held any view, one way or the other, about a general tort of privacy.

[28] The claimants placed particular reliance upon the judgment of Sedley LJ in *Douglas v Hello! Ltd* [2001] 2 All ER 289, [2001] QB 967. Sedley LJ drew attention to the way in which the development of the law of confidence had attenuated the need for a relationship of confidence between the recipient of the confidential information and the person from whom it was obtained—a development which enabled the United Kingdom government to persuade the European Commission of Human Rights in *Earl Spencer v UK* (1998) 25 EHRR CD

105 that English law of confidence provided an adequate remedy to restrain the publication of private information about the applicants' marriage and medical condition and photographs taken with a telephoto lens. These developments showed that the basic value protected by the law in such cases was privacy. Sedley LJ said ([2001] 2 All ER 289 at 320, [2001] QB 967 at 1001 (para 126)):

> 'What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.'

**[29]** I read these remarks as suggesting that, in relation to the publication of personal information obtained by intrusion, the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary. As the underlying value protected is privacy, the action might as well be renamed invasion of privacy. 'To say this' said Sedley LJ ([2001] 2 All ER 289 at 320, [2001] QB 967 at 1001 (para 125)), 'is in my belief to say little, save by way of a label, that our courts have not said already over the years'.

**[30]** I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence. As Buxton LJ pointed out in this case in the Court of Appeal ([2003] 3 All ER 943 at [96]–[99], [2002] QB 1334 at [96]–[99]), such an extension would go further than any English court has yet gone and would be contrary to some cases (such as *Kaye v Robertson* [1991] FSR 62) in which it positively declined to do so. The question must wait for another day. But Sedley LJ's dictum does not support a principle of privacy so abstract as to include the circumstances of the present case.

**[31]** There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values—principles only in the broadest sense—which direct its development. A famous example is *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.

**[32]** Nor is there anything in the jurisprudence of the European Court of Human Rights which suggests that the adoption of some high level principle of privacy is necessary to comply with art 8 of the convention. The European Court is concerned only with whether English law provides an adequate remedy in a specific case in which it considers that there has been an invasion of privacy contrary to art 8(1) and not justifiable under art 8(2). So in *Earl Spencer*'s case it was satisfied that the action for breach of confidence provided an adequate remedy for the Spencers' complaint and looked no further into the rest of the armoury of remedies available to the victims of other invasions of privacy. Likewise, in *Peck v UK* (2003) 13 BHRC 669 at 692 (para 103) the court expressed

some impatience at being given a tour d'horizon of the remedies provided and to be provided by English law to deal with every imaginable kind of invasion of privacy. It was concerned with whether Mr Peck (who had been filmed in embarrassing circumstances by a CCTV camera) had an adequate remedy when the film was widely published by the media. It came to the conclusion that he did not.

**[33]** Counsel for the Wainwrights relied upon *Peck's* case as demonstrating the need for a general tort of invasion of privacy. But in my opinion it shows no more than the need, in English law, for a system of control of the use of film from CCTV cameras which shows greater sensitivity to the feelings of people who happen to have been caught by the lens. For the reasons so cogently explained by Megarry V-C in *Malone v Comr of Police of the Metropolis* [1979] 2 All ER 620, [1979] Ch 344, this is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle.

**[34]** Furthermore, the coming into force of the 1998 Act weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under art 8 have been infringed by a public authority, he will have a statutory remedy. The creation of a general tort will, as Buxton LJ pointed out in the Court of Appeal ([2003] 3 All ER 943 at [92], [2003] QB 1334 at [92]) pre-empt the controversial question of the extent, if any, to which the convention requires the state to provide remedies for invasions of privacy by persons who are not public authorities.

**[35]** For these reasons I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy.

**[36]** I turn next to the alternative argument based upon *Wilkinson v Downton* [1897] 2 QB 57, [1895–9] All ER Rep 267. This is a case which has been far more often discussed than applied. Thomas Wilkinson, landlord of the Albion public house in Limehouse, went by train to the races at Harlow, leaving his wife Lavinia behind the bar. Downton was a customer who decided to play what he would no doubt have described as a practical joke on Mrs Wilkinson. He went into the Albion and told her that her husband had decided to return in a horse-drawn vehicle which had been involved in an accident in which he had been seriously injured. The story was completely false and Mr Wilkinson returned safely by train later that evening. But the effect on Mrs Wilkinson was dramatic. Her hair turned white and she became so ill that for some time her life was thought in danger. The jury awarded her £100 for nervous shock and the question for the judge on further consideration was whether she had a cause of action.

**[37]** The difficulty in the judge's way was the decision of the Privy Council in *Victorian Railways Comrs v Coultas* (1888) 13 App Cas 222, in which it had been said that nervous shock was too remote a consequence of a negligent act (in that case, putting the plaintiff in imminent fear of being run down by a train) to be a recoverable head of damages. Wright J distinguished the case on the ground that Downton was not merely negligent but had intended to cause injury. Quite what the judge meant by this is not altogether clear; Downton obviously did not intend to cause any kind of injury but merely to give Mrs Wilkinson a fright. The judge said, however ([1897] 2 QB 57 at 59, [1895–9] All ER Rep 267 at 269) that as what he said could not fail to produce grave effects 'upon any but an exceptionally indifferent person', an intention to cause such effects should be 'imputed' to him.

[38] The outcome of the case was approved and the reasoning commented upon by the Court of Appeal in *Janvier v Sweeney* [1919] 2 KB 316, [1918–19] All ER Rep 1056. During the First World War Mlle Janvier lived as a paid companion in a house in Mayfair and corresponded with her German lover who was interned as an enemy alien on the Isle of Man. Sweeney was a private detective who wanted secretly to obtain some of her employer's documents and sent his assistant to induce her to co-operate by pretending to be from Scotland Yard and saying that the authorities wanted her because she was corresponding with a German spy. Mlle Janvier suffered severe nervous shock from which she took a long time to recover. The jury awarded her £250.

[39] By this time, no one was troubled by the *Victorian Railways Comrs* case. In *Dulieu v White & Sons* [1901] 2 KB 669, [1900–3] All ER Rep 353 the Divisional Court had declined to follow it; Phillimore J said ([1901] 2 KB 669 at 683, [1900–3] All ER Rep 353 at 361) that in principle 'terror wrongfully induced and inducing physical mischief gives a cause of action'. So on that basis Mlle Janvier was entitled to succeed whether the detectives intended to cause her injury or were merely negligent as to the consequences of their threats. Duke LJ observed ([1919] 2 KB 316 at 326, [1918–19] All ER Rep 1056 at 1061) that the case was stronger than *Wilkinson v Downton* because Downton had intended merely to play a practical joke and not to commit a wrongful act. The detectives, on the other hand, intended to blackmail the plaintiff to attain an unlawful object.

[40] By the time of *Janvier*'s case, therefore, the law was able comfortably to accommodate the facts of *Wilkinson v Downton* in the law of nervous shock caused by negligence. It was unnecessary to fashion a tort of intention or to discuss what the requisite intention, actual or imputed, should be. Indeed, the remark of Duke LJ to which I have referred suggests that he did not take seriously the idea that Downton had in any sense intended to cause injury.

[41] Commentators and counsel have nevertheless been unwilling to allow *Wilkinson v Downton* to disappear beneath the surface of the law of negligence. Although, in cases of actual psychiatric injury, there is no point in arguing about whether the injury was in some sense intentional if negligence will do just as well, it has been suggested (as the claimants submit in this case) that damages for distress falling short of psychiatric injury can be recovered if there was an intention to cause it. This submission was squarely put to the Court of Appeal in *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932 and rejected. Hale LJ said that before the passing of the Protection from Harassment Act 1997 there was no tort of intentional harassment which gave a remedy for anything less than physical or psychiatric injury. That leaves *Wilkinson v Downton* with no leading role in the modern law.

[42] In *Khorasandjian v Bush* [1993] 3 All ER 669, [1993] QB 727 the Court of Appeal, faced with the absence of a tort of causing distress by harassment, tried to press into service the action for private nuisance. In *Hunter v Canary Wharf Ltd, Hunter v London Docklands Development Corp* [1997] 2 All ER 426, [1997] AC 655, as I have already mentioned, the House of Lords regarded this as illegitimate and, in view of the passing of the 1997 Act, unnecessary. I did however observe ([1997] 2 All ER 426 at 452, [1997] AC 655 at 707) that:

> 'The law of harassment has now been put on a statutory basis ... and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or

> discomfort in actions based on negligence ... The policy considerations are quite different.'

[43] Mr Wilby said that the Court of Appeal in *Wong's* case should have adopted this remark and awarded Ms Wong damages for distress caused by intentional harassment before the 1997 Act came into force. Likewise, the prison officers in this case did acts calculated to cause distress to the Wainwrights and therefore should be liable on the basis of imputed intention as in *Wilkinson v Downton*.

[44] I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be very careful about what you mean by intend. In *Wilkinson v Downton* Wright J wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in *Janvier*'s case, that the plaintiff should succeed whether the conduct of the defendant was intentional or negligent. But the *Victorian Railway Comrs* case prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go.

[45] If, on the other hand, one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not. Lord Woolf CJ, as I read his judgment ([2003] 3 All ER 943 at [50]–[51], [2002] QB 1334 at [50]–[51]), might have been inclined to accept such a principle. But the facts did not support a claim on this basis. The judge made no finding that the prison officers intended to cause distress or realised that they were acting without justification in asking the Wainwrights to strip. He said that they had acted in good faith and that—

> 'The deviations from the procedure laid down for strip searches were, in my judgment, not intended to increase the humiliation necessarily involved but merely sloppiness.'

[46] Even on the basis of a genuine intention to cause distress, I would wish, as in *Hunter v Canary Wharf Ltd*, to reserve my opinion on whether compensation should be recoverable. In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation. The Protection from Harassment Act 1997 defines harassment in s 1(1) as a 'course of conduct' amounting to harassment and provides by s 7(3) that a course of conduct must involve conduct on at least two occasions. If these requirements are satisfied, the claimant may pursue a civil remedy for damages for anxiety: see s 3(2). The requirement of a course of conduct shows that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident. It may be that any development of the common law should show similar caution.

[47] In my opinion, therefore, the claimants can build nothing on *Wilkinson v Downton* [1897] 2 QB 57, [1895–9] All ER Rep 267. It does not provide a remedy

for distress which does not amount to recognised psychiatric injury and so far as there may be a tort of intention under which such damage is recoverable, the necessary intention was not established. I am also in complete agreement with Buxton LJ ([2003] 3 All ER 943 at [67]–[72], [2002] QB 1334 at [67]–[72]) that *Wilkinson v Downton* has nothing to do with trespass to the person.

**[48]** Counsel for the Wainwrights submit that unless the law is extended to create a tort which covers the facts of the present case, it is inevitable that the European Court of Human Rights will find that the United Kingdom was in breach of its convention obligation to provide a remedy for infringements of convention rights. In addition to a breach of art 8, they say that the prison officers infringed their convention right under art 3 not to be subjected to degrading treatment.

**[49]** I have no doubt that there was no infringement of art 3. The conduct of the searches came nowhere near the degree of humiliation which has been held by the European Court of Human Rights to be degrading treatment in the cases on prison searches to which we were referred: see *Valasinas v Lithuania* [2001] ECHR 44558/98 (applicant made to strip naked and have his sexual organs touched in front of a woman); *Iwanczuk v Poland* [2001] ECHR 25196/94 (applicant ordered to strip naked and subjected to humiliating abuse by guards when he tried to exercise his right to vote in facilities provided in prison); *Lorsé v Netherlands* [2003] ECHR 52750/99 (applicant strip searched weekly over six years in high security wing without sufficient security justification).

**[50]** In the present case, the judge found that the prison officers acted in good faith and that there had been no more than 'sloppiness' in the failures to comply with the rules. The prison officers did not wish to humiliate the claimants; the evidence of Mrs Wainwright was that they carried out the search in a matter-of-fact way and were speaking to each other about unrelated matters. The Wainwrights were upset about having to be searched but made no complaint about the manner of the search; Mrs Wainwright did not ask for the blind to be drawn over the window or to be allowed to take off her clothes in any particular order and both of them afterwards signed the consent form without reading it but also without protest. The only inexplicable act was the search of Alan's penis, which the prison officers were unable to explain because they could not remember having done it. But this has been fully compensated.

**[51]** Article 8 is more difficult. Buxton LJ thought ([2003] 3 All ER 943 at [62], [2002] QB 1334 at [62]), that the Wainwrights would have had a strong case for relief under s 7 if the 1998 Act had been in force. Speaking for myself, I am not so sure. Although art 8 guarantees a right of privacy, I do not think that it treats that right as having been invaded and requiring a remedy in damages, irrespective of whether the defendant acted intentionally, negligently or accidentally. It is one thing to wander carelessly into the wrong hotel bedroom and another to hide in the wardrobe to take photographs. Article 8 may justify a monetary remedy for an intentional invasion of privacy by a public authority, even if no damage is suffered other than distress for which damages are not ordinarily recoverable. It does not follow that a merely negligent act should, contrary to general principle, give rise to a claim for damages for distress because it affects privacy rather than some other interest like bodily safety: compare *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65.

**[52]** Be that as it may, a finding that there was a breach of art 8 will only demonstrate that there was a gap in the English remedies for invasion of privacy which has since been filled by ss 6 and 7 of the 1998 Act. It does not require that

the courts should provide an alternative remedy which distorts the principles of the common law. a

[53] I would therefore dismiss the appeal.

**LORD HOPE OF CRAIGHEAD.**

[54] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he gives I too would dismiss this appeal. b

**LORD HUTTON.**

[55] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he gives I too would dismiss this appeal. c

**LORD SCOTT OF FOSCOTE.**

[56] My Lords, I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Hoffmann and am in full agreement with his analysis and exposition of the principles of law applicable to this case. d

[57] The essence of the complaint of each claimant is that he or she was subjected to conduct by the prison officers at Armley Prison, Leeds, that was calculated to, and did, cause humiliation and distress. The main issue is whether this conduct was tortious. In the case of each the strip search was carried out in a manner that, in a number of respects, was in breach of the procedures prescribed for strip searches by the internal rules of Armley Prison. And whether or not it was the intention of the prison officers to humiliate and cause distress to Mrs Wainwright and to Alan, it must, in my opinion, be accepted that the manner in which the strip searches were carried out was calculated (in an objective sense) to produce and did in fact, in relation to each of them, produce that result. I need not rehearse the relevant core facts. They are set out in [5], above. e f

[58] But there is an important difference between the case of Alan Wainwright and that of Mrs Wainwright. In the course of, and as part of, the strip search of Alan, one of the prison officers poked a finger into Alan's armpits, handled his penis and pulled back his foreskin. It is conceded by the defendant that this touching of Alan constituted battery. The commission of the battery, being part of the conduct of the strip search, was inextricably associated with the overall humiliation and distress caused to Alan by the strip search. No justification for the handling of Alan's penis in the way described, or indeed for any of the touching of him, was offered by the prison officers. They said they had no recollection of the strip searching of Alan but that they would, when carrying out a strip search, have followed the prescribed procedure and avoided any touching of the person being searched. But the trial judge accepted Alan's evidence to the contrary of what they had done to him. Counsel for the defendant, the Secretary of State, did not suggest that there could ever be circumstances in which a strip search with a view to discovering the presence of drugs on the person being searched would require the foreskin of the penis to be pulled back, or indeed the penis to be touched at all. For my part I am unable to understand how in any circumstances the pulling back of the foreskin could be a necessary part of a search for drugs. g h j

[59] The pulling back of Alan Wainwright's foreskin by the prison officers constituted as gross an indignity as can be imagined. It undeniably warranted an award of aggravated damages. The judge awarded Alan £3,500 ordinary damages and £1,000 aggravated damages. He did so on the footing that even without the touching, ie without the battery, the conduct of the strip search would have been tortious. The Court of Appeal disagreed with that conclusion. They held that if there had been no touching the prison officers' conduct would not have been tortious and they, therefore, reduced Alan's damages by £750.

[60] My Lords I am doubtful whether this reduction was justified. I agree with the Court of Appeal, and with your Lordships, that if there had been no touching, as there was not in Mrs Wainwright's case, no tort would have been committed. The unjustified infliction of humiliation and distress does not, without more, suffice at common law to constitute a tort. But the touching of Alan, in his armpits and on his penis, and the humiliation and distress thereby caused to him, cannot in my opinion be separated out from the strip search as a whole and the humiliation and distress caused by the strip search as a whole. The touching was an integral part of the strip search, neither minor nor incidental. Accordingly, I would have been receptive to an argument that, whatever view be taken about the existence at common law of a tort based on the infliction of humiliation and distress, the judge's award to Alan of £4,500 should have been left untouched.

[61] Moreover, the award to Alan of £1,000 aggravated damages was, in my opinion, distinctly on the low side. It was the same amount as that awarded to Mrs Wainwright who did not suffer the humiliation of having her sexual parts handled. And the absence of any possible justification for the handling of Alan's penis allows the inference to be drawn that it was a form of bullying, done with the intention to humiliate. However, no argument on these lines was addressed to your Lordships. The claimants have not sought to distinguish their respective cases. They have concentrated on the issue of principle.

[62] The important issue of principle is not, in my opinion, whether English common law recognises a tort of invasion of privacy. As Lord Hoffmann has demonstrated, whatever remedies may have been developed for misuse of confidential information, for certain types of trespass, for certain types of nuisance and for various other situations in which claimants may find themselves aggrieved by an invasion of what they conceive to be their privacy, the common law has not developed an overall remedy for the invasion of privacy. The issue of importance in the present case is whether the infliction of humiliation and distress by conduct calculated to humiliate and cause distress, is without more, tortious at common law. I am in full agreement with the reasons that have been given by Lord Hoffmann for concluding that it is not. Nor, in my opinion, should it be. Some institutions, schools, university colleges, regiments and the like (often bad ones) have initiation ceremonies and rites which newcomers are expected to undergo. Ritual humiliation is often a part of this. The authorities in charge of these institutions usually object to these practices and seek to put an end to any excesses. But why, absent any of the traditional nominate torts such as assault, battery, negligent causing of harm etc, should the law of tort intrude? If a shop assistant or a bouncer or barman at a club is publicly offensive to a customer, the customer may well be humiliated and distressed. But that is no sufficient reason why the law of tort

should be fashioned and developed with a view to providing compensation in money to the victim. a

**[63]** Whether today, the Human Rights Act 1998 having come into effect, conduct similar to that inflicted on Mrs Wainwright and Alan Wainwright, but without any element of battery and without crossing the line into the territory of misfeasance in public office, should be categorised as tortious must be left to be decided when such a case arises. It is not necessary to decide now whether such conduct would constitute a breach of art 8 or of art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as now set out in Sch 1 to the Human Rights Act 1998). b

**[64]** I, too, would dismiss these appeals.

*Appeal dismissed.*

Celia Fox Barrister.

# Rees v Darlington Memorial Hospital NHS Trust

[2003] UKHL 52

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD HUTTON, LORD MILLETT AND LORD SCOTT OF FOSCOTE

11, 12 JUNE, 16 OCTOBER 2003

*Damages – Unwanted pregnancy – Negligence – Disabled woman wishing to be sterilised because of her disability – Surgeon aware of reason for sterilisation but performing operation negligently – Woman becoming pregnant and giving birth to healthy child – Whether disabled woman entitled to recover costs of bringing up healthy child attributable to her disability where child conceived as a result of negligently-performed sterilisation.*

The claimant, a woman with a genetic condition which left her severely visually disabled, wished to be sterilised. The consultant to whom she was referred knew that her reasons for wanting the operation included her belief that her eyesight would prevent her from looking after children properly. He carried out a sterilisation operation, but did so negligently, and the claimant later gave birth to a normal healthy child. In proceedings for negligence against the defendant hospital trust the claimant sought damages for the full costs of bringing up her child. The judge ruled against the claimant on the determination as a preliminary issue of whether she was in principle entitled to recover any part of the cost of bringing up her child in the light of a previous decision of the House of Lords that able-bodied parents could not recover damages for the costs of bringing up a healthy child born after negligent sterilisation advice, although a mother in such circumstances was entitled to damages for the pain, inconvenience and expense of pregnancy and childbirth. On the claimant's appeal the Court of Appeal held that she was entitled to recover the 'extra' costs of bringing up her child which she would incur as a result of her disability. The hospital trust appealed, submitting that the case was governed by the overriding principle established in the previous decision. The claimant invited the House of Lords to depart from that previous decision as wrongly decided.

**Held** – (1) The previous decision that parents could not recover as damages the cost of bringing up a healthy and normal child born as a result of medical negligence was not to be departed from (see [7], [16], [32], [50], [86], [103], [143], below); *McFarlane v Tayside Health Board* [1999] 4 All ER 961considered.

(2) (Lord Steyn, Lord Hope and Lord Hutton dissenting) The legal policy considerations underpinning the previous decision, which were an unwillingness to regard a child as a financial liability and nothing else; a recognition that the rewards which parenthood, even if involuntary, might or might not bring could not be quantified; and a sense that to award potentially very large sums of damages to the parents of a normal, healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated, applied equally to the circumstances of the instant case. However, the parent of a child born following a negligently-performed vasectomy or sterilisation, or negligent

advice on the effect of such a procedure, was the victim of a legal wrong. There should, accordingly, in all such cases be a conventional award of £15,000 to mark the injury and loss, added to the award for pregnancy and birth. Such an award would not be compensatory, but would afford some measure of recognition of the wrong done. Accordingly, subject to the award of £15,000, the appeal would be allowed (see [6]–[8], [10], [15]–[17], [19], [104], [105], [109], [112], [123], [126], [143], [148], below); *McFarlane v Tayside Health Board* [1999] 4 All ER 961 followed; *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] 3 All ER 97 distinguished.

Decision of the Court of Appeal [2002] 2 All ER 177 reversed.

**Notes**

For failed sterilisation, see 12(1) *Halsbury's Laws* (4th edn reissue) para 896.

**Cases referred to in judgment**

*Benarr v Kettering Health Authority* (1988) 138 NLJ 179.

*Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.

*Cattanach v Melchior* [2003] HCA 38, Aust HC; *affg* [2001] QCA 246, Queensland CA.

*Clark v Novacold Ltd* [1999] ICR 951.

*Donoghue (or M'Alister) v Stevenson* [1932] AC 562, [1932] All ER Rep 1, HL.

*Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462, [1972] 1 QB 373, [1972] 2 WLR 299.

*Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044, [1985] QB 1012, [1985] 2 WLR 233, CA.

*Farley v Skinner* [2001] UKHL 49, [2001] 4 All ER 801, [2002] 2 AC 732, [2001] 3 WLR 899.

*Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, [1977] 1 WLR 1345, HL.

*Goodwin v Patent Office* [1999] ICR 302, [1999] IRLR 4.

*Hadley v Baxendale* (1854) 9 Exch 341, [1843–60] All ER Rep 461, 156 ER 145.

*Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, HL.

*Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1972] 2 All ER 898, [1973] AC 435, [1972] 3 WLR 143, HL.

*Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 3 All ER 209, [2002] 2 AC 883, [2002] 2 WLR 1353.

*Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910, [1980] AC 174, [1979] 3 WLR 44, HL.

*Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, HL.

*McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59, [1999] 3 WLR 1301, HL.

*McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] 1 AC 410, [1992] 2 WLR 982, HL.

*Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, [1976] AC 443, [1975] 3 WLR 758, HL.

*Morgans v Launchbury* [1972] 2 All ER 606, [1973] AC 127, [1972] 2 WLR 1217, HL.

*Murphy v Brentwood DC* [1990] 2 All ER 908, [1991] 1 AC 398, [1990] 3 WLR 414, HL.

*Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97, [2002] QB 266, [2001] 3 WLR 376.

*Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191, [1967] WLR 1666, HL.
*SCM (UK) Ltd v WJ Whittall & Son Ltd* [1970] 3 All ER 245, [1971] 1 QB 337, [1970] 3 WLR 694, CA.
*Shaher v British Aerospace Flying College Ltd* 2003 SLT 791.
*Shaw v DPP* [1961] 2 All ER 446, [1962] AC 220, [1961] 2 WLR 897, HL.
*South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group plc* [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.
*Sutherland Shire Council v Heyman* (1985) 157 CLR 424, Aust HC.
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*White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, [1995] 2 WLR 187, HL.
*Wright v British Railways Board* [1983] 2 All ER 698, [1983] 2 AC 773, [1983] 3 WLR 211, HL.

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*Groom v Selby* [2001] EWCA Civ 1522, (2001) 64 BMLR 47.
*Hardman v Amin* (2000) 59 BMLR 58.
*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.
*Lee v Taunton and Somerset NHS Trust* [2001] 1 FLR 419.
*McKay v Essex Area Health Authority* [1982] 2 All ER 771, [1982] QB 1166, [1982] 2 WLR 890, CA.
*McKernan v Aasheim* (1984) 687 P 2d 850, Wash SC.
*McLelland v Greater Glasgow Health Board* [2002] SLT 446.
*Quebec v Montreal (City)* [2000] 1 SCR 665, Can SC.
*Rand v East Dorset Health Authority* (2000) 56 BMLR 39.
*Rodriguez v A-G of British Columbia* (1993) 50 BMLR 1, Can SC.
*Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831, [1989] 2 WLR 790, HL.
*White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, sub nom *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, [1998] 3 WLR 1509, HL.

**Appeal**

The defendant, County Durham and Darlington Acute Hospitals NHS Ttrust (formerly Darlington Memorial NHS Trust), appealed with permission of the Appeal Committee of the House of Lords given on 17 July 2002 from the judgment of the Court of Appeal (Robert Walker and Hale LJJ, Waller LJ dissenting) on 14 February 2002 ([2002] EWCA Civ 88, [2002] 2 All ER 177) allowing in part the appeal of the claimant, Karina Rees, from the decision of Stuart Brown QC, sitting as a deputy judge of the High Court on 16 May 2001, whereby, on the determination of a preliminary issue, he held that she was not

entitled to recover as damages any of the costs of bringing up her son who was born as a result of the negligence of the defendant. The facts are set out in the opinion of Lord Bingham of Cornhill.

*Jeremy Stuart-Smith QC* (instructed by *Eversheds*, Newcastle) for the defendant.
*Robin de Wilde QC* and *Joseph O'Brien* (instructed by *Blackett Hart & Pratt*, Newcastle) for the claimant.

Their Lordships took time for consideration.

16 October 2003. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

[1] My Lords, in *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59 a husband and wife, themselves healthy and normal, sought to recover as damages the cost of bringing up a healthy and normal child born to the wife, following allegedly negligent advice on the effect of a vasectomy performed on the husband. Differing from the Inner House of the Court of Session (1998 SLT 307), the House unanimously rejected this claim. A factual variant of that case reached the Court of Appeal in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97, [2002] QB 266: the mother, who had undergone a negligently-performed sterilisation operation, conceived and bore a child who was born with severe disabilities. Following *McFarlane*'s case, the Court of Appeal held that the mother could not recover the whole cost of bringing up the child; but it held that she could recover the additional costs she would incur so far as they would be attributable to the child's disabilities. There was no appeal from that decision. The present case raises a further factual variant of *McFarlane*'s case. The claimant in these proceedings (Ms Rees) suffers a severe and progressive visual disability, such that she felt unable to discharge the ordinary duties of a mother, and for that reason wished to be sterilised. She made her wishes known to a consultant employed by the appellant NHS Trust, who carried out a sterilisation operation but did so negligently, and the claimant conceived and bore a son. The child is normal and healthy but the claimant's disability remains. She claimed as damages the cost of rearing the child. The Court of Appeal (Robert Walker and Hale LJJ, Waller LJ dissenting) held that she was entitled to recover the additional costs she would incur so far as they would be attributable to her disability: [2002] EWCA Civ 88, [2002] 2 All ER 177, [2003] QB 20. The appellant NHS Trust now challenges that decision as inconsistent with *McFarlane*'s case. The claimant seeks to uphold the decision, but also claims the whole cost of bringing up the child, inviting the House to reconsider its decision in *McFarlane*'s case.

[2] Since the argument in this appeal the High Court of Australia has given judgment in *Cattanach v Melchior* [2003] HCA 38. That case arose from negligent advice following an incompletely-performed sterilisation operation and one of the issues (the only issue litigated in the High Court) was whether the parents could recover as damages the cost of rearing the child, both parents and child being normal and healthy. The trial judge upheld that claim and her decision was affirmed by a majority of the Court of Appeal of the Supreme Court of Queensland ([2001] QCA 246) and by a bare majority of the High Court. I have found the judgments of the High Court of particular value since, although most of the arguments deployed are not novel (as they could scarcely be, given the

volume of litigation on this subject in many different countries), the division of opinion among the members of the court gives the competing arguments a notable sharpness and clarity.

[3] It is convenient to begin by considering *McFarlane*'s case. In that case there were, as it seems to me, broadly three solutions which the House could have adopted to the problem then before it. (I can, for present purposes, omit two of the solutions which Kirby J listed in para 138 of his judgment in *Melchior*'s case but gratefully adopt his formulation of the remaining three, while altering their order). They were the following. (1) That full damages against the tortfeasor for the cost of rearing the child may be allowed, subject to the ordinary limitations of reasonable foreseeability and remoteness, with no discount for joys, benefits and support, leaving restrictions upon such recovery to such limitations as may be enacted by a Parliament with authority to do so. (2) That damages may be recovered in full for the reasonable costs of rearing an unplanned child to the age when that child might be expected to be economically self-reliant, whether the child is 'healthy' or 'disabled' or 'impaired' but with a deduction from the amount of such damages for the joy and benefits received, and the potential economic support derived, from the child. (3) That no damages may be recovered where the child is born healthy and without disability or impairment.

[4] An orthodox application of familiar and conventional principles of the law of tort would, I think, have pointed towards acceptance of the first of these solutions. The surgeon whose allegedly negligent advice gave rise to the action was exercising his professional skill for the benefit of the McFarlanes who relied on it. The foreseeable result of negligent advice would be the birth of a child, the very thing they wished to avoid. No one can be unaware that bringing up a child has a financial cost. All members of the House accepted that the surgeon owed a duty of care to the McFarlanes, and the foreseeable result was that which occurred. Thus the proven violation of a legal right would lead to a compensatory remedy. I do not find it surprising that this solution has been supported by the line of English authority which preceded *McFarlane*'s case (*Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044, [1985] QB 1012, *Thake v Maurice* [1986] 1 All ER 497, [1986] 1 QB 644, *Benarr v Kettering Health Authority* (1988) 138 NLJ 179), by the Inner House in *McFarlane*'s case itself (1998 SLT 307), by decisions of the Hoge Raad in the Netherlands and the Bundesverfassungsgericht in Germany (see Keuleneer, Androulidakis-Dimitriadis and Pozzo *European Review of Private Law* (1999) 2:241–256) and now by a majority of the High Court of Australia. Faithful adherence to the precepts articulated by Lord Scarman in *McLoughlin v O'Brian* [1982] 2 All ER 298 at 309, [1983] 1 AC 410 at 429–430 would have pointed towards adoption of this first solution.

[5] The second solution has been adopted in 6 state courts in the United States (see La Croix and Martin 'Damages in Wrongful Pregnancy Tort Actions', in Ireland and Ward *Assessing Damages in Injuries and Deaths of Minor Children* (2002) pp 93, 97–98, quoted by Callinan J in his judgment in *Melchior*'s case at para 287). But this solution did not commend itself to any member of the House in *McFarlane*'s case or any member of the High Court in *Melchior*'s case, it was not supported by counsel in the present appeal and the objections to it are in my opinion insuperable. While it would be possible to assess with some show of plausibility the likely discounted cost of rearing a child until the age when the child might reasonably be expected to become self-supporting, any attempt to quantify in money terms the value of the joys and benefits which the parents

might receive from the unintended child, or any economic benefit they might derive from it, would, made when the child is no more than an infant, be an exercise in pure speculation to which no court of law should lend itself. I need say no more of this possible solution.

[6] The five members of the House who gave judgment in *McFarlane*'s case adopted different approaches and gave different reasons for adopting the third solution listed in [3], above. But it seems to me clear that all of them were moved to adopt it for reasons of policy (legal, not public, policy). This is not a criticism. As Lord Denning MR said in *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462 at 475, [1972] 1 QB 373 at 397–398:

> 'This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11: but it is a question whether we should apply them here. In *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1023, [1970] 2 All ER 294 at 297, Lord Reid said that the words of Lord Atkin expressed a principle which ought to apply in general "unless there is some justification or valid explanation for its exclusion". So did Lord Pearson ([1970] 2 All ER 294 at 321, [1970] AC 1004 at 1054). But Lord Diplock spoke differently. He said it was a guide but not a principle of universal application ([1970] 2 All ER 294 at 325–326, [1970] AC 1004 at 1060). It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing. In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth. Nowadays we direct ourselves to considerations of policy. In *Rondel v Worsley* ([1967] 3 All ER 993, [1969] 1 AC 191), we thought that if advocates were liable to be sued for negligence they would be hampered in carrying out their duties. In *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, we thought that the Home Office ought to pay for damage done by escaping Borstal boys, if the staff was negligent, but we confined it to damage done in the immediate vicinity. In *SCM (UK) Ltd v WJ Whittall & Son Ltd* ([1970] 3 All ER 245, [1971] 1 QB 337), some of us thought that economic loss ought not to be put on one pair of shoulders, but spread among all the sufferers. In *Launchbury v Morgans*, we thought that as the owner of the family car was insured she should bear the loss. In short, we look at the relationship of the parties: and then say, as matter of policy, on whom the loss should fall.'

The policy considerations underpinning the judgments of the House were, as I read them, an unwillingness to regard a child (even if unwanted) as a financial liability and nothing else, a recognition that the rewards which parenthood (even if involuntary) may or may not bring cannot be quantified and a sense that to award potentially very large sums of damages to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public

resources should be allocated. Kirby J was surely right to suggest (in his judgment in *Cattanach v Melchior* [2003] HCA 38 (at para 178)) that:

> 'Concern to protect the viability of the National Health Service at a time of multiple demands upon it might indeed help to explain the invocation in the House of Lords in *McFarlane* of the notion of "distributive justice".'

It is indeed hard to think that, if the House had adopted the first solution discussed above, its decision would have long survived the first award to well-to-do parents of the estimated cost of providing private education, presents, clothing and foreign holidays for an unwanted child (even if at no more expensive a level than the parents had provided for earlier, wanted, children) against a National Health Service found to be responsible, by its negligence, for the birth of the child. In favouring the third solution, holding the damages claimed to be irrecoverable, the House allied itself with the great majority of state courts in the United States and relied on arguments now strongly supported by the dissenting judgments of Gleeson CJ, Hayne and Heydon JJ in *Melchior*'s case.

[7] I am of the clear opinion, for reasons more fully given by my noble and learned friends, that it would be wholly contrary to the practice of the House to disturb its unanimous decision in *McFarlane*'s case given as recently as four years ago, even if a differently-constituted committee were to conclude that a different solution should have been adopted. It would reflect no credit on the administration of the law if a line of English authority were to be disapproved in 1999 and reinstated in 2003 with no reason for the change beyond a change in the balance of judicial opinion. I am not in any event persuaded that the arguments which the House rejected in 1999 should now be accepted, or that the policy considerations which (as I think) drove the decision have lost their potency. Subject to one gloss, therefore, which I regard as important, I would affirm and adhere to the decision in *McFarlane*'s case.

[8] My concern is this. Even accepting that an unwanted child cannot be regarded as a financial liability and nothing else and that any attempt to weigh the costs of bringing up a child against the intangible rewards of parenthood is unacceptably speculative, the fact remains that the parent of a child born following a negligently-performed vasectomy or sterilisation, or negligent advice on the effect of such a procedure, is the victim of a legal wrong. The members of the House who gave judgment in *McFarlane*'s case recognised this by holding, in each case, that some award should be made to Mrs McFarlane (although Lord Millett based this on a ground which differed from that of the other members and he would have made a joint award to Mr and Mrs McFarlane). I can accept and support a rule of legal policy which precludes recovery of the full cost of bringing up a child in the situation postulated, but I question the fairness of a rule which denies the victim of a legal wrong any recompense at all beyond an award immediately related to the unwanted pregnancy and birth. The spectre of well-to-do parents plundering the National Health Service should not blind one to other realities: that of the single mother with young children, struggling to make ends meet and counting the days until her children are of an age to enable her to work more hours and so enable the family to live a less straitened existence; the mother whose burning ambition is to put domestic chores so far as possible behind her and embark on a new career or resume an old one. Examples can be multiplied. To speak of losing the freedom to limit the size of one's family is to mask the real loss suffered in a situation of this kind. This is that a parent, particularly (even today) the mother, has been denied, through the

negligence of another, the opportunity to live her life in the way that she wished and planned. I do not think that an award immediately relating to the unwanted pregnancy and birth gives adequate recognition of or does justice to that loss. I would accordingly support the suggestion favoured by Lord Millett in *McFarlane*'s case ([1999] 4 All ER 961 at 158, [2000] 2 AC 59 at 114) that in all cases such as these there be a conventional award to mark the injury and loss, although I would favour a greater figure than the £5,000 he suggested (I have in mind a conventional figure of £15,000) and I would add this to the award for the pregnancy and birth. This solution is in my opinion consistent with the ruling and rationale of *McFarlane*'s case. The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done. And it would afford a more ample measure of justice than the pure *McFarlane*'s case rule.

**[9]** I would for my part apply this rule also, without differentiation, to cases in which either the child or the parent is (or claims to be) disabled. (1) While I have every sympathy with the Court of Appeal's view that Mrs Parkinson should be compensated, it is arguably anomalous that the defendant's liability should be related to a disability which the doctor's negligence did not cause and not to the birth which it did. (2) The rule favoured by the Court of Appeal majority in the present case inevitably gives rise to anomalies such as those highlighted by Waller LJ in paras [53]–[54] of his dissenting judgment. (3) It is undesirable that parents, in order to recover compensation, should be encouraged to portray either their children or themselves as disabled. There is force in the points made by Kirby J in paras 163–166 of his judgment in *Melchior*'s case. (4) In a state such as ours, which seeks to make public provision for the consequences of disability, the quantification of additional costs attributable to disability, whether of the parent or the child, is a task of acute difficulty. This is highlighted by the inability of the claimant in this appeal to give any realistic indication of the additional costs she seeks to recover.

**[10]** I would accordingly allow the appeal, set aside the orders of the Court of Appeal and of the deputy judge, and order that judgment be entered for the claimant for £15,000. I would invite the parties to make written submissions on costs within 14 days.

**LORD NICHOLLS OF BIRKENHEAD.**

**[11]** My Lords, in this appeal, as in the recent case of *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59, your Lordships' House has to make a decision concerning the development of the law in a field which is highly controversial and, therefore, exceedingly difficult. What should be the policy of the law on the award of damages when an unwanted pregnancy occurs, and an unintended child is born, following professionally negligent medical procedures or advice? Should the doctor or the hospital be required to pay the cost of bringing up the child to an age when he will be self-supporting?

**[12]** The parent's claim in this type of case can be stated simply. The negligent doctor committed a legal wrong towards the parent, and the precise event the parent sought to avoid then happened: the birth of a child. On ordinary legal principles the foreseeable adverse financial consequences of a legal wrong may expect to be borne by him who committed the wrong. Here the cost of bringing up the child was foreseeable and, indeed, may have been one of the very reasons why the parent sought to avoid pregnancy.

[13] This argument is forceful. But it is important to keep in mind that the law's evaluation of the damages recoverable for a legal wrong is not an automatic, mechanical exercise. Recoverability of damages is always bounded by considerations of fairness and reasonableness: see *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19 at [69]–[70], [2002] 3 All ER 209 at [69]–[70], [2002] 2 AC 883. So the answers to the questions I have stated calls for an assessment of what is fair and reasonable in cases of this nature.

[14] Judges of course do not have, and do not claim to have, any special insight into what contemporary society regards as fair and reasonable, although their legal expertise enables them to promote a desirable degree of consistency from one case or type of case to the next, and to avoid other pitfalls. But, however controversial and difficult the subject matter, judges are required to decide the cases brought before the courts. Where necessary, therefore, they must form a view on what are the requirements of fairness and reasonableness in a novel type of case.

[15] In *McFarlane*'s case, your Lordships' House held unanimously that a negligent doctor is not required to meet the cost of bringing up a healthy child born in these circumstances. The language, and to some extent the legal reasoning, employed by each of their Lordships differed. But, however expressed, the underlying perception of all their Lordships was that fairness and reasonableness do not require that the damages payable by a negligent doctor should extend so far. The approach usually adopted in measuring recoverable financial loss is not appropriate when the subject of the legal wrong is the birth of an unintended healthy child and the head of claim is the cost of the whole of the child's upbringing.

[16] I have heard nothing in the submissions advanced on the present appeal to persuade me that this decision by the House was wrong and ought to be revisited. On the contrary, that the negligent doctor or, in most cases, the National Health Service should pay all the costs of bringing up the child seems to me a disproportionate response to the doctor's wrong. It would accord ill with the values society attaches to human life and to parenthood. The birth of a child should not be treated as comparable to a parent suffering a personal injury, with the cost of rearing the child being treated as special damages akin to the financially adverse consequences flowing from the onset of a chronic medical condition.

[17] But this is not to say it is fair and reasonable there should be no award at all except in respect of stress and trauma and costs associated with the pregnancy and the birth itself. An award of some amount should be made to recognise that in respect of birth of the child the parent has suffered a legal wrong, a legal wrong having a far-reaching effect on the lives of the parent and any family she may already have. The amount of such an award will inevitably have an arbitrary character. I do not dissent from the sum of £15,000 suggested by my noble and learned friend Lord Bingham of Cornhill in this regard. To this limited extent I agree that your Lordships' House should add a gloss to the decision in *McFarlane*'s case.

[18] Once it is decided that damages do not include the cost of bringing up a healthy child, anomalies such as those noted by Waller LJ in the Court of Appeal in the present case become inescapable if an exception is made when either the child or the mother is disabled. The personal circumstances where this problem arises will vary so widely that what is fair and reasonable in one set of family circumstances, including the financial means of the family, may not seem so in

another. But awards of damages of this nature cannot sensibly be made by courts on a discretionary or means-tested basis. The preferable approach is an award of a lump sum of modest amount in all circumstances.

**[19]** For these reasons, and also the reasons given by Lord Bingham of Cornhill, I would allow this appeal, and set aside the orders of the Court of Appeal and of Stuart Brown QC sitting as a deputy High Court judge. In response to the preliminary issue I would declare that the claimant is not entitled to recover any of the costs of bringing up the child Anthony, but she is entitled to payment of £15,000.

**LORD STEYN.**

I. A DISABLED MOTHER AND A FAILED STERILISATION

**[20]** My Lords, Ms Karina Rees is now 31 years of age. She suffers from a genetic condition known as retinitis pigmentosa. Since the age of two she has been blind in one eye and has limited vision (6/36) in the other. She is severely visually handicapped.

**[21]** In 1995 Ms Rees consulted her general medical practitioner with a view to undergoing a sterilisation procedure. The GP referred her to a consultant gynaecologist at the Darlington Memorial Hospital. The referral letter to the consultant explained that: (a) Ms Rees was registered partially sighted; (b) her vision had deteriorated over the last few years and she had recently given up work; (c) she had great difficulty in finding a suitable method of contraception and at times had requested the morning after pill; (d) she was single and had been advised that the sterilisation would be irreversible but she was adamant that she did not want and would never want children; (e) she felt that her eyesight would prevent her from looking after children properly; (f) she was anxious about health matters and scared at the thought of labour and delivery. When Ms Rees saw the consultant, she told him that she did not want to have children. She told him that her very poor eyesight would make it very difficult for her to look after a baby.

**[22]** On 18 July 1995 the consultant performed the sterilisation operation. He did not adequately occlude the fallopian tubes. Ms Rees was unaware that the sterilisation operation had failed.

**[23]** In July 1996 Ms Rees became pregnant. On 28 April 1997 she gave birth to a son, Anthony. His father has no desire to be involved with him. There is a risk that Anthony has inherited retinitis pigmentosa but it is low. Anthony is a healthy and normal child. Very little is known about the impact of Ms Rees' disability on the way in which she cares for Anthony. The Court of Appeal was, however, told that she is bringing up Anthony herself with the help of her mother and other relatives who live nearby. The Court of Appeal was also told that Ms Rees does not cook because she feels it to be too dangerous but that she does try to dress the child.

II. THE PROCEEDINGS BELOW

**[24]** On 21 September 1999 Ms Rees issued proceedings in the Darlington County Court claiming damages for negligence arising out of the failure of the sterilisation operation. By her amended particulars of claim she claimed the cost of bringing up Anthony to his majority which costs would include expenses that would be common to the upbringing of Anthony by a mother who was healthy and expenses that would be incurred by her as a result of her

visual handicap. By its defence the NHS Hospital Trust admitted that the sterilisation operation was performed negligently but it denied liability for any part of the cost of bringing up Anthony. The case was transferred to the High Court. On 1 May 2001 Mr Stuart Brown QC, sitting as a deputy judge of the High Court, heard a preliminary issue. The purpose of the preliminary issue was to determine whether Ms Rees was in principle entitled to recover any part of the cost of bringing up Anthony in the light of the decision of the House of Lords in *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59. In *McFarlane*'s case this House had decided that parents of a healthy child, born after negligent sterilisation advice, could not recover in tort the cost of bringing up the child. At the same time the House held that a modest solatium in respect of the pain and suffering associated with pregnancy and childbirth may be awarded. On 16 May 2001, the judge held that Ms Rees was not entitled to recover any part of the costs of bringing up Anthony.

**[25]** When the matter came before the Court of Appeal it had before it not only the decision of the House in *McFarlane*'s case but also the subsequent decision of the Court of Appeal in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97, [2002] QB 266 where it was held that in a failed sterilisation case the extra costs of discharging parental responsibility towards *a disabled child* is unaffected by *McFarlane*'s case and can in principle be recovered. There was no appeal against this decision. On 14 February 2002 by a majority the Court of Appeal (Hale and Robert Walker LJJ, with Waller LJ dissenting) allowed the appeal of the claimant and held that *a disabled parent* is entitled to recover those 'extra' costs involved in discharging his or her responsibility to bring up a healthy child which are attributable to and incurred as a result of the fact of the parent's disability: *Rees v Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88, [2002] 2 All ER 177, [2003] QB 20. Unfortunately, there was no information before the Court of Appeal as how, if at all, it is more costly for the claimant to look after Anthony than it would be for a mother who does not have her disability.

### III. THE ISSUES BEFORE THE HOUSE

**[26]** The agreed issue before the House reads as follows:

> 'In the light of the decision of the House of Lords in *McFarlane v Tayside Health Board* where a person who suffers from a physical disability undergoes a negligently performed sterilisation operation, conceives, gives birth to a healthy child and, as a consequence of the birth of the child incurs: (a) costs of bringing up the healthy child which would be incurred by a healthy parent; and (b) additional costs of bringing up the healthy child which would not be incurred by a healthy parent and which are incurred because of the particular parent's physical disability; which of those costs of bringing up the healthy child (if any) may be recovered by the parent in an action in negligence brought against the person responsible for the performance of the sterilisation.'

Despite this formulation of the issue, the case for the claimant at the hearing before the House appeared to be restricted to seeking to recover the extra cost involved in discharging her responsibility for bringing up a healthy child which are incurred as a result of her disability. The House has the same meagre information before it as the Court of Appeal had. There is in particular no information before the House as to how, if at all, it is more costly for the

claimant to look after Anthony than it would be for a mother who does not have the disability. In what has been a complex case this has proved to be a difficulty.

**[27]** It is necessary to explain the framework of the appeal in more detail. First it was submitted on behalf of the claimant that the House wrongly decided *McFarlane*'s case. If this challenge succeeds, it is common ground that the claimant is entitled to succeed and the appeal of the NHS Trust Hospital must be dismissed. If it fails, other issues arise. The second issue, relevant by analogy and not direct application, is whether the decision in *Parkinson*'s case, which laid down that the case of a disabled child falls outside the scope of the principle laid down in *McFarlane*'s case, was correct. The answer to this question has some bearing on the ultimate decision in the instant case. The third question is then whether the majority in the Court of Appeal in the present case correctly held that the decision in *McFarlane*'s case does not preclude recovery by a disabled parent of a healthy child of the extra cost of caring for the child.

IV. THE CHALLENGE TO THE DECISION IN *McFARLANE*

**[28]** I do not propose to undertake the gruesome task of discussing the judgments in *McFarlane*'s case. But it is necessary to explain briefly what was decided in *McFarlane*'s case. It was held that the cost of parents caring for a healthy and normal child, born as a result of negligent sterilisation advice, was not recoverable in tort. There was undoubtedly divergence between the reasoning in the speeches. Subject to Lord Millett's view that a modest conventional sum—he mentioned £5,000 ([1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 114)—could be awarded there was unanimity on the outcome of the principal claim for the cost of bringing up the child. There is a clear ratio. Moreover, despite differences in reasoning, two features were crucial. First, in monetary terms it is impossible to calculate the benefits of avoiding a birth and having a healthy child. In *Parkinson*'s case Hale LJ sought to rationalise the decision in *McFarlane*'s case by saying that it depended on a deemed equilibrium theory: [2001] 3 All ER 97 at [87]–[91]. That is not a correct interpretation of *McFarlane*'s case. Instead the emphasis was squarely on the impossibility of undertaking a process of weighing the advantages and disadvantages. The second feature was explained by Lord Millett as follows ([1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 113–114):

> 'In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. *But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.*' (My emphasis.)

These I believe to be themes which led the Law Lords sitting in the case to reject the claim for the cost of bringing up the healthy child: see [1999] 4 All ER 961 at 971, 972, 978, 990, 996, 1002, [2000] 2 AC 59 at 75, 76, 83, 97, 103 and 111 per Lord Slynn of Hadley, my judgment, Lord Hope of Craighead, Lord Clyde and Lord Millett respectively.

**[29]** That brings me to the question what the foundation of this reasoning was. For my part the answer is clear. The House did not rest its decision on public policy in a conventional sense: Lord Slynn of Hadley ([1999] 4 All ER 961 at 972, [2000] 2 AC 59 at 76); my judgment ([1999] 4 All ER 961 at 978, [2000] 2 AC 59 at 83); Lord Hope of Craighead ([1999] 4 All ER 961 at 988, [2000] 2 AC 59 at 95); Lord Clyde ([1999] 4 All ER 961 at 993, [2000] 2 AC 59 at 100); and Lord Millett ([1999] 4 All ER 961 at 1000, [2000] 2 AC 59 at 108). Instead the Law Lords relied on legal policy. In considering this question the House was bound, in the circumstances of the case, to consider what in their view the ordinary citizen would regard as morally acceptable. Invoking the moral theory of distributive justice, and the requirements of being just, fair and reasonable, culled from case law, are in context simply routes to establishing the legal policy.

**[30]** Now I turn to the question whether this conclusion was reached on the basis that there was absence of a duty of care in respect of the cost of bringing up a healthy and normal child or whether the decision was made on the basis that this head of loss is not recoverable. This question arises because there was undoubtedly a duty of care to the extent that the mother was allowed to recover for pain and suffering associated with the pregnancy and childbirth. Some Law Lords thought that an absence of a duty of care was the correct analysis and others thought it was a matter of irrecoverability of a head of loss. In my opinion the former view is entirely orthodox: see Lord Hope of Craighead ([1999] 4 All ER 961 at 989, [2000] 2 AC 59 at 95–96): see also Lord Slynn of Hadley ([1999] 4 All ER 961 at 972, [2000] 2 AC 59 at 76); and my judgment ([1999] 4 All ER 961 at 978, [2000] 2 AC 59 at 83). On the other hand, the latter is an equally valid explanation: Lord Clyde ([1999] 4 All ER 961 at 998, [2000] 2 AC 59 at 105); and Lord Millett ([1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 113–114). One is perhaps in the area of conceptualistic thinking—what some overseas writers have impolitely called professors' law. Provided that one is clear about the foundation and reach of the legal policy involved, the difference in method is not of great importance. In this case the two concepts yield the same results.

**[31]** It is now necessary to consider how an invitation to depart from a decision of the House should be approached. *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234, which announced that such a course was possible, was in no sense an open sesame for a differently-constituted committee to prefer their views to those of the committee which determined the decision unanimously or by a majority. That would be a licence not appropriate to final decision-making by a supreme court. In *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1972] 2 All ER 898, [1973] AC 435 Lord Reid considered the point. He observed ([1972] 2 All ER 898 at 902–903, [1973] AC 435 at 455):

> 'It was decided by this House in *Shaw v DPP* ([1961] 2 All ER 446, [1962] AC 220) that conspiracy to corrupt public morals is a crime known to the law of England. So if the appellants are to succeed on this count, either this House must reverse that decision or there must be sufficient grounds for distinguishing this case. The appellants' main argument is that we should reconsider that decision; alternatively they submit that it can and should be distinguished.
>
> I dissented in *Shaw*'s case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of

practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act ... I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament.'

This led the House to refuse to depart from a decision given 11 years earlier even if it had been wrong. In *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, [1977] 1 WLR 1345 the House returned to the point. There was an invitation to the House to depart from a majority decision (by 3:2) in a previous case decided 11 years before. Lord Wilberforce observed (with the express agreement of Lord Salmon and Lord Keith) ([1977] 3 All ER 996 at 999, [1977] 1 WLR 1345 at 1349):

'There is therefore nothing left to the taxpayer but to contend, as it frankly does, that the 1966 decision is wrong. This contention means, when interpreted, that three or more of your Lordships ought to take the view which appealed then to the minority.

My Lords, in my firm opinion, the 1966 Practice Statement ([1966] 3 All ER 77, [1966] 1 WLR 1234) was never intended to allow and should not be considered to allow such a course. Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view, which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate, two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.'

Viscount Dilhorne and Lord Edmund-Davies gave speeches along the same lines. None of this detracts from the power of the House to depart from a previous decision where there are cogent reasons to do so. Without trying to be exhaustive, I would mention that a fundamental change in circumstances such as was before the House in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, [1976] AC 443, or experience showing that a decision of the House results in unforeseen serious injustice, may permit such a departure.

**[32]** The issue in *McFarlane*'s case was a profoundly controversial one. Ultimately, there was a choice to be made between eminently reasonable competing arguments. The House carefully examined the earlier domestic case law. The House embarked on an extensive review of the comparative jurisprudence. It is not suggested that this examination did not reveal the range of feasible solutions. The subsequent decision in *Cattanach v Melchior* [2003] HCA 38 (16 July 2003) where by a 4:3 majority the High Court of Australia decided in favour of recovery merely underlines the controversiality of the problem and the range of views on the subject. In *McFarlane*'s case the House examined the applicable principles and relevant analogies in great depth. It is not argued that the House overlooked any arguments of substance. Rather counsel for the

claimant invites the House to say that the Law Lords in *McFarlane*'s case made the wrong choice. For my part it would be entirely wrong for the House, differently constituted today, to depart from *McFarlane*'s case even if some Law Lords had been persuaded that they would have decided the case differently.

[33] Having listened to the argument of counsel for the claimant that *McFarlane*'s case was wrongly decided—an argument somewhat less detailed and rigorous than was before the House in *McFarlane*'s case—I have to say I am satisfied that the House came to the correct conclusion four years ago. The comparative review before the House showed that, although the subject is controversial and that the solutions vary, the decision in *McFarlane*'s case is probably that followed in a majority of jurisdictions. There has been academic criticism of *McFarlane*'s case. There is disagreement among writers about the correctness of the outcome: see, for example, Tony Weir *A Casebook on Tort* (9th edn, 2000) p 131; Joe Thomson 'Abandoning the Law of Delict? *McFarlane v Tayside Health Board* in the Lords' 2000 SLT 43; Laura CH Hoyano 'Misconceptions about Wrongful Conception' (2002) 65 MLR 883. Accepting that the subject is a highly controversial one, the decision of the House, rooted as it was in morality, justice and legal policy, represented the least bad choice. For my part the decision in *McFarlane*'s case was a sound one.

V. PARKINSON: A DISABLED CHILD

[34] Throughout the speeches in *McFarlane*'s case runs the strong emphasis on the birth of a healthy and normal child. The opinions show that the House was fully alive to the different considerations which arise if the child is seriously disabled. But the case then before the House did not require a decision on such a case.

[35] When the issue involving a disabled child came before the Court of Appeal in *Parkinson*'s case the ruling was unanimous that such a case is not affected by *McFarlane*'s case. While not wishing to endorse everything said in the detailed judgments of Brooke and Hale LJJ, I agree with the decision. The legal policy on which *McFarlane*'s case was based is critically dependent on the birth of a healthy and normal child. That policy does not apply where the child is seriously disabled physically and/or mentally. In such cases normal principles of corrective justice permit recovery of compensation for the costs of providing for the child's needs and care relating to his disability but not for the basic costs of his maintenance.

VI. REES: THE DISABLED MOTHER

[36] The position of a disabled mother who gives birth to a healthy and normal child was not considered in *McFarlane*'s case. And to the best of my knowledge the Law Lords did not have it in mind at all. What the House would have said if in *McFarlane*'s case the claim was by a seriously disabled mother, who had told the surgeon that due to her incapacities she would be unable to look after a child, is a matter of speculation. But the House must now grapple with this difficult case.

[37] Unlike the position of the disabled child, it is not possible to regard the disabled mother of a healthy and normal child as unaffected by the principle in *McFarlane*'s case. On the contrary, an award of damages in the present case is only possible if an exception is created. That this is so becomes even clearer if one considers the grounds of legal policy which underpin *McFarlane*'s case as I have explained them.

[38] In a powerful dissenting judgment in *Rees'* case, Waller LJ explained why he regarded such an exception as unacceptable I set out the core of his reasoning. He observed ([2002] 2 All ER 177 at [52]–[55]):

> '[52] Where the court is concerned with the birth of a healthy child, it seems to me that before contemplating the making of an exception to the general rule established by *McFarlane's* case one must examine with even greater care (if that is possible) whether any exception is justified, because (as I have stressed) the House of Lords were concerned with the award of damages in relation to the birth of a healthy child. In that context one must take into consideration how such an exception would be perceived by others who, as already stated, would have recovered damages on normal principles but will not recover because of the *McFarlane* decision, or, perhaps more accurately, one must take into account how the ordinary person would perceive the fairness of the exception.
>
> [53] Let me address some examples, I hope not too extreme. If one takes the facts to be that a woman already has four children and wishes not to have a fifth; and if one assumes that having the fifth will create a crisis in health terms, unless help in caring for the child was available. She cannot recover the costs of caring for the child which might alleviate the crisis, as I understand *McFarlane's* case. I would have thought that her need to avoid a breakdown in her health was no different from the need of someone already with a disability, and indeed her need might be greater depending on the degree of disability. Does she, or ordinary people, look favourably on the law not allowing her to recover but allowing someone who is disabled to recover?
>
> [54] If one were to add that the lady with four children was poor, but the lady with a disability was rich—what then? It would simply emphasise the perception that the rule was not operating fairly. One can add to the example by making comparisons between possible family circumstances of the different mothers. Assume the mother with four children had no support from husband, mother or siblings, and then compare her with the person who is disabled, but who has a husband, siblings and a mother all willing to help. I think ordinary people would feel uncomfortable about the thought that it was simply the disability which made a difference.
>
> [55] If a disabled person has a healthy child, and finds that she can, contrary to her anxieties, cope with that child with the help of family and others, I would have thought that in Lord Hope's words the benefits of having that child would be incalculable. It is the fact that such benefits of having that healthy child are incalculable which it seems to me leads to the result that the court simply should not give damages for the birth of that child. It is because the court is simply not prepared to go into a calculation which involves weighing one aspect against the other which in my view should bring about the conclusion that it is not fair, just, and reasonable that a disabled person should recover when other mothers in as great a need cannot. On the basis of distributive justice I believe that ordinary people would think that it was not fair that a disabled person should recover when mothers who may in effect become disabled by ill-health through having a healthy child would not.'

The examples given by Waller LJ at [53], [54] are telling. I would accept that there is an element of arbitrariness involved in holding that only the disabled mother

of a healthy and normal child can claim damages. Since it is of prime importance that the law must avoid arbitrariness this creates a serious difficulty.

**[39]** On the other hand, there is great force in the observations of Robert Walker LJ. He held (at [41]):

> 'But these difficulties should not in my view deter this court from allowing the possibility of recovery (which is all it is, on the preliminary issue) in circumstances which, as I see it, are not covered by McFarlane's case and are a legitimate extension of *Parkinson*'s case. Disabled persons are a category of the public whom the law increasingly recognises as requiring special consideration (the Disability Discrimination Act 1995 is an important landmark) and the developing law as to disability should (as Hale LJ explained in *Parkinson*'s case [2001] 3 All ER 97 at [91]) avoid the sort of definitional problems which Lord Hoffmann referred to in *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1 at 47, [1999] 2 AC 455 at 510.'

How is this tension between cogent arguments pulling in opposite directions to be resolved? In jurisprudential and positive law terms this is a truly hard case. It is unrealistic to say that there is only one right answer. But a decision must be made, and that decision must represent the best available choice and hopefully a decision defensible as delivering justice. For reasons which are apparent from this opinion it is logically not straightforward to treat the present case as simply an extension of *Parkinson*'s case. On the other hand, I consider (like Hale and Walker LJJ) that the law should give special consideration to the serious disability of a mother who had wanted to avoid having a child by undergoing a sterilisation operation. I am persuaded that the injustice of denying to such a seriously disabled mother the limited remedy of the extra costs caused by her disability outweighs the considerations emphasised by Waller LJ.

VII. A CONVENTIONAL AWARD

**[40]** Lord Bingham has explained why he favours a conventional award of £15,000 in the present case. His opinion makes clear that to this extent he would depart from *McFarlane*'s case in the case of a healthy and normal child. He has further observed that he would apply this rule, without differentiation, to cases in which either the child or the parent is (or claims to be) disabled. This involves overruling the majority of the Court of Appeal in the present case. It also involves overruling the Court of Appeal decision in *Parkinson*'s case against which there was no appeal. The other opinions in the present case speak for themselves.

**[41]** As Lord Bingham has said the suggestion was first made by Lord Millett in *McFarlane*'s case ([1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 114). It is true that none of the members of the majority in *McFarlane*'s case discussed the point. It was, of course, not an issue at all in *McFarlane*'s case. But it would be wrong to assume that the majority did not consider it. Like Lord Hope I considered it but found it unacceptable. And without doubt that was also the position of Lord Slynn and Lord Clyde. The proposal for a conventional award therefore runs counter to the views of the majority in *McFarlane*'s case. Now the idea appeals to a narrow majority of a differently-constituted Appellate Committee. This does not mean that the point cannot be re-examined but it certainly suggests that the matter should be examined with great care and due observance of the usual procedures.

**[42]** In *Parkinson*'s case the idea of a conventional award was not raised at all. It could, of course, have been raised as an alternative. The reason was no doubt that after *McFarlane*'s case it was thought that this avenue was no longer open.

**[43]** In the present case the idea of a conventional award was not raised at first instance or in the Court of Appeal. For my part it is a great disadvantage for the House to consider such a point without the benefit of the views of the Court of Appeal. And the disadvantage cannot be removed by calling the new rule a 'gloss'. It is a radical and most important development which should only be embarked on after rigorous examination of competing arguments.

**[44]** It is clear from the agreed statement of facts and issues, as well as the printed case of the parties, that the idea of a conventional award was not an issue in the present case until the oral hearing. It is true that questions along these lines were put in oral argument but the examination of the issue was cursory and unaccompanied by research.

**[45]** No United Kingdom authority is cited for the proposition that judges have the power to create a remedy of awarding a conventional sum in cases such as the present. There is none. It is also noteworthy that in none of the decisions from many foreign jurisdictions, with varying results, is there any support for such a solution. This underlines the heterodox nature of the solution adopted.

**[46]** Like Lord Hope I regard the idea of a conventional award in the present case as contrary to principle. It is a novel procedure for judges to create such a remedy. There are limits to permissible creativity for judges. In my view the majority have strayed into forbidden territory. It is also a backdoor evasion of the legal policy enunciated in *McFarlane*'s case. If such a rule is to be created it must be done by Parliament. The fact is, however, that it would be a hugely controversial legislative measure. It may well be that the Law Commissions and Parliament ought in any event, to consider the impact of the creation of a power to make a conventional award in the cases under consideration for the coherence of the tort system.

**[47]** I cannot support the proposal for creating such a new rule.

VIII. THE CONCLUSION AND DISPOSAL

**[48]** While I am troubled by the wholly unparticularised nature of the claim I would allow the claim of Ms Rees to be pursued. For avoidance of doubt I add that the cases mentioned by Waller LJ, at [53], [54] of his judgment are on the wrong side of the line drawn in *McFarlane*'s case and I would not extend the exception to such cases.

**[49]** I would dismiss the appeal of the NHS Hospital Trust.

**LORD HOPE OF CRAIGHEAD.**

**[50]** My Lords, my noble and learned friend Lord Steyn has summarised the facts of this case, and I gratefully adopt his account of them. I cannot improve upon his masterly analysis of the decision of this House in *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59 that the costs of rearing a normal and healthy child were not recoverable. I also agree with him, for all the reasons that he has given, that it would be wrong for the House now to depart from *McFarlane*'s case even if some of your Lordships had been persuaded that they would have decided the case differently.

**[51]** When I was giving my reasons for the decision in *McFarlane*'s case I said that the value which was to be attached to the benefits which would have to be set off against the costs of rearing the child were incalculable: [1999] 4 All ER 961 at 991,

[2000] 2 AC 59 at 97. I did not base my decision on a belief that it was morally repugnant to award damages for the birth of a healthy child. As Gleeson CJ observed in *Cattanach v Melchior* [2003] HCA 38 (at para 6), the fundamental value which is attached to human life is an ethical, not an economic, concept and the problem which had to be addressed was legal, not theological. It was the insuperable problem of calculation that was the critical point in the decision so far as I was concerned. If, as I believe, it is impossible to measure the benefits, it must follow that no value can properly be arrived at for the balance that would need to be struck between the costs and the benefits to arrive at a figure which could be awarded as damages. The conclusion which I drew was that, for this reason, these costs must be held to fall outside the ambit of the duty of care which was owed to the pursuers by the persons who carried out the procedures in the hospital and the laboratory.

**[52]** In expressing myself in that way I was adopting the approach to economic loss which was indicated by Lord Oliver of Aylmerton in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 599, [1990] 2 AC 605 at 651 and in *Murphy v Brentwood DC* [1990] 2 All ER 908 at 934, [1991] 1 AC 398 at 486–487. I share the view which Gleeson CJ expressed in *Melchior*'s case [2003] HCA 38 (at para 30), that the claim was one for the recovery of pure economic loss arising out of a relationship, liability for which has to be justified by showing that there was a duty of care to protect the claimants from that kind of harm. It has been suggested that it would be more accurate to say simply that it was for a head of loss which was not recoverable. There may indeed be other ways of expressing the point. I continue to think that Lord Oliver's formulation of the principle is acceptable in this context. But, as Lord Steyn has explained, the decision was at its heart founded in legal policy. This means that we are dealing with an area of the law where the responsibility for making choices about its development lies with the judges.

**[53]** The question which has been raised in this case is whether *McFarlane*'s case can be distinguished because the claimant is a seriously disabled person. The facts are different, of course, because the parents in that case were both free from disability, as was the child who had been born as a result of the board's negligence. But the ratio of that decision needs to be examined as well, in order to discover whether this difference in the facts allows the conclusion to be drawn that in her case the extra costs of rearing a normal, healthy child which are due to her disability are recoverable.

THE DISABLED CHILD

**[54** ]It has already been held in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97, [2002] QB 266 that the case of a seriously disabled child can be distinguished and that, although the ordinary costs of rearing the child are not recoverable, the decision in *McFarlane*'s case does not preclude recovery of the extra costs which are attributable to the child's disability. This point did not require to be examined in *McFarlane*'s case. The Lord Ordinary, Lord Gill, emphasised at the outset of his opinion that the debate in that case was conducted on the basis that the child was a normal, healthy child: 1997 SLT 211 at 212. The position was unchanged when the case reached your Lordships' House, as can be seen from all the speeches.

**[55]** I agree with the Court of Appeal that the question whether the extra costs of raising a seriously disabled child are recoverable raises a separate issue. In

principle, these costs constitute an extra and distinct burden on the parent who has suffered damage as result of the tortfeasor's negligence. The task of identifying and setting off against each other all the many and various costs and benefits, both tangible and intangible, of raising a normal, healthy child throughout its childhood is an impossible one. As my noble and learned friend Lord Millett said in *McFarlane*'s case, the advantages and disadvantages are inseparable.

**[56]** But the scene changes if, following upon a wrongful or uncovenanted pregnancy (as to the use of these expressions, see JK Mason *Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology* (2002) 6 Edin LR 46 at 47 and 65, note 77), the mother gives birth to a child who is seriously disabled and is likely to remain so throughout its childhood. Here too there is the inevitable mixture of costs and benefits, of blessings and detriments, that cannot be separated. One cannot begin to disentangle the complex emotions of joy and sorrow and the intangible burdens and rewards that will result from having to assume responsibility for the child's upbringing. But there is no getting away from the fact that the parent of a seriously disabled child is likely to face extra costs in her endeavour to make the child's upbringing as normal as possible.

**[57]** A disabled child is likely to need extra care, and the provision of this care is likely to mean extra expenditure. As Professor Mason has observed in his helpful contribution to the debate on this subject, (2000) 6 Edin LR 46 at 58 and 64, love in the context of disability has to be backed by corresponding supportive resources. These resources cost money. The more disabled the child is, the more difficult it is to fulfil these obligations. I consider that, as a matter of legal policy, the Court of Appeal were right to hold that in principle these extra costs are recoverable. In *Melchior*'s case [2003] HCA 38 (at para 166), Kirby J said that to award these extra costs would reinforce views about disability and attitudes towards parents and children with physical or mental impairments that were contrary to contemporary Australian values reinforced by the law. The law in this country is just as alert to the need to eliminate discrimination on the ground of disability. But I do not, for my part, see any conflict between the policy which the law in that area has adopted and awarding damages for the extra costs that have to be incurred to enable a disabled child who has special needs to lead as normal a life as possible.

THE DISABLED MOTHER

**[58]** Now we are faced with the difficult question whether the extra costs which will be incurred by a seriously disabled parent in rearing a normal, healthy child are recoverable. The issue did not arise in *McFarlane*'s case. But I think that it can be taken to have been the unspoken assumption at all levels in that case that the child-rearing costs which the parents were seeking to recover were the costs which normal, healthy parents would incur when they were providing for their child's upbringing.

**[59]** It has to be made clear that *McFarlane*'s case was not decided on the basis that, if the child too was a normal and healthy one, there was a deemed equilibrium, as Hale LJ in *Parkinson*'s case suggested: [2001] 3 All ER 97 at [87]–[91]. By this metaphor she meant that the benefits brought by the child were deemed sufficient to negative the claim for the costs of its upbringing: [2002] 2 All ER 177 at [10]. This suggests that there was assumed to be an equal distribution on either side of benefits and disadvantages. With respect, however, that reads too much into the decision. No calculation of that kind was attempted

or even contemplated. It was considered that a calculation aimed at achieving a fair result, taking everything into account, was impossible.

**[60]** Nevertheless it is true to say that, if one assumes that the child and the parent are normal and healthy when one is contemplating the advantages and disadvantages that will flow from the child's birth, an element of symmetry is inherent in the exercise. The symmetry lies in the assumption that the parent and the child are both normal and healthy. It is disturbed if one is driven to assume that either the parent or the child is affected by a serious disability. Once one accepts, as I would do, that the extra costs of rearing a seriously disabled child are recoverable it may thought that to deny the recovery of extra costs by the seriously disabled parent would be to introduce a distinction between these two cases which was arbitrary and unreasonable.

**[61]** But the risks of a decision which is arbitrary and unreasonable are not all one way. It may indeed be difficult, as Lord Millett points out, to isolate the extra costs which are due to the parent's disability from the financial benefits which, over time, will result from bringing up the child within the disabled person's family. How, it may be asked, can these extra costs be identified if the benefits and disadvantages of rearing a normal and healthy child are incalculable? It has also been suggested that it is difficult to justify making an exception in favour of the seriously disabled parent when others such as the exhausted and depressed mother who already has more children than she can cope with cannot recover the extra costs of rearing which are attributable to her special circumstances. These were the points which troubled Waller LJ in the Court of Appeal. It led him, in a careful and helpful opinion, to dissent from the decision that in principle these extra costs were recoverable: which is all that is being asked for by way of a preliminary issue at this stage: [2002] 2 All ER 177 at [52]–[55].

**[62]** It seems to me that the first of these difficulties raises a question of fact rather than a question of principle. Great care must be taken to avoid passing on to the tortfeasor costs which are attributable simply to the fact of the parent's disability. It is the extra out-of-pocket expenses which the seriously disabled parent has to incur when she is confronted by the ordinary tasks of child-rearing after making due allowance for any anticipated financial benefits, and those costs only, that are in issue here. Her situation has to be compared with that of the normal, healthy parent. One can say, as in the case of a seriously disabled child, that a seriously disabled parent who has special needs is likely to require help if her child is to have a normal upbringing and that this is likely to lead to extra expenditure. Here again I do not see any conflict between the policy which the law has adopted about discrimination on the ground of disability and awarding damages for the extra costs that have to be incurred to enable a parent who has special needs to provide her child with as normal a life as possible. I agree with Robert Walker LJ that the care that may be needed in sorting out what costs are and are not so attributable should not deter us from allowing the possibility of recovery, which is all that is being asked for by way of a preliminary issue at this stage: [2002] 2 All ER 177 at [41].

**[63]** The second point, however, is more troublesome and I confess that I have not found it easy to find a clear answer to it. I agree with Lord Millett that as a general rule the parent's motive for not wanting any, or any more, children is irrelevant. On balance however I have come to the view that the fact that the child's parent is a seriously disabled person does provide a ground for distinguishing *McFarlane*'s case and that it would be fair, just and reasonable to

hold that such extra costs as can be attributed to the disability are within the scope of the tortfeasor's duty of care and are recoverable.

**[64]** It is suggested that to make an exception in favour of the seriously disabled parent would undermine the basis of the decision in *McFarlane*'s case to such an extent that it would open the door to claims for extra child-rearing costs by disadvantaged parents generally. The question then is, are there sound reasons for making an exception only in the case of serious disability?

**[65]** Disadvantages which are the result of the parent's choice of lifestyle prior to the unwanted conception can be said, without hesitation, to fall into an entirely different category. So too, although this is a harder case, are disadvantages that flow from circumstances beyond the parent's control such as social deprivation, racial discrimination or family breakdown. The decision in *McFarlane*'s case applies across the board, to every healthy and normal parent, in whatever social or family condition they may find themselves. The seriously disabled parent is in a different category. It is the inescapable fact of her disability which marks the case of the seriously disabled parent out from these cases. The fact that this category too must be applied across the board, irrespective of the social or family situation in which the parent finds herself, indicates the fundamental nature of the characteristic that gives rise to it. Her social or family circumstances may, of course, affect the amount of the costs that can be considered to be recoverable. But it is the inescapable fact that the seriously disabled parent cannot, however hard she tries, do all the things that a normal, healthy parent can do when carrying out the ordinary tasks involved in a child's upbringing that place this parent's case into distinct category.

**[66]** I would also take into account this further factor. In the Court of Appeal Robert Walker LJ referred to the developing law as to disability: which is all that is being asked for by way of a preliminary issue at this stage: [2002] 2 All ER 177 at [41]. He suggested that this should help to overcome the problems in defining what is and what is not a disability. I would prefer to regard the developing law on this subject as a guide to the general direction the common law should take when it is considering what it should do in cases of serious disability as a matter of legal policy.

**[67]** There has been a good deal of activity in the field of employment law and in the law relating to discrimination generally. Discrimination in the employment field on grounds of disability presents unique challenges to legislators, as Mummery LJ pointed out in *Clark v Novacold Ltd* [1999] ICR 951 at 954. Section 1(1) of the Disability Discrimination Act 1995 provides that a person has a disability for the purposes of that Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. But this is subject to various qualifications and exceptions in Sch 1. Guidance under s 3 of that Act has been issued by the Secretary of State and there is also a Code of Practice. The decision of the Employment Appeal Tribunal in *Goodwin v Patent Office* [1999] ICR 302 illustrates the complex exercise that may have to be undertaken when the statutory definition is applied to the facts with the assistance of this additional material. Further legislation will be needed to give effect by 2 December 2006 to that part of Council Directive 2000/78/EC (OJ, L303/16, 2 December 2000) which, in laying down a general framework for equal treatment in employment and occupation, deals with discrimination on grounds of age and disability: see the second paragraph of art 18.

**[68]** It is the main thrust of this legislation rather than the detailed definitions that I would look to for guidance. The respect and value which the law places on

every life extends to everybody irrespective of whether they are born with or without disabilities. But, as the legislation shows, the law also faces up to the fact of disability and to the risk of discrimination and disadvantage that it gives rise to. Its aim is to provide civil rights for disabled people whose impairment affects their ability to carry out normal day-to-day activities. By allowing the seriously disabled parent to recover the extra costs of child-rearing which are due to her disability the law will be doing its best to enable her to perform this task on equal terms with those who are not affected by her impairment.

**[69]** What then does one mean, in this context, when one refers to serious disability? I would prefer to rely on the flexibility of the common law. Each case must be taken on its own facts. The temptation to find a handicap where there is none must be resisted. I have referred to the parent in whose favour the exception exists as 'seriously disabled'. The word 'serious' is important. The normal incidents of an otherwise healthy life must be held to be covered by the *McFarlane* principle. As for the word 'disability', I would take the requirement of need as the guiding principle. Is the mental or physical characteristic which distinguishes the case from that of the normal, healthy parent of such a kind that extra costs will need to be incurred if the child is to receive a normal and proper upbringing? In the present case the genetic condition from which the claimant suffers suggests that, when the facts are examined, the answer to this question will be in the affirmative.

A CONVENTIONAL SUM?

**[70]** I should like to add that I have not overlooked Lord Millett's suggestion that the proper outcome in all these cases would be to award the parents a modest conventional sum for the denial of their right to limit the size of their family—or, as he now puts it, to compensate them for the injury to their autonomy. I was not attracted by this suggestion when he made it in *McFarlane*'s case, and I have to confess, with respect, that I am not attracted by it in this case either. I agree with Gleeson CJ's observation in *Melchior*'s case [2003] HCA 38 (at para 23) that it would be more accurate to say that parents have the freedom to choose, and therefore to limit, the size of their family. To describe this freedom as a right—or, as Lord Millett now suggests, as the loss of an opportunity which is the proper subject of compensation by way of damages—seems to me beg many questions which are not answered in his analysis. But that is not the only reason for the difficulty which I have in accepting this suggestion.

**[71]** The award of a conventional sum is familiar in the field of damages for personal injury. Conventional sums are awarded as general damages for typical injuries such as the loss of a limb or an eye or for the bereavement that results from the loss of a child or parent in the case of a fatal accident. This is the means by which the court arrives, as best it can, at a figure for the damage suffered which is incapable of being calculated arithmetically: Kemp and Kemp *The Quantum of Damages*, vol 1, para 1-003. The sum which it awards has been described by Lord Denning MR in *Ward v James* [1965] 1 All ER 563 at 576, [1966] 1 QB 273 at 303 as 'basically a conventional figure derived from experience and from awards in comparable cases': see also *Wright v British Railways Board* [1983] 2 All ER 698 at 699, [1983] 2 AC 773 at 777 per Lord Diplock. The award is conventional in the sense that there is no pecuniary guideline which can point the way to a correct assessment: *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 at 919, [1980] AC 174 at 189 per Lord Scarman. But financial loss does not present the same

problem. It is capable of assessment in money. So it has never been the practice to resort to a conventional sum as a means of compensating the claimant for that part of the loss that falls under the head of special damages.

[72] To take just one example, the distinction between these two heads of loss has been recognised by s 1 of the Damages (Scotland) Act 1976, as amended by s 1 of the Damages (Scotland) Act 1993, which defines the rights of relatives of a deceased person in Scots law. The relatives' claims for loss of support and funeral expenses are dealt with in s 1(3). Members of the deceased's immediate family may then be awarded under s 1(4), without prejudice to any claim under s 1(3), such sum as the court thinks just by way of compensation for distress and anxiety, grief and sorrow and the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died. This is the equivalent of an award of damages for bereavement under s 1A of the Fatal Accidents Act 1976, which was inserted by s 3(1) of the Administration of Justice Act 1982, except that the amount of the award is left to the court and not fixed, as it is in England and Wales, by statutory instrument.

[73] The award of a conventional sum to parents for the loss of the right, or the opportunity, to limit the size of their family would perform a similar function to the award of a conventional sum under s 1(4). It would deal with that part of the parents' claim that fell into the category of general damages. But it would not deal—nor, as Lord Millett has explained, would it be designed to deal—with that part of the claim resulting from the loss of the right that fell into the category of special damages. The splitting up of a claim of damages into these two parts in order to allow recovery of one part and deny recovery of the other part is a novel concept and it seems to me, with respect, to be contrary to principle. If damages are to be awarded at all, the aim must be to put the injured parties into the same position as far as money will allow as if they had not sustained the wrong for which they are being compensated: *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn. That rule would be broken if we were to assume that the loss of the right to limit one's family was capable of being compensated for by an award of damages and then to say that the parents' award was to be restricted by law to a conventional sum to compensate them only for their general damages. It would also be broken if we were to say—contrary to my assumption—that the conventional sum was intended to give them something for their financial loss also. It would deny them the opportunity of attempting to establish the true value of that part of their claim according to the compensatory principle.

[74] Lord Bingham of Cornhill seeks to escape from this problem by asserting that the conventional award which he favours would not be, and would not be intended to be, compensatory. It would not be the product of calculation nor would it be nominal, but would afford some measure of recognition of the wrong done. This approach seems to me to depart from the principle which has always guided the common law in its approach to the assessment of damages. He does not suggest that the award is intended to be punitive. If it is not, and the case is not one for an award that is purely nominal, what basis can there be for it other than the compensatory principle? Both Lord Millett and Lord Scott use language which suggests that they are seeking to arrive at a figure which would compensate the parents for being deprived of the loss of opportunity or of the benefits which they were entitled to expect. Lord Nicholls of Birkenhead does not use the same language, but his brief treatment of the issue leaves me in doubt

as to the basis for it. The lack of any consistent or coherent ratio in support of the proposition in the speeches of the majority is disturbing. It underlines Lord Steyn's point that the examination of the issue at the oral hearing was cursory and unaccompanied by research. Like him, I cannot agree with the description of the new rule by Lord Bingham and Lord Nicholls as a 'gloss' on the decision in *McFarlane*'s case.

[75] Then there is the problem of arriving at an appropriate figure for a conventional sum which was not at risk of being seen by the parents as derisory. The figure which Lord Millett suggested in *McFarlane*'s case seems to me to invite that criticism. I doubt whether the larger figure that is now being suggested removes this difficulty. We are in uncharted waters, as there are no previous awards for the loss of this right to which we can look in order to discover the parameters. But it would be wrong to ignore the current level of awards in actions of damages for personal injury. To take just one recent example, the Inner House of the Court of Session has held, having regard to the recent level of jury awards for bereavement (jury awards are still competent in Scotland in actions of damages for personal injuries: Court of Session Act 1988, s 11(a)), that the parents of an adult son who was killed in a flying accident should be awarded £20,000 each under s 1(4) of the Damages (Scotland) Act 1976 for their bereavement: *Shaher v British Aerospace Flying College Ltd* 2003 SLT 791. How is one to measure the loss of the right to limit the size of one's family against an award of that kind, bearing in mind the far-reaching and long-lasting effect that the birth of the uncovenanted child will have on the life of the parent? It seems to me that a much closer examination of the general level of awards in these and other similar cases would be needed before one could come up with a figure that one could even begin to regard as appropriate. In my respectful opinion it would not be right for your Lordships, without guidance from judges sitting at first instance, to attempt to carry out that exercise.

[76] Lord Bingham has given, as one of his reasons for applying the new rule without differentiation to cases whether either the child or the parent is, or claims to be, disabled the acute difficulty of the task of quantifying the additional costs attributable to disability. As I have already said, I agree with Robert Walker LJ that care would be needed in sorting out what costs are and are not so attributable. But to describe the task as one of acute difficulty seems to me to be an overstatement. Lord Bingham then says that the difficulty is highlighted by the inability of the respondent to give any realistic indication of the additional costs she seeks to recover. But I think that this may be unfair to the respondent, as all that was being asked for at this stage was an answer to the preliminary issue whether the recovery of costs was a possibility. We have no means of knowing whether the additional costs in her case can or cannot readily be identified, as this question was not explored at first instance or in the Court of Appeal nor was it focused as an issue in this appeal.

[77] I am left with the uneasy feeling that the figure which is to be established by the new rule will in many cases, and especially in this one, fall well short of what would be needed to satisfy Lord Millett's aim, which Lord Scott of Foscote adopts, of compensating the parents for the wrong that has been done to them. The issue is, as Lord Steyn says, hugely controversial and I agree with him that its creation—which would surely then have been the product of much more study and research than has been given to its creation in this case by the majority—ought to have been left, preferably with the benefit of a report by the Law Commissions, to Parliament.

CONCLUSION

[78] I would allow the respondent's claim to proceed. I would dismiss the appeal.

**LORD HUTTON.**

[79] My Lords, the claimant, Ms Karina Rees, is a young woman in her early thirties who suffers from the genetic condition of retinitis pigmentosa. Since the age of two she has been blind in one eye and has limited vision in the other eye; she is severely visually handicapped. In recent years her vision had deteriorated and she had given up work. She felt that her eyesight would bar her from properly looking after a child and she was anxious about health matters and frightened by the thought of labour and delivery. She had great difficulty in finding a suitable method of contraception and she came to a very definite decision that she did not want and would never want to give birth to a child. She was referred by her general practitioner to a consultant gynaecologist at Darlington Memorial Hospital and when she saw the consultant she told him of her visual handicap and of the concerns and fears which had led her to the decision that she would never want to give birth to a child. With this knowledge of her concerns and of her decision the consultant performed a sterilisation operation on the claimant on 18 July 1995. The appellant hospital trust admits that the operation was performed negligently and that the right fallopian tube was not adequately occluded. In July 1996 the claimant's son Anthony was conceived and he was born on 28 April 1997. His father had no desire to be involved with him and the claimant is a single mother who is bringing up Anthony alone. It is accepted for the purposes of this appeal that Anthony is a healthy child.

[80] In September 1999 the claimant commenced proceedings against the hospital trust claiming damages for negligence in respect of the sterilisation operation and she sought to recover the costs of bringing up Anthony to his majority. The costs which she claimed included the costs which would be incurred by a mother who was not disabled in the bringing up of a child and she also claimed the extra costs that would be incurred by her as a result of her severe visual disability.

[81] At the trial of a preliminary issue Mr Stuart Brown QC, sitting as a deputy judge of the High Court, held that he was bound by the decision of this House in *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59 to hold that the claimant was not entitled to recover damages for any of the costs of bringing up her son. On appeal the Court of Appeal (Robert Walker and Hale LJJ, Waller LJ dissenting) held that the claimant was entitled to damages to compensate her for the extra costs incurred by her in bringing up her son attributable to her disability, and the hospital trust now appeals to the House against that decision.

*McFARLANE v TAYSIDE HEALTH BOARD*

[82] In *McFarlane*'s case a married couple with four children decided that they did not want any more children and that the husband should undergo a vasectomy. A vasectomy operation was performed by a surgeon employed by the defendant health board and five months later the surgeon informed the husband that his sperm counts were negative and that contraceptive measures were no longer necessary. The parents acted on that advice and subsequently the wife became pregnant and after a normal pregnancy and labour gave birth to a

healthy child whom the parents loved and cared for as an integral part of their family. Both parents were also in good health. Both parents sued the health board for negligence, the mother claiming damages for the physical discomfort suffered by her in her pregnancy, confinement and delivery and both parents also sued for the financial costs of caring for and bringing up the child. The Outer House of the Court of Session dismissed the pursuers' action on the ground that a normal pregnancy and labour could not constitute personal injuries for which damages were recoverable and that the benefits of parenthood transcended any financial loss incurred by the parents in looking after and bringing up their child. The Second Division of the Inner House of the Court of Session reversed that decision and held that the wife was entitled, if negligence were established, to damages for the physical effects of pregnancy and childbirth. The Second Division further held that in accordance with the conventional principles of delict law the parents would be entitled to recover the costs of bringing up the child and that there were no public policy grounds to disentitle the parents from recovering such costs.

**[83]** The House decided, Lord Millett dissenting, that the wife was entitled to general damages for the pain suffering and inconvenience of pregnancy and childbirth and, Lord Clyde dissenting, to special damages for extra medical expenses, clothing and loss of earnings associated with the pregnancy and birth. The House further held that the parents were not entitled to recover damages for the costs of bringing up the child. Each member of the Appellate Committee delivered a speech and there was some degree of difference in the reasons given for the decision. Lord Slynn of Hadley ([1999] 4 All ER 961 at 972, [2000] 2 AC 59 at 76) and Lord Hope of Craighead ([1999] 4 All ER 961 at 990, [2000] 2 AC 59 at 97) held that it would not be fair, just or reasonable to impose a duty of care on the employees of the health board giving rise to liability for the cost of bringing up the child. Lord Steyn ([1999] 4 All ER 961 at 978, [2000] 2 AC 59 at 83) held in reliance on principles of distributive justice that the tort law of Scotland and England does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor. He further observed that if it were necessary to do so, he would say that the claim did not satisfy the requirement of being fair, just and reasonable. Lord Clyde held ([1999] 4 All ER 961 at 998, [2000] 2 AC 59 at 105) that to award damages for the cost of bringing up the child would not constitute reasonable restitution as it would not take into account the benefit to the parents of having a loved and healthy child. Lord Millett stated ([1999] 4 All ER 961 at 1000, [2000] 2 AC 59 at 108) that the court is engaged in a search for justice, and that this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper, and he held ([1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 114) that society itself must regard the balance of advantages and disadvantages in having a normal, healthy baby as beneficial. It would be repugnant to its own sense of values to do otherwise, and it is morally offensive to regard a normal, healthy baby as more trouble and expense than it was worth.

**[84]** In holding that it would not be fair, just or reasonable to impose a duty of care giving rise to liability for the cost of bringing up the child, Lord Slynn and Lord Hope were applying the principle stated by Lord Oliver of Aylmerton in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 583, [1990] 2 AC 605 at 633 that before imposing a duty of care the law requires 'that the attachment of liability for harm which has occurred be "just and reasonable"', and the related

principle stated by Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group plc* [1996] 3 All ER 365 at 370, [1997] AC 191 at 211 (*Banque Bruxelles*) that the plaintiff must show 'that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered'.

**[85]** Both the *Caparo* and *Banque Bruxelles* cases were cases where no physical harm caused by the alleged breach of duty intervened between it and the financial loss which had been suffered, and in the *Banque Bruxelles* case Lord Hoffmann stated ([1996] 3 All ER 365 at 371, [1997] AC 191 at 213): 'Normally the law limits liability to those consequences which are attributable to that which made the act wrongful', and it would appear to be clear that the costs of bringing up the child were, in accordance with conventional principles, attributable to the wrongdoing of the hospital staff. I think it was for this reason that Lord Clyde stated ([1999] 4 All ER 961 at 995, [2000] 2 AC 59 at 102):

> '... the issue raised in the appeal is not properly one of the existence or non-existence of a duty of care ... The present case is concerned with the extent of the losses which may properly be claimed in the circumstances of the case, rather than with the existence or non-existence of a liability to make reparation.'

However, as my noble and learned friend Lord Steyn observes in his speech, this is a point in the area of conceptualist thinking. What is important is that the two concepts, the one stated by Lord Slynn and Lord Hope, the other by Lord Clyde, yield the same result, and in my opinion the fundamental principle underlying the speeches in *McFarlane*'s case is that it would not be fair, just or reasonable to award damages for the cost of bringing up a healthy child.

THE ISSUES ON THIS APPEAL

**[86]** Two principal issues arise on this appeal. The first issue is whether the House should depart from the decision in *McFarlane*'s case. Mr de Wilde QC, for the respondent, submits that the House is entitled to depart from the decision pursuant to *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234 and that the House should do so because the decision was contrary to well-established principles of tort law. My Lords, I reject that submission. I consider that the decision was right. Even if I considered that the decision was erroneous, I would be of opinion for the reasons given by the House in *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, [1977] 1 WLR 1345 that the House should not depart from the decision.

**[87]** The second issue is, if the decision in *McFarlane*'s case stands as good law, does it require a court to hold, as did the deputy High Court judge, that damages cannot be recovered in the present case where the single mother, unlike the mother in *McFarlane*'s case, is seriously disabled. This is the issue which I now turn to consider, but before doing so I think it is relevant to make a further observation. I think it is clear, as stated by Hale LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530 at [75], [2001] 3 All ER 97 at [75], [2002] QB 266 and Waller LJ in the Court of Appeal in the present case [2002] EWCA Civ 88 at [44], [2002] 2 All ER 177 at [44], [2003] QB 20 that in *McFarlane*'s case the House recognised that on normal principles of tort law the claim for the cost of bringing up the child would succeed. Lord Millett stated ([1999] 4 All ER 961 at 999, [2000] 2 AC 59 at 107):

'The defenders do not deny that they are responsible for having supplied the information in question, that Mr and Mrs McFarlane were entitled to rely on it, that it was incorrect, and that they were under a duty to take reasonable care to ensure that it was correct. Nor do they deny that, if they failed to do so, then they would normally be liable for all the foreseeable consequences of its being wrong: see *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 372–373, [1997] AC 191 at 214 per Lord Hoffmann.'

And ([1999] 4 All ER 961 at 1001, [2000] 2 AC 59 at 109):

'Catherine's conception and birth are the very things that the defenders' professional services were called upon to prevent. In principle any losses occasioned thereby are recoverable however they may be characterised.'

See also Lord Slynn ([1999] 4 All ER 961 at 967, [2000] 2 AC 59 at 70) and Lord Hope ([1999] 4 All ER 961 at 984, [2000] 2 AC 59 at 90).

THE DECISION OF THE COURT OF APPEAL IN *PARKINSON*

**[88]** In deciding the second issue a further point which has to be considered is whether *Parkinson*'s case was correctly decided. In that case the sterilisation operation was negligently carried out and the claimant later conceived and gave birth to a child who was born with severe disabilities. Longmore J held that the claimant was entitled to recover damages for the costs of providing for her child's special needs relating to his disabilities but not for the basic costs of his maintenance, and this decision was upheld by the Court of Appeal.

**[89]** In his judgment Brooke LJ based his decision that the appeal of the health trust should be dismissed on the ground that it was fair, just and reasonable to award the claimant compensation for the extra expenses associated with bringing up a child with significant disabilities. He cited the judgment of the Supreme Court of Florida in *Fassoulas v Ramey* (1984) 450 So 2d 822:

'There is no valid policy argument against parents being recompensed for these costs of extraordinary care in raising a deformed child to majority. We hold these special upbringing costs associated with a deformed child to be recoverable.' (See [2001] 3 All ER 97 at [49].)

He then stated: 'Unless we are bound by authority to the contrary, I find this argument persuasive.' And, he stated:

'... an award of compensation which is limited to the special upbringing costs associated with rearing a child with a serious disability would be fair, just and reasonable; (vii) if principles of distributive justice are called in aid, I believe that ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child's disability.'

**[90]** In her judgment Hale LJ gave consideration to the right to physical autonomy ([2001] 3 All ER 97 at [56] and discussed conception, pregnancy and childbirth as an invasion of bodily integrity (at [58]). Having discussed the judgment in *McFarlane*'s case she stated (at [87]):

'At the heart of it all is the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far. A child brings benefits as well

as costs; it is impossible accurately to calculate those benefits so as to give a proper discount; the only sensible course is to assume that they balance one another out.' a

And (at [90]):

'The solution of deemed equilibrium also has its attractions and is in any event binding upon us. Indeed, it provides the answer to many of the b questions arising in this case. The true analysis is that this is a limitation on the damages which would otherwise be recoverable on normal principles. There is therefore no reason or need to take that limitation any further than it was taken in *McFarlane*'s case. This caters for the ordinary costs of the ordinary child. A disabled child needs extra care and extra expenditure. He is c deemed, on this analysis, to bring as much pleasure and as many advantages as does a normal healthy child. Frankly, in many cases, of which this may be one, this is much less likely. The additional stresses and strains can have seriously adverse effects upon the whole family, and not infrequently lead, as here, to the break up of the parents' relationship and detriment to the other children. But we all know of cases where the whole family has been d enriched by the presence of a disabled member and would not have things any other way. This analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more.'

At the end of her judgment she stated: e

'[94] ... The difference between a normal and a disabled child is primarily in the extra care that they need, although this may bring with it extra expenditure. It is right, therefore, that the parent who bears those *extra* burdens should have a claim.

[95] Longmore J considered that such a claim would not "stick in the f gullet". I agree. Whatever the commuter on the Underground might think of the claim for Catherine McFarlane, it might reasonably be thought that he or she would not consider it unfair, unjust or disproportionate that the person who had undertaken to prevent conception, pregnancy and birth and negligently failed to do so were held responsible for the extra costs of caring g for and bringing up a disabled child.

[96] For those reasons, as well as those given by Brooke LJ, I would dismiss this appeal.'

Sir Martin Nourse agreed with both judgments.

**[91]** In my opinion the decision of the Court of Appeal in *Parkinson*'s case was h right. In *McFarlane*'s case the House confined its considerations to the case of the birth of a healthy child and expressed no opinion in relation to the birth of a child with disabilities. In that case the House considered that it was not fair, just or reasonable to award damages for the costs of bringing up a healthy child. But in my opinion it is fair, just and reasonable to award damages for the extra costs of j bringing up a disabled child and I am in agreement with the observation of Robert Walker LJ in relation to *Parkinson* in his judgment in the present case ([2002] 2 All ER 177 at [33]):

'There is not the same intuitive feeling that it would be exorbitant compensation to award damages for financial burdens which are the direct consequence of the disability of a child who was born disabled after a failed

sterilisation, and which would not be incurred in consequence of the birth of a normal, healthy child.'

THE DECISION OF THE COURT OF APPEAL IN THIS CASE

[92] In the instant case Robert Walker LJ stated the basis of his decision as follows ([2002] 2 All ER 177 at [37]):

> 'I would base my decision on there being nothing unfair, unjust, unreasonable, unacceptable or morally repugnant in permitting recovery of compensation for a limited range of expenses which (when specified and proved) will be found to have a very close connection with the mother's severe visual impairment, and nothing to do with the blessings which the birth of her healthy son may have brought her.'

He further stated, that the circumstances of Karina Rees' case are not covered by *McFarlane*'s case, that an award to her would be a legitimate extension of the decision in *Parkinson*'s case, and that disabled persons are a category of the public whom the law increasingly recognises as requiring special consideration.

[93] Hale LJ also held that the appeal of Karina Rees should be allowed. She stated that all the discussion in the judgments in *McFarlane*'s case was on the basis that the child was healthy and the costs were those of bringing up a healthy child. In her opinion it did no violence to the reasoning in *McFarlane*'s case to conclude in *Parkinson*'s case that the extra costs of bringing up a disabled child altered the justice of the case. In *McFarlane*'s case in terms of the actual care required by the child, the parents were as well able to provide such care as any other parents and the House had not considered the position of a parent in a different position. Earlier in her judgment, she had referred to the concept of deemed equilibrium upon which she had relied in her judgment in *Parkinson*'s case and she stated (at [23]):

> 'Hence I would conclude that, just as the extra costs involved in discharging that responsibility towards a disabled child can be recovered, so too can the extra costs involved in a disabled parent discharging that responsibility towards a healthy child. Of course we can assume that such a parent benefits, and benefits greatly, from having a child she never thought she would have. We can and must assume that those benefits negative the claim for the ordinary costs of looking after and bringing him up. But we do not have to assume that it goes further than that. She is not being overcompensated by being given recompense for the extra costs of child care occasioned by her disability. She is being put in the same position as her able-bodied fellows.'

[94] However both Robert Walker LJ (at [36]) and Waller LJ (at [50]) questioned the validity of the concept of deemed equilibrium on the ground that, as expressed by Waller LJ, in *McFarlane*'s case the members of the House did not think in terms of an equilibrium with precise quantities on either side of the balance. In my respectful opinion this non-acceptance of the concept was justified for the reason stated by Waller LJ.

[95] Waller LJ dissented from the opinion of the majority of the court that Karina Rees should recover the extra costs of bringing up her child on the ground that such a ruling would constitute an exception to the general rule established by *McFarlane*'s case, and that such an exception would not be fair and reasonable when the difficulties of a mother who was not disabled but who faced other

severe difficulties and problems was compared with the difficulties of Karina Rees. He gave as an example a woman who already had four children and wished not to have a fifth, and for whom the birth of a fifth child would create a crisis in health terms unless help in caring for the child was available. Waller LJ concluded his judgment by stating at [55]:

> 'It is because the court is simply not prepared to go into a calculation which involves weighing one aspect against the other which in my view should bring about the conclusion that it is not fair, just, and reasonable that a disabled person should recover when other mothers in as great a need cannot. On the basis of distributive justice I believe that ordinary people would think that it was not fair that a disabled person should recover when mothers who may in effect become disabled by ill-health through having a healthy child would not.'

CONCLUSION

[96] The difficulties posited by Waller LJ place in sharp focus the problem which arises on this appeal, but I find myself in respectful agreement with the opinion of Robert Walker LJ (at [41]) that these difficulties should not deter the courts from deciding that a disabled mother is entitled to recover compensation for the extra costs of bringing up her child.

[97] My reasons for so holding, which have been foreshadowed in the views which I have already expressed, can be stated shortly. As I have said, I consider that the decision in *McFarlane*'s case was grounded on the principle that it is not just, fair or reasonable to award damages to healthy parents for the costs of bringing up a healthy baby; the House did not consider the position where the mother was disabled. In my opinion where the mother is disabled it is not unjust, unfair or unreasonable to award damages for the extra costs of bringing up the child. In considering whether damages should be awarded there is, in my view, a clear distinction between a disabled mother and a mother in normal health. It is right, in my opinion, to recognise and give effect to this distinction in laying down a principle to guide courts of first instance notwithstanding that a mother who is not disabled may face the serious difficulties described by Waller LJ. The fact that hard cases can be pointed to very close to the line which divides recovery from non-recovery does not invalidate the principle itself.

[98] Secondly, there are two ways of stating the decision of the Court of Appeal in this case. It can either be said that the decision creates an exception to the principle established by *McFarlane*'s case, or it can be said that *McFarlane*'s case created an exception, in the case of the birth of a healthy baby to healthy parents, to the principle that where there is a breach of duty causing physical harm, all the damages directly flowing from that breach of duty can be recovered. As I have stated, I think that the members of the House recognised that under the general principles applicable to the recovery of damages for negligent breach of duty the *McFarlane* parents would have been entitled to recover damages. Therefore, whilst to some extent the matter is one of terminology, I would hold that *McFarlane*'s case created an exception to the general principles, that that exception does not apply to a disabled child or to a disabled mother, and that accordingly the *McFarlane* decision does not bar the mother from recovering in this case.

[99] Accordingly, for the reasons which I have given, I would dismiss this appeal.

**LORD MILLETT.**

[100] My Lords, in *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59 your Lordships were called upon to consider for the first time the extent to which damages are recoverable for the birth of an unintended child following a wrongful pregnancy. By this is meant a pregnancy which is consequent upon a failed sterilisation, whether it has been performed negligently or the parents have been negligently informed that it has been successful. The House held that the parents could not recover the costs of bringing up a normal, healthy child. In *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97, [2002] QB 266 the Court of Appeal held that the additional costs of bringing up a disabled child were recoverable. The question in the present case is whether the additional costs of bringing up a normal, healthy child which are attributable to the fact that one of the parents is disabled are similarly recoverable.

[101] Your Lordships are therefore asked to decide whether the present case is a legitimate extension of *Parkinson*'s case or is governed by the overriding principle established in *McFarlane*'s case. The respondent sought to avoid this question by inviting the House to depart from its decision in *McFarlane*'s case.

[102] The principles which guide the House in deciding whether to depart from a previous decision of its own are well established and have been repeatedly stated: see *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234; *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1972] 2 All ER 898 at 903, [1973] AC 435 at 455 per Lord Reid; and *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996 at 999, [1977] 1 WLR 1345 at 1349 per Lord Wilberforce. As Lord Wilberforce said in the last-mentioned case: 'It requires much more than doubts as to the correctness of [the previous decision] to justify departing from it.'

[103] The established criteria are nowhere near satisfied in the present case. I would not depart from the unanimous decision of the House in *McFarlane*'s case even if, after further reflection, I thought that it was wrong. But I am not persuaded that it was. I have heard nothing in the arguments presented to us which was not considered in *McFarlane*'s case. All aspects of the question and the reasoning of the final appellate courts in numerous jurisdictions (which were seldom unanimous) were exhaustively canvassed. Experience has not shown there to be unforeseen difficulties in application; nor has it shown that the decision is productive of injustice. It has not been universally welcomed by academic writers; nor has it been universally condemned. The most that can be said is that the decision was controversial; and that was evident from the most casual reading of the comparative case law. If further evidence were needed, it is provided by the recent decision of the High Court of Australia in *Cattanach v Melchior* [2003] HCA 38, which was reached by a majority of four to three. Quot judices tot sententiae. Despite the diversity of opinion, the judgments cover familiar ground and contribute no new insight.

[104] *McFarlane*'s case was a case of negligent sterilisation advice. It decided that the costs of bringing up a normal, healthy child are not recoverable. Negligence was not admitted—that issue remained to be tried—but the appeal was brought on the pleadings and negligence had to be assumed. The defenders conceded that they were responsible for having given the advice in question and

that they were under a duty to take reasonable care to ensure that it was correct. They acknowledged that they would normally be liable for all the foreseeable consequences of its being wrong. They accepted that Mrs McFarlane's pregnancy and the child's birth were the direct and foreseeable consequences of the advice being wrong. Causation was not in issue. On conventional legal reasoning Mr and Mrs McFarlane would be entitled to recover damages which represented the full extent of the financial and other losses consequent upon Mrs McFarlane's pregnancy and the birth of their child, including the costs of bringing her up.

**[105]** The House nevertheless unanimously held that the costs of bringing up the child were not recoverable. In their speeches the individual members of the Appellate Committee all based this conclusion on legal policy, though they expressed themselves in different terms. My noble and learned friend Lord Steyn spoke of distributive justice; he asked himself what would be morally acceptable to the ordinary person. Others spoke of what was 'fair, just and reasonable'—which expresses the same idea. I spoke openly of legal policy. I said ([1999] 4 All ER 961 at 1000, [2000] 2 AC 59 at 108):

> 'The admission of a novel head of damages is not solely a question of principle. Limitations on the scope of legal liability arise from legal policy, which is to say "our more or less inadequately expressed ideas of what justice demands" (see Prosser and Keeton *Law of Torts* (5th edn, 1984) p 264). This is the case whether the question concerns the admission of a new head of damages or the admission of a duty of care in a new situation. Legal policy in this sense is not the same as public policy, even though moral considerations may play a part in both. The court is engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper. It is also concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases.'

Others too made it clear that this was not the same as public policy in the traditional sense of that expression. It would not have been contrary to public policy to award damages to the pursuers in *McFarlane's* case any more than it would be contrary to public policy to award damages for breach of contract beyond the limits imposed by the rule in *Hadley v Baxendale* (1854) 9 Exch 341, [1843–60] All ER Rep 461. But in both cases the denial of damages rests upon policy considerations.

**[106]** Another and more technical difference of approach is detectable in the speeches. Lord Clyde and I considered that the question was directed to the admission of a new head of loss. Others considered that the question was whether the loss claimed was within the scope of the duty of care. In my opinion this is merely a difference of exposition. In some cases it is more illuminating to approach the question from one end; in other cases from the other. In *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 581, [1990] 2 AC 605 at 627 Lord Bridge of Harwich said:

> 'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. "The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the

existence and extent of any duty to avoid or prevent it." (See *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 48 per Brennan J.)'

In *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group plc* [1996] 3 All ER 365 at 370, [1997] AC 191 at 211 Lord Hoffmann said:

> 'A duty of care such as the valuer owes does not, however, exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered.'

**[107]** Each of those cases raised an issue of causation. In neither case was it a factual issue, for there was no doubt that the loss was sustained as a direct result of the negligent information which the defendant had supplied. But the law does not hold a person liable for all the foreseeable consequences of his actions. So the question in each case was one of responsibility: was the defendant legally responsible for the loss which his negligence had caused? There was nothing unusual, however, in the nature of the loss; indeed it was commonplace—financial loss arising from a bad investment. The difficulty arose from the causal relationship between the defendant's negligence and the loss sustained by the plaintiff. The solution lay in recognising that a person is only liable for loss which falls within the scope of his duty of care.

**[108]** The problem in a case of wrongful pregnancy is not the same. There is no difficulty about causation, whether as a matter of fact or of legal responsibility. The pregnancy and birth of a child are the very things which the defendants are employed to prevent. It is impossible to say that consequential loss falls outside the scope of their duty of care. They are accordingly liable for the normal and foreseeable heads of loss, such as the mother's pain and suffering (and where appropriate loss of earnings) due to the confinement and delivery. The novelty of the claim in *McFarlane*'s case lay in one particular head of damage—the cost of bringing up a healthy child. The House considered it to be morally repugnant to award damages for the birth of a healthy child. It makes for easier exposition to identify the issue by reference to the head of damage rather than the duty of care. It also has the added advantage that identifying the *ratio* of *McFarlane*'s case in this way may make it simpler to find the answer to the question raised by the present case.

**[109]** In a lecture to the Personal Injury Bar Association's Annual Conference in 2003 Sir Roger Toulson, Chairman of the Law Commission, described the ratio of *McFarlane*'s case as follows:

> 'Although at a detailed level there are therefore significant differences between the judgments, at a broader level two features dominate them. These are, first, the incalculability in monetary terms of the benefits to the parents of the birth of a healthy child; and, secondly, a sense that for the parents to recover the costs of bringing up a healthy child ran counter to the values which they held and which they believed that society at large could be expected to hold.'

**[110]** I agree with this analysis, which accurately represents my own reasoning and, I believe, that of other members of the Committee. I said ([1999] 4 All ER 961 at 1005, [2000] 2 AC 59 at 113–114):

> 'In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. *But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.*' (My emphasis.)

**[111]** In subsequent cases Hale LJ has developed the idea that the decision in *McFarlane*'s case rested on a theory of 'deemed equilibrium'. With respect, such a theory cannot be extracted from any of the speeches; on the contrary, it is entirely inconsistent with them. To say that something is incalculable or cannot be weighed at all is quite different from saying that it is deemed to weigh the same as something else. To say, as I did, that 'society itself must regard the balance as beneficial' is quite different from saying that the balance must be treated as level.

**[112]** *McFarlane*'s case decides that the costs of bringing up a normal, healthy child must be taken to be outweighed by the incalculable blessings which such a child brings to his or her parents and do not sound in damages. *Parkinson*'s case decides that the additional costs of bringing up a disabled child are recoverable in damages. It may be that strict logic demands a different answer. A disabled child is not 'worth' less than a healthy one. The blessings of his or her birth are no less incalculable. Society must equally 'regard the balance as beneficial'. But the law does not develop by strict logic; and most people would instinctively feel that there was a difference, even if they had difficulty in articulating it. Told that a friend has given birth to a normal, healthy baby, we would express relief as well as joy. Told that she had given birth to a seriously disabled child, most of us would feel (though not express) sympathy for the parents. Our joy at the birth would not be unalloyed; it would be tinged with sorrow for the child's disability. Speaking for myself, I would not find it morally offensive to reflect this difference in an award of compensation. But it is not necessary for the disposal of the present appeal to reach any conclusion whether *Parkinson*'s case was rightly decided, and I would wish to keep the point open. It would in any case be necessary to limit the compensation to the *additional* costs attributable to the child's disability; and this may prove difficult to achieve without introducing nice distinctions and unacceptable refinements of a kind which tend to bring the law into disrepute. For the reasons I gave in my speech in *McFarlane*'s case I would not for my part wish to distinguish between the various motives which the parties might have for desiring to avoid a pregnancy.

**[113]** However that may be, the decision of the Court of Appeal in the present case is not a legitimate extension of *Parkinson*'s case, but an illegitimate gloss on *McFarlane*'s case. The conventional approach to damages would allow the costs of bringing up a healthy child, but only so far as they were reasonable. Costs which are incurred unreasonably are not recoverable. So what *McFarlane*'s case decides is that the costs of bringing up a healthy child, even though reasonably incurred, are not recoverable.

[114] Such costs are infinitely variable. They will differ as between one family and another. They will vary, not only according to the needs of the individual child, but according to the circumstances of the parents and other members of the family. They may be greater in the case of a single parent, and less where there are grandparents or siblings to fetch and carry and help with the care of the child. They may be greater where the mother chooses or has to go out to work and so must employ a child minder or home help. They may be very great if the mother is a highly paid professional woman or works at a job which takes her frequently away from home; or if the family is accustomed to private health care or education. All these factors, which are referable to the personal circumstances of the child's family and not to those of the child, go to increase the costs which are reasonably incurred in bringing up the child. But *McFarlane*'s case teaches that none of these costs are recoverable in the case of a healthy child, however reasonably they may be incurred. In principle, the same must be true of the disabled parent. To the extent that her disability has any effect, it increases the amount of the costs which she reasonably incurs in bringing up the child, costs which are nevertheless not recoverable.

[115] It is, with respect, no answer to say that the disabled parent has no choice in the matter; and that if a mother's disability makes it impossible for her to look after the child, she must perforce employ someone to do it for her. The normal, healthy parent may also have no real choice in the matter. A single mother with no disability allowance may have no choice but to go out to work. A mother who, like the old woman who lived in a shoe, has 'so many children she doesn't know what to do' may have no choice but to employ someone to look after them. A family which has already resorted to private health care and private education for the existing children cannot realistically choose to do less for their latest child. By contrast, a disabled mother may have a husband, parents and other members of the family to give support and look after the child. There is no relevant difference between costs which are 'necessary' and those which are 'reasonable', even if it were practicable to attempt to draw it; but it cannot be drawn on the line which distinguishes the disabled parent from the normal, healthy one.

[116] There is another consideration. A child who is born disabled is disabled throughout his or her childhood. Likewise a disabled parent is disabled throughout his or her child's childhood. But there is a significant difference. The factors which make it appropriate to award compensation for the birth of a disabled child are present throughout; those which appear to make it appropriate to award damages for the birth of a healthy child to a disabled parent gradually disappear to be overtaken by the advantages. Once the child is able to go to school alone and be of some help around the house, his or her presence will to a greater or lesser extent help to alleviate the disadvantages of the parent's disability. And once the child has grown to adulthood, he or she can provide immeasurable help to an ageing and disabled parent.

[117] It is a mistake to assume that, because the costs attributable to the disability are 'extras' whether the disabled party is the child or the parent, there is any symmetry. It is true that *McFarlane*'s case was concerned with a normal, healthy baby born to normal, healthy parents, though this group includes parents who for one reason or another could ill afford to have to look after another child. We expressly confined our decision to the case of a healthy child because we recognised that the case of a disabled child might be distinguishable. But, speaking for myself, I made no assumptions about the health or other characteristics of the parents. I considered their circumstances to be irrelevant. It

was enough that they did not want or could not properly look after another child. I expressly said that their motives for not wanting another child were irrelevant. I still regard this to be the case.

**[118]** Disability is a misfortune, and it is the mark of a civilised society that it should provide financial assistance to the disabled. The United Kingdom discharges this responsibility by payment of disability allowance. But this is the responsibility of the state and is properly funded by general taxation. It is not the responsibility of the private citizen whose conduct has neither caused nor contributed to the disability. *McFarlane's* case teaches that the costs of bringing up a healthy child by an unimpaired parent do not sound in damages. Whatever we may say to the contrary, an award of the 'extra' costs which are attributable to the fact that the parent is disabled is an award of damages for the disability.

**[119]** It is accepted that care must be taken not to award damages for the parent's disability. An immediate difficulty is that the costs which are attributable to the parent's disability cannot be disentangled from those which are attributable to the birth of the child. If the parent is unable through disability to look after her healthy child, she must employ someone to do so. How are those costs to be characterised? They must be due at least in part to the birth of the child, and in part to the parent's disability. It is impossible to separate the two elements. They are not different components of the cost, but a single cost with composite causes.

**[120]** But even if they could be separately identified it would not help, for in principle no part of the costs is recoverable. This is what marks the difference between the present case and *Parkinson's* case. Where it is the child who is disabled the costs are attributable either to the birth of the child or to the fact that the child is disabled. The former are not recoverable; the latter are. Where it is the mother who is disabled they are attributable either to the birth of the child or to the fact that the mother is disabled. There is no third possibility. To the extent that they are due to the birth of the child *McFarlane's* case precludes recovery and to the extent that they are not due to the birth of the child, the causal link with the wrong is broken and the defendants are not liable for them in any case. The fact that the mother is disabled aggravates the financial consequences of the birth of a healthy child, and the birth of a healthy child aggravates the financial consequences of the mother's disability. The former is the defendants' responsibility but does not sound in damages and the latter is not the responsibility of the defendants at all.

**[121]** In my opinion, principle mandates the rejection of the parent's claim. But in this case principle also marches with justice. The decision of the majority of the Court of Appeal is destructive of the concept of distributive justice. It renders the law incoherent and is bound to lead to artificial and indefensible distinctions being drawn as the courts struggle to draw a principled line between costs which are recoverable and those which are not. In his powerful dissenting judgment Waller LJ drew attention to the absurdities which would result from drawing the line in entirely the wrong place. He said:

> '[53] Let me address some examples, I hope not too extreme. If one takes the facts to be that a woman already has four children and wishes not to have a fifth; and if one assumes that having the fifth will create a crisis in health terms, unless help in caring for the child was available. She cannot recover the costs of caring for the child which might alleviate the crisis, as I understand *McFarlane's* case. I would have thought that her need to avoid a

breakdown in her health was no different from the need of someone already with a disability, and indeed her need might be greater depending on the degree of disability. Does she, or ordinary people, look favourably on the law not allowing her to recover but allowing someone who is disabled to recover?

[54] If one were to add that the lady with four children was poor, but the lady with a disability was rich—what then? It would simply emphasise the perception that the rule was not operating fairly. One can add to the example by making comparisons between possible family circumstances of the different mothers. Assume the mother with four children had no support from husband, mother or siblings, and then compare her with the person who is disabled, but who has a husband, siblings and a mother all willing to help. I think ordinary people would feel uncomfortable about the thought that it was simply the disability which made a difference.'

**[122]** I can see no answer to these criticisms. In my opinion, principle, common justice and the coherence of the law alike demand that the line be drawn between those costs which are referable to the characteristics of the child and those which are referable to the characteristics of the parent. I agree with Waller LJ that ordinary people would think it unfair that a disabled person should recover the costs of looking after a healthy child when a person not suffering from disability who through no fault of her own was no better able to look after such a child could not. I can identify no legal principle by which such a distinction could be defended.

**[123]** I still regard the proper outcome in all these cases is to award the parents a modest conventional sum by way of general damages, not for the birth of the child, but for the denial of an important aspect of their personal autonomy, viz the right to limit the size of their family. This is an important aspect of human dignity, which is increasingly being regarded as an important human right which should be protected by law. The loss of this right is not an abstract or theoretical one. As my noble and learned friend Lord Bingham of Cornhill has pointed out, the parents have lost the opportunity to live their lives in the way that they wished and planned to do. The loss of this opportunity, whether characterised as a right or a freedom, is a proper subject for compensation by way of damages.

**[124]** I made this suggestion in *McFarlane*'s case, but it was not taken up by any one else. As I see it, it was neither accepted nor rejected, and I do not think it right to say that the point was decided. The majority did not consider it at all, at least expressly, perhaps because it was wrongly thought to be an alternative to the award of damages for the mother's pain and suffering. It was not, for I would have awarded it to both parents. In my opinion the point is still open for consideration without the need to depart from the decision in *McFarlane*'s case.

**[125]** The award of a modest sum would not, of course, go far towards the costs of bringing up a child. It would not reflect the financial consequences of the birth of a normal, healthy child; but it would not be meant to. They are not the proper subject of compensation for the reasons stated in *McFarlane*'s case. A modest award would, however, adequately compensate for the very different injury to the parents' autonomy; moreover it would be available without proof of financial loss, and so would not attract the distaste or moral repugnance which was the decisive factor in *McFarlane*'s case. In that case I suggested that the award should not exceed £5,000 in a straightforward case. On reflection, I am persuaded that the figure should be a purely conventional one which should not be

susceptible of increase or decrease by reference to the circumstances of the particular case. I agree with the figure of £15,000 which Lord Bingham has suggested.

**[126]** I would allow the appeal and substitute an award of £15,000 as a conventional sum.

**LORD SCOTT OF FOSCOTE.**

**[127]** My Lords, in this appeal your Lordships have been invited to reconsider the decision of the House in *McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59 and, second, to consider whether the principle established by that decision is determinative of the issue arising in the present case. It is, therefore, necessary to try to identify the principle underlying *McFarlane*'s case.

**[128]** *McFarlane*'s case was one in which a married couple decided that they did not want any more children. So the husband, Mr McFarlane, underwent a vasectomy, or so he thought. After the operation had been carried out, Mr McFarlane submitted sperm samples for examination by the surgeon who had carried out the operation. The surgeon advised Mr and Mrs McFarlane that the samples showed the vasectomy had been successful and that they no longer needed to take contraceptive measures. This advice was acted on by Mr and Mrs McFarlane but unfortunately was wrong. Six months or so later Mrs McFarlane became pregnant and subsequently gave birth to a healthy baby who, although originally unwanted, became a much loved member of the McFarlane family. Mr and Mrs McFarlane sued for damages in negligence. It may be that the vasectomy had been negligently carried out but they based their claim on the surgeon's negligent representation that Mr McFarlane's sperm counts were negative. This negligent advice was, indeed, the only basis on which Mrs McFarlane could have based an action. The McFarlanes claimed damages for Mrs McFarlane's pain, suffering and distress attributable to the unwanted pregnancy and the trauma of childbirth and also for the costs they would incur in raising the child to adulthood. Nothing, for present purposes, turns on the former damages claim. The House held, unanimously that the McFarlanes were not entitled to the latter.

**[129]** It is helpful, to me at least, to start with a review of the general principles that apply to damages. The basic rule of damages, whether in contract or in tort, was expressed by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25. He said (at 39) that damages should be—

> 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'

**[130]** In applying this principle there is often, however, a difference depending on whether the claim is a contractual one or a claim in tort. In general, where a claim is based on a breach of contract, the claimant is entitled to the benefit of the contract and entitled, therefore, to be placed in the position, so far as money can do so, in which he would have been if the contractual obligation had been properly performed. But where the claim is in tort, there being no contract to the benefit of which the claimant is entitled, the claimant is entitled to be placed in the position in which he would have been if the tortious act, the wrong, had not been committed. The difference in approach is often important in cases where the claim is based on negligent advice or negligent misrepresentation. If the

defendant was under a contractual obligation to give competent advice, the claimant is entitled to be put in the position he would have been in if competent advice had been given. But if the defendant owes no contractual obligation to the claimant and the case is brought in tort, the claimant must be put in the position he would have been in if no advice had been given at all.

**[131]** I have mentioned this difference in approach to claims in contract and claims in tort in order to clear it out of the way. For it has, in my opinion, no relevance at all in cases based on professional advice or services given by professionals. There are two reasons for this. First, if a professional, whether a doctor, a lawyer or any other professional, provides professional advice or services to a client on a non-contractual basis, the professional owes to the client a professional duty of care in doing so. In the case, for example, of a doctor working in the National Health Service and advising or treating an NHS patient, the advice or services are provided by the doctor pursuant to his contractual arrangements with the NHS, not pursuant to any contract with the patient. But the intention and purpose of those arrangements is that the doctor's services be made available to NHS patients. That being so, the extent of the duty of care owed to each NHS patient and the extent of the doctor's liability, and his NHS employer's vicarious liability, if the doctor is in breach of that duty, cannot in my opinion be any different from the extent of the duty and of the liability for any breach of duty that would apply in the case of a private patient with whom the doctor had a contractual relationship. The NHS patient is entitled to the benefit of the contractual duty owed by the doctor pursuant to his contract with his NHS employers (cf *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207 where the disappointed beneficiaries, suing in tort, were placed by way of damages in the position they would have been in if the negligent solicitor had properly discharged his duty to his client, the testator).

**[132]** Alternatively, applying the traditional approach to tortious damages, it can be said that if, in a case like *McFarlane*'s case, no representation at all had been made by the surgeon about Mr McFarlane's post-vasectomy fertility, the McFarlanes would not have assumed that contraceptive measures were unnecessary, would have taken suitable precautions and would have been in exactly the same position as they would have been in if a correct representation about his fertility had been made. Similarly, in a case like the present one, if a sterilisation operation had not been carried out on the respondent by the negligent doctor, the respondent would either have continued to take contraceptive measures or she would have had a sterilisation operation carried out by some other doctor. In either case her baby would, on a balance of probabilities, not have been conceived.

**[133]** Accordingly, as it seems to me, the answer to *McFarlane*'s case, to the present case and to each of the other like cases to which your Lordships have been referred does not depend on whether the claim is a contractual or a tortious one. The same result must be reached whether the claimant was a private patient or an NHS patient. In every case the claimant, having established negligence, is entitled, as a matter of general principle, to be placed in the same position he or she would have been in if the professional advice or services had been competently provided. So in every case this general principle of damages would require the claimant to be placed in the position he or she would have been in if the baby had not been born.

**[134]** It is at this point that, as it seems to me, the application of general principle becomes difficult. It becomes difficult because the consequence of the

negligence is the birth of a human being and because assessments about the value or the burden of a particular human life are impossible. These difficulties have to be grappled with, and I will come back to them, but before doing so I want to consider how the damages issue would look if analogous professional negligence had occurred in a context that did not involve these difficulties. Suppose the owner of a two-year old colt decided to have the colt gelded and engaged a veterinary surgeon (a vet) to carry out the operation. The vet operates on the colt and advises the owner that the operation has been successful. In the belief that that is so the owner allows the gelding, as he believes the colt to have become, to graze in a paddock with some mares. But the operation has been negligently performed, the colt succeeds in getting one of the mares in foal, the condition of the mare is not discovered until it is too late to do anything about it and in due time the mare gives birth to a healthy foal. The mare is not damaged by the experience but the owner sues the vet for damages. Negligence is not in issue. For what damages would the vet be liable? An account of detriment and benefit would need to be drawn up. Veterinary costs occasioned by the mare's unwanted pregnancy and the birth of the foal would be recoverable. But what else? Special circumstances might, subject to remoteness rules, justify special claims; but leave special claims aside. What about the costs of rearing the foal to maturity? The proposition that the defendant vet would be liable for such costs seems absurd. It is instructive to ask oneself why that is so. It is absurd, in my opinion, because the owner of the foal does not have to keep it. Its unexpected and originally unwanted arrival would present him with a number of choices. He could have the foal destroyed as soon as it was born. But this would be an unlikely choice for the foal would be likely to have some value and it would cost very little to leave it with its dam until it could be weaned. Or the owner could decide to keep the foal until it could be weaned and then to sell it. Or he could decide to keep it until, as a yearling or a two-year old, it had reached a little more maturity and then sell it. Or he could try and add value to it by breaking it in, schooling it and then selling it. Or he could keep it for his own use. Each of these choices, bar the first, would have involved the owner in some expense in rearing the foal. But the expense would be the result of his choice to keep the foal. Moreover, the expense of rearing the foal would have to be set against the value of the foal. The owner could not claim as damages reimbursement of the expenses without bringing into account the benefit.

**[135]** The inability of the owner of the unwanted foal to claim from the negligent vet the cost of rearing the foal seems to me to raise no particular difficulty or issue of principle. The difficulty produced by cases like *McFarlane*'s case and the present case is because the originally unwanted progeny is a human being, not an animal, and because, for very deeply ingrained cultural and, for some, religious reasons, human life, whether that of babies, children, adults in the prime of life or the aged and whether normal or associated with disability, is regarded by society generally and by the law as uniquely precious and as incapable of valuation in monetary terms. And the relationship between the originally unwanted but, once born, loved and cherished baby and his or her parents and siblings cannot be put into any monetary scale of benefit and detriment.

**[136]** None the less it must be recognised that the parents' costs and expenses in looking after and providing for the originally unwanted baby until his or her maturity do result from the decision of the parent or parents to keep the child. If the parents decided, for example, to place the child with an adoption society with

a view to adoption, they would not incur those costs and expenses. Nor would they incur them if, for whatever reason, the mother had had her unwanted pregnancy terminated. Most parents, I am sure, would not regard their decision to keep and rear their baby as representing a choice. It would seem to them inevitable that this is what they would have to do. The owner of the unwanted foal, they would say, has a true choice. There is no reason why he should keep the foal and if he decides to do so he must accept the adverse as well as the beneficial consequences of doing so. But the choice, if that is the right word, facing the parents of the originally unwanted baby is not comparable. For a mix of cultural, moral and religious reasons the parents of every baby are expected to accept a responsibility for the baby and its well being that has no parallel in the case of the unwanted foal. The law, indeed, reinforces these reasons with its own expectations of and duties imposed on parents in relation to the children born to them. It is, in my opinion, reasonable for parents who have produced an originally unwanted baby to say that they regard themselves as having had no choice but to keep the child as a member of their family and raise him or her to the best of their ability.

[137] But this conclusion does not itself answer the question: why should the negligent doctor be liable for the economic consequences of the parents' decision to keep and rear the child, reasonable, praiseworthy and socially valuable though that decision no doubt was? As to causation, the doctor's negligence was undoubtedly a causa sine qua non of the costs in question and was a reasonably foreseeable consequence of the pregnancy notwithstanding that it resulted from an independent decision of the parents to keep the child. And the pregnancy was the outcome the avoidance of which had been the reason for seeking the doctor's services. These considerations suggest that the answer to the question should favour the claimant.

[138] But there are two further considerations which seem to me to be of importance and, in the end, determinative. First, there is no escaping that it is a feature of these cases that the expenses sought to be recovered from the negligent doctor have been, or will be, necessarily accepted by the parents of the child as the price to be paid for having the child as a member of their family. It has not been asserted by any parent in any of the cases to which your Lordships have been referred that the price was not worth paying. The value to the parents and the other family members of having the child as a member is not capable of valuation, either at a particular snapshot of chosen time or over the period until the child reaches maturity. Is it right to charge the defendant with the costs and expenses of providing the parents with something of unique value but incapable of valuation? The account of detriment and benefit, into which would go the costs of rearing the child on one side and, at least, the child benefit allowance on the other, would be incomplete without anything to represent the value of what was being acquired by the expenditure. The impossibility of drawing up a balance fair to both sides seems to me a strong argument why no balance should be drawn up at all. And, finally, the placing of a money value on the net detriment to the child's parents of having to rear the child would, it seems to me, be inconsistent with the status of the child as a valued and loved member of the family. I regard these considerations as having a weight that requires a departure from the conclusion to which the normal application of tortious damages rules would lead.

[139] In *McFarlane's* case somewhat different reasons were given by different members of the Appellate Committee for concluding that the parents could not

claim damages for the cost of rearing their healthy and much loved baby. I am not in disagreement with the reasons they expressed and have reached the same conclusion. In my opinion, however, it is important to recognise that the conclusion is not that which the normal application of established tortious damages principles would lead to. It is an exception based upon a recognition of the unique nature of human life, a uniqueness that our culture and society recognise and that the law, too, should recognise. It seems to me to be an acceptable irony that the conclusion is the same conclusion as that which would have been reached in the case of the unwanted foal, but reached by an entirely different route.

**[140]** If I am right in concluding that the unanimous decision in *McFarlane*'s case was correct and that the decision was not reached by applying normal principles of damages but by constructing an exception to those principles based upon a recognition of the uniqueness of every human being and, therefore, of every baby whether wanted or unwanted, the question then arises whether the present case falls within that exception.

**[141]** The only relevant factual difference between *McFarlane*'s case and the present case is that in the present case the mother is blind. Her blindness was the reason why she wanted a sterilisation operation to be performed on her. She doubted her ability to look after her baby if she were to bear one. But, due to the doctor's negligence, she did bear one and, on the footing that *McFarlane*'s case bars her recovery as damages of the ordinary expenses of looking after her child, she seeks damages to reimburse herself for the extra costs she will incur on account of her blindness.

**[142]** My Lords, in my opinion the mother's visual disability does not take the case out of the exception to normal principle established by *McFarlane*'s case. Her baby, too, is a healthy and much loved baby. She has not said, and would not say, that her baby's presence in her household is not a joy and a delight. But it has caused her to incur expenses and will, no doubt, continue for some years to do so. However, all the features of *McFarlane*'s case that justify creating an exception from normal principle are present, too, in this case. The mother need not have kept her baby but decided to do so. I do not imagine that she ever felt that she had a real choice. There is no doubt that her baby adds value to her life and that the value is not capable of assessment in monetary terms. A balance sheet of detriment and benefit caused by the doctor's negligence cannot be drawn up.

**[143]** The majority in the Court of Appeal treated this case as justifying, on account of the mother's blindness, an exception to *McFarlane*'s case. An exception to an exception is apt to produce messy jurisprudence and for all the reasons so cogently expressed by Waller LJ in his dissenting judgment in the Court of Appeal, the creation of an exception in the present case would lead to further exceptions. The exception that *McFarlane*'s case constitutes is based on a recognition of the uniqueness of a human being. The principle on which *McFarlane*'s case is based cannot be limited to the particular circumstances peculiar to that particular case and I do not think the mother's disability in the present case can justify a departure from the basis on which *McFarlane*'s case was decided. I suspect that underlying the majority decision in the Court of Appeal lies the thought that *McFarlane*'s case was wrong and a desire to limit its effect as much as possible. In my opinion, however, *McFarlane*'s case was correctly decided and the basis of the decision should be applied in the present case.

[144] I should mention *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97, [2002] QB 266. In *Parkinson*'s case a sterilisation operation on the claimant was negligently performed. As a result the claimant conceived when she thought, and hoped, she was unable to do so. She declined to have her pregnancy terminated although warned that the child might be born with a disability. The child was born with severe disabilities. The claimant claimed damages for negligence. The Court of Appeal, following *McFarlane*'s case up to a point, held that she was entitled to recover damages for the costs of providing for her child's special needs relating to his disabilities but was not entitled to recover the basic costs of his ordinary maintenance.

[145] The question how the *McFarlane* principle should be applied to a case in which the mother is healthy but the child is born with a disability is not one which needs to be resolved on this appeal. In my opinion, however, a distinction may need to be drawn between a case where the avoidance of the birth of a child with a disability is the very reason why the parent or parents sought the medical treatment or services to avoid conception that, in the event, were negligently provided and a case where the medical treatment or services were sought simply to avoid conception. *Parkinson*'s case was a case in the latter category. In such a case, where the parents have had no particular reason to fear that if a child is born to them it will suffer from a disability, I do not think there is any sufficient basis for treating the expenses occasioned by the disability as falling outside the principles underlying *McFarlane*'s case. The striking of the balance between the burden of rearing the disabled child and the benefit to the parents of the child as a member of their family seems to me as invidious and impossible as in the case of the child born without any disability.

[146] Moreover, the immediate cause of the extra expenses is the child's disability, not the doctor's negligence. In *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044, [1985] QB 1012 evidence was given to the effect that the chance of a baby being born with a congenital abnormality was between one in 200 and one in 400 (see [1984] 3 All ER 1044 at 1049, [1985] QB 1012 at 1019 per Waller LJ). Waller LJ's reference to this statistic was cited by Brooke LJ in *Parkinson*'s case in support of his conclusion that the birth of a child with abnormalities was a reasonably foreseeable consequence of the negligent failure to carry out a sterilisation operation successfully.

[147] My Lords, I have some doubts about this conclusion. The possibility that a child may be born with a congenital abnormality is plainly present to some degree in the case of every pregnancy. But is that a sufficient reason for holding the negligent doctor liable for the extra costs, attributable to the abnormality, of rearing the child? In my opinion it is not. Foreseeability of a one in 200 to 400 chance does not seem to me, by itself, enough to make it reasonable to impose on the negligent doctor liability for these costs. It might be otherwise in a case where there had been particular reason to fear that if a child were conceived and born it might suffer from some inherited disability. And, particularly, it might be otherwise in a case where the very purpose of the sterilisation operation had been to protect against that fear. But on the facts of *Parkinson*'s case I do not think the Court of Appeal's conclusion was consistent with *McFarlane*'s case.

[148] For the reasons I have given I would allow this appeal. But, like my noble and learned friends Lord Bingham of Cornhill and Lord Millett, I am not sure that the recovery by the respondent of nothing for the frustration of her expectation that her sterilisation operation would safeguard her against

conception satisfies justice. She was owed a duty of care in the carrying out of the operation. She was entitled to the benefit of the doctor's contractual obligation to his NHS employers to carry out the operation with due care. It is open to the court to put a monetary value on the expected benefit of which she was, by the doctor's negligence, deprived (cf *Farley v Skinner* [2001] UKHL 49, [2001] 4 All ER 801, [2002] 2 AC 732). I would respectfully agree with Lord Bingham's suggestion that she be awarded £15,000. So I, too, while allowing the appeal, would substitute an award of £15,000 as a conventional sum to compensate the respondent for being deprived of the benefit that she was entitled to expect.

*Appeal allowed.*

Kate O'Hanlon Barrister.

# Fernandez and another v McDonald and another

[2003] EWCA Civ 1219

COURT OF APPEAL, CIVIL DIVISION
POTTER AND HALE LJJ
29 JULY, 19 AUGUST 2003

*Landlord and tenant – Recovery of possession – Order for possession – Assured tenancy – Periodic tenancy – Statutory provision requiring court to make order for possession of assured shorthold periodic tenancy if landlord serving notice specifying last date of period of tenancy and requiring possession thereafter – Whether notice valid if not specifying last date of period of tenancy but requiring possession on day known to be day immediately following last day of period – Housing Act 1988, s 21(4)(a).*

The defendant tenants were granted an assured shorthold tenancy for six months. After the end of the term, they remained as statutory periodic tenants from the fourth day of each month to the third day of the following month. As an assured tenancy, the tenancy could not be brought to an end by the claimant landlords except by obtaining an order of the court in accordance with provisions of the Housing Act 1988. In October 2002 the landlords gave the tenants a notice stating that they required possession on 4 January 2003, ie the day after the last day of a period of the tenancy. That notice was headed: 'Section 21(4)(a)—Assured Shorthold Tenancy: Notice Requiring Possession: Periodic Tenancy'. The provision referred to in the heading of the notice was s 21(4)(a)[a] of the 1988 Act. Section 21(4)(a) required a court to make an order for possession of a dwelling-house let on an assured shorthold tenancy which was a periodic tenancy if it was satisfied, inter alia, that the landlord had given the tenant a notice in writing 'stating that, after a date specified in the notice, being the last day of a period of the tenancy', possession was required by virtue of s 21. In subsequent possession proceedings, the district judge struck out the tenants' defence, and the circuit judge dismissed their appeal. On a second appeal by the tenants, the Court of Appeal was required to determine whether a notice, which did not specify any date which was, or was said to be, the last day of a periodic tenancy, but required possession to be given on a day which was, and was known to be, the day immediately following the last day of a periodic tenancy, was a valid notice for the purpose of s 21(4)(a).

**Held** – A notice that failed to specify a date which was the last day of a period of the tenancy was not a valid notice for the purposes of s 21(4)(a) of the 1988 Act. The statute did not require the landlord to specify a date on which he required possession. It was not a notice to quit. The landlord would not get possession without the tenant's consent unless he went to court. For that reason, the statute required the landlord to state that possession was required 'after a date specified in the notice, being the last day of a period of the tenancy'. The subsection was clear and precise. Nor was it difficult for landlords to comply. They knew when the period ended. Furthermore, the consequences of a failure to comply were

a Section 21(4) is set out at [2], below

not particularly serious for landlords: a defective notice could be cured the next day. Even if the defect were not noticed until the point was taken in court, a valid notice could then be given. The landlord was not unwillingly and unwittingly saddled with a tenant who had security of tenure. It followed in the instant case that the notice had not complied with s 21(4)(a). Accordingly, the appeal would be allowed (see [22]–[25], below).

*Burman v Mount Cook Land Ltd* [2002] 1 All ER 144 and *Ravenseft Properties v Hall* [2002] HLR 624 considered.

**Notes**

For recovery of possession of assured shorthold periodic tenancies, see 27(1) *Halsbury's Laws* (4th edn reissue) para 975.

For the Housing Act 1988, s 21, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 1082.

**Cases referred to in judgments**

*Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712, [2002] 1 All ER 144, [2002] Ch 256, [2002] 2 WLR 1172.
*Carradine Properties Ltd v Aslam* [1976] 1 All ER 573, [1976] 1 WLR 442.
*Crate v Miller* [1947] 2 All ER 45, [1947] 1 KB 946, CA.
*Gracechurch International SA v Tribhovan and Abdul* (2001) 33 HLR 263, CA.
*Lower Street Properties v Jones* (1996) 28 HLR 877, CA.
*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] AC 749, [1997] 2 WLR 945, HL.
*Ravenseft Properties v Hall* [2001] EWCA Civ 2034, [2002] HLR 624.
*Sidebotham v Holland* [1895] 1 QB 378, [1891–4] All ER Rep 617, CA.
*Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277, [2002] HLR 813.
*Yeandle v Reigate and Banstead BC* [1996] 1 EGLR 20, CA.
*York v Casey* [1998] 2 EGLR 25, CA.

**Application for permission to appeal**

The defendants, James McDonald and Kerry Allen, the tenants of residential premises known as 15 Avenue Road Extension, Leicester, applied for permission to appeal from the order of Judge Mayor QC in Leicester County Court on 11 April 2003 dismissing their appeal from the order of District Judge Merriman on 17 March 2003 striking out their defence to possession proceedings brought by the claimant landlords, J Fernandez and Mrs Fernandez. The Court of Appeal granted permission to appeal at the outset of hearing, and proceed to hear the appeal. The facts are set out in the judgment of Hale LJ.

*Mark Jones* (instructed by *Abbot Kennedy*) for the tenants.
*Peter Dean* (instructed by *Bray & Bray*, Leicester) for the landlords.

*Cur adv vult*

19 August 2003. The following judgments were delivered.

**HALE LJ** (giving the first judgment at the invitation of Potter LJ).

**[1]** This was listed as an application for permission to make a second appeal against the order of Judge Mayor QC dated 11 April 2003 in Leicester County Court dismissing the applicants' appeal against the order of District Judge Merriman dated 17 March 2003. The district judge had struck out the applicant tenants' defence

to the respondent landlords' claim for possession of their home. Chadwick LJ adjourned the application for hearing on notice with the appeal to follow if permission is granted.

[2] The case raises a short point on the construction of s 21(4) of the Housing Act 1988. This reads as follows, with the relevant words italicised:

> 'Without prejudice to any such right as is referred to in subsection (1) above, a court shall make an order for possession of a dwelling-house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied—(a) that the landlord or, in the case of joint landlords, at least one of them has given to the tenant a notice in writing *stating that, after a date specified in the notice, being the last day of a period of the tenancy* and not earlier than two months after the date the notice was given, possession of the dwelling-house is required by virtue of this section; and (b) that the date specified in the notice under paragraph (a) above is not earlier than the earliest day on which, apart from section 5(1) above, the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice under paragraph (a) above.'

[3] The facts are not disputed. The tenants were granted an assured shorthold tenancy of 15 Avenue Road Extension, Leicester, for six months from 4 September 1999 to 3 March 2000. They remained thereafter as statutory periodic tenants from the 4th of each month to the 3rd of the following month. On 24 October 2002 the landlords gave them a notice headed 'Section 21(4)(a)—Assured Shorthold Tenancy: Notice Requiring Possession: Periodic Tenancy'. The relevant part reads as follows: 'I give you notice that I require possession of the dwelling house known as 15 Avenue Road Extension Leicester on 4th January 2003.'

[4] The issue, therefore, as summed up by Chadwick LJ, is—

> 'whether a notice which (i) does not specify any date which is (or is said to be) the last day of a periodic tenancy, but (ii) requires possession to be given on a day which is (and is known to be) the day immediately following the last day of a periodic tenancy is a valid notice for purpose of s 21(4)(a).'

[5] He considered that this was a question which ought not to be in doubt. County courts deal with large volumes of accelerated possession proceedings every day. There should not be uncertainty and inconsistency between them. Chadwick LJ did not himself give permission to appeal because a stay of execution would be needed and this should not be granted without giving the landlord an opportunity to make representations. Hence the most convenient course was to adjourn for hearing on notice.

[6] Despite Mr Peter Dean's valiant attempts to persuade us that the case does not raise 'an important point of principle or practice' for the purpose of s 55(1) of the Access to Justice Act 1999, we agree that this simple question of great practical importance to the everyday work of county courts up and down the country should not be left in doubt. Save to the parties in this case, to whom of course it is important, it matters less which way the issue is resolved than that it is resolved one way or the other. We therefore gave permission to appeal at the outset of the hearing.

[7] Mr Mark Jones' argument on behalf of the tenants is simple. It must be understood against the background of s 5(1) of the 1988 Act, which provides that 'An assured tenancy cannot be brought to an end by the landlord except by obtaining an order of the court' in accordance with Chapters I or II of the Act. Accordingly, 'the service by the landlord of a notice to quit shall be of no effect in

relation to a periodic assured tenancy'. Section 21 is in Chapter II. Section 21(1) deals with court orders for possession 'on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy'. Section 21(4) deals with court orders for possession where the dwelling is let 'on an assured shorthold tenancy which is a periodic tenancy', as here. Section 21(4) is 'Without prejudice to any such right as is referred to in subsection (1)' so they are obviously intended to make different provision from one another.

**[8]** Both subsections, it should be noted, are concerned with the criteria for making court orders for possession and not with the requirements of notices to quit in the contractual or common law sense.

**[9]** Mr Jones also points out that the notice stated that possession was required on 4 January 2003. This was not 'the last day of a period of the tenancy' for the purpose of s 21(4)(a). The last day was 3 January. The notice did not therefore comply with the requirement that the notice state that possession was required 'after a date specified in the notice, being the last day of a period of the tenancy'. It was thus invalid. Apart from the straightforward wording of the section, Mr Jones relies on the only two authorities dealing with s 21(4) which counsel have traced.

**[10]** In *Lower Street Properties v Jones* (1996) 28 HLR 877, the notice did not give a date, but did say that it would expire 'at the end of the period of your tenancy which will end after the expiry of two months from service' of the notice. It therefore referred to the last day with sufficient specificity because it could readily be ascertained. But Kennedy LJ said (at 882):

> 'Because of the wording of section 21(4) if an actual date is to be given in the notice it must be "the last day of the period of the tenancy" and there is an obvious risk of a minor arithmetical error giving rise to the argument that the notice is invalid which no doubt is why the printed form suggests as a possible form of wording that the notice will expire "at the end of the period of your tenancy which will end after the expiry of two months from the service upon you of this notice".'

We are told that landlords do often use this saving formula, but they did not do so in this case.

**[11]** Mr Jones also refers us to *Gracechurch International SA v Tribhovan and Abdul* (2001) 33 HLR 263, in which it was accepted that the notice was invalid and the *Lower Street Properties* case was referred to in that context. Although it might be inferred that the notice was invalid because the wrong date was specified, we do not know this to be the case. This case therefore adds nothing to the simple proposition that the subsection requires the date specified to be the last date of a period of the tenancy, which this was not.

**[12]** For the landlords, Mr Dean has two submissions. His first is that a periodic tenancy may have 'two last days', the last day of one period and the first day of the next. Hence the last day of this period could be either 3 or 4 January and the notice was accurate. To the ordinary person this would be a startling proposition. But Mr Dean relies on authorities dealing with contractual and common law notices to quit. In *Sidebotham v Holland* [1895] 1 QB 378, [1891–4] All ER Rep 617, this court held (AL Smith LJ doubting) that a notice to quit a yearly tenancy on either the last day of the year or the anniversary of its beginning was a good notice. This was followed in *Crate v Miller* [1947] 2 All ER 45, [1947] 1 KB 946, where this court held that a weekly tenancy which begins on Saturday may be

determined validly by notice to quit either on Friday or Saturday. Both are equally intimations that the tenant is to quit when the current period ends.

[13] Mr Dean very properly admitted that in neither of these cases was it stated that a periodic tenancy could have two last days. He relied upon the words of Leggatt LJ in *Yeandle v Reigate and Banstead BC* [1996] 1 EGLR 20 at 21:

> 'In my judgment, a valid 12 months' notice in writing to determine the tenancy from year to year, commencing on September 29 1968, may, if given in time, specify either September 28 or 29 in a subsequent year as the date for delivery of possession because the tenancy would be construed as ending on the last moment of the 28th or on the first moment of the 29th.'

[14] However, the other member of the court, Roch LJ, expressed himself differently (at 22):

> 'A 12 months' notice will mean a 12 months' notice to quit and will remain a 12 months' notice to quit, whether it is expressed to end on September 28—in which case it will take effect at the last moment of September 28—or whether it is expressed to take effect on September 29, when it would take effect on the first moment of that day.'

[15] In my view, this approach makes much more sense. It may be possible to give a notice to quit which expires on either day, but that is not because there are two last days: it is because the last day ends at midnight and the first day of the new period begins thereafter and that is the first day on which possession can be required. It might, I suppose, be possible to grant a tenancy from midday on the 3rd of each month to midday on the 3rd of the next. In that event, the same day could be both the first day of the new period and the last day of the old. Otherwise, however, the idea that one day could simultaneously be the first day of a new period and the last day of the old would come as a surprise to most people. The niceties of contractual notices to quit should not be imported into the plain words of a statute which is about something else. I would therefore reject Mr Dean's first submission.

[16] Mr Dean's second submission is that the notice in this case was sufficiently clear to comply with its statutory purpose. He relies upon the House of Lords' approach to the construction of contractual notices in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] AC 749. The facts were the reverse of ours. There was a contractual provision that notice under a break clause in a commercial lease had to expire on the third anniversary of the commencement date. The tenants served a notice referring to the day before that anniversary. The majority of their Lordships held that it was valid. They approved the test adopted by Goulding J in *Carradine Properties Ltd v Aslam* [1976] 1 All ER 573 at 576, [1976] 1 WLR 442 at 444: '... is the notice quite clear to a reasonable tenant reading it? is it plain that he cannot be misled by it?'; the reasonable tenant must be taken to know the terms of the lease. But Lord Steyn made it clear that the reasonable recipient should be left in no doubt as to what was intended by the notice.

[17] These tenants, it is argued, knew that their tenancy ran from the 4th to the 3rd. They can have been in no doubt that the landlord was giving them notice that after the expiry of the December 2002 to January 2003 period, he would be going to court to seek possession if they did not voluntarily vacate the property. Saying 'I want possession on 4 January' is no different from saying 'I want possession on the day after 3 January'.

**[18]** The question is how the reasonable recipient test is to be applied to a statutory requirement of this sort. In *Ravenseft Properties v Hall* [2001] EWCA Civ 2034, [2002] HLR 624, the court was concerned with notices under s 20 of the 1988 Act. An assured tenancy is an assured shorthold tenancy if, among other things, the landlord serves a notice which is in the prescribed form. The relevant regulations (the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988, SI 1988/2203) prescribe either a form scheduled to the regulations or one 'substantially to the same effect'. Mummery LJ (at [11]) pointed out that—

> 'the question whether a notice under section 20 is in the prescribed form or is in a form "substantially to the same effect" is a question of fact and degree in each case, turning on a comparison between the prescribed form in Annex 1 and the particular form of notice given.'

He went on (at [12]–[13]) to make two general statements steering the courts to a consistent approach. The first concerned the purposive approach: the purpose of the notice was to tell the tenant that it would be an assured shorthold tenancy with legal consequences which included very limited security of tenure. The second concerned the reasonable recipient test derived from the *Mannai Investment Co Ltd* case:

> 'In applying the *Mannai* approach, it is therefore important to have well in mind the context of the evident purpose of the requirement of a notice in the prescribed form. If notwithstanding errors or omissions, the substance of the notice is sufficiently clear to the reasonable person reading it, the notice is likely to serve the purpose ...'

**[19]** The question remains, however, what does the statute require and has it been complied with? *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712, [2002] 1 All ER 144, [2002] Ch 256 concerned the contents of landlords' counter-notices in proceedings for a new lease under the Leasehold Reform, Housing and Urban Development Act 1993. The judge had applied the reasonable recipient test, but Chadwick LJ said (at [11]):

> 'The relevant inquiry is what does the statutory language require. The task is to construe the words which Parliament has used in context of the statutory scheme. It is only when the court has informed itself of the true nature of the statutory requirement that it can sensibly address the second question: does the notice in this case meet that requirement?'

He went on to explain (at [18]) that the proper working of the statutory scheme required that the tenant be left in no doubt as to what the landlord admitted, how far the tenant's proposals are accepted and what, if any, are the landlord's counter-proposals. He commented (at [23]), that in neither the *Carradine Properties Ltd* case nor the *Mannai Investment Co Ltd* case did the contract require the notice to be in any particular form. If they had done, the result would have been different. He cited with approval (at [26]) a passage from the judgment of Rimer J in the Court of Appeal decision in *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277 at [22], [2002] HLR 813 at [22]:

> '... I consider that the better approach is to look at the particular statutory provisions pursuant to which the notice is given and to identify what its requirements are. Having done so, it should then be possible to arrive at a conclusion as to whether or not the notice served under it adequately complies

> with those requirements. If anything in the notice contains what appears to be an error on its face, then it may be that there will be scope for the application of the *Mannai* approach, although this may depend upon the particular statutory provisions in question. The key question will always be: is the notice a valid one for the purpose of satisfying the relevant statutory provisions?'

Chadwick LJ described this passage as encapsulating 'succinctly and accurately' the correct approach not only for notices served under statutes but also notices served under contractual provisions such as those commonly found in leases.

**[20]** Mr Dean did not disagree, save with the suggestion that the scope for the approach in the *Mannai Investment Co Ltd* case arises only if the notice contains what appears to be an error on its face. He argued that the reasonable recipient test applies whether or not the error is obvious. In *York v Casey* [1998] 2 EGLR 25 at 27, Peter Gibson LJ had said that the court must see whether the error in the notice was obvious or evident and then go on to ask whether it was sufficiently clear. In *Ravenseft Properties v Hall* [2002] HLR 624 at [27], on the other hand, Mummery LJ did—

> 'not read the authorities as laying down a two stage test which can only be operated when the error is "obvious." The question is simply whether, notwithstanding any errors and omissions, the notice is "substantially to the same effect" in accomplishing the statutory purpose of telling the proposed tenant of the special nature of an assured shorthold tenancy.'

In my view, the obviousness or otherwise of an error is simply a factor in deciding what the reasonable recipient would understand by the notice. The more obvious it is that a slip has been made, the less likely is the reasonable recipient to be in any doubt as to what was meant.

**[21]** In this case, however, a good deal hangs upon the precise question which is to be asked. If the question is simply, what would a reasonable tenant understand by this notice, then a reasonable tenant would understand that the landlord wanted to regain possession on or after 4 January 2003. If the question is what is the purpose of requiring such notice, I would accept that one purpose is to give the tenant at least two months' notice that the landlord will be starting the process of regaining possession once the relevant period of the tenancy has expired, so that the tenant can begin to make plans accordingly.

**[22]** But if the question is, what does the statute require, the answer is that the statute requires the notice to specify a date which is the last day of the period. The statute does not require the landlord to specify a date on which he requires possession. This is not a notice to quit. The landlord will not get possession without the tenant's consent unless he goes to court. That is why the statute requires the landlord to state that possession is required 'after a date specified in the notice, being the last day of a period of the tenancy' (see s 21(4) of the 1988 Act).

**[23]** This is not a case where the legislation permits a form to be 'substantially to the same effect'. The subsection is clear and precise. Nor is it difficult for landlords to comply. They know when the period ends. Furthermore, this is not a case where the consequences of failure to comply are particularly serious for landlords: a defective notice can be cured the next day. Even if the defect is not noticed until the point is taken in court, a valid notice can then be given. The landlord is not unwillingly and unwittingly saddled with a tenant who has security of tenure, as would be the case with an invalid notice under s 20 of the 1988 Act. One purpose of the subsection may be to alert tenants to the need to look for alternative

accommodation, but another is to give the courts a clear and simple set of criteria which trigger their mandatory duty to order possession. The notice in this case was only one day out, but once Mr Dean's first submission is rejected, his alternative submission would leave room for all sorts of arguments, uncertainty and inconsistency up and down the country on a matter about which there should be no doubt at all. a

[24] I would therefore hold that this notice did not comply with s 21(4)(a) of the 1988 Act and allow this appeal. b

**POTTER LJ.**

[25] I agree.

*Application for permission to appeal granted and appeal allowed.*

Alexander Horne Barrister.

# Re Casterbridge Properties Ltd (in liquidation)

## Jeeves v Official Receiver

[2003] EWCA Civ 1246

COURT OF APPEAL, CIVIL DIVISION
SIMON BROWN, CHADWICK AND RIX LJJ
28, 30 JULY 2003

*Company – Compulsory winding up – Public examination – Official Receiver applying for public examination of person concerned with management of company – Whether court required to grant application – Discretion of court on application to rescind order for public examination – Insolvency Act 1986, s 133 – Insolvency Rules 1986, r 7.47(1).*

The appellant was a director of a company, incorporated in St Vincent and the Grenadines which was the sole director of CP Ltd, a company also registered in St Vincent, whose business involved the buying and selling on of timeshare interests, including a timeshare development in Kent. An order for the winding up of CP Ltd was made on 1 August 2000 on the petition of the Secretary of State. On 27 February 2001 the registrar made an order on a without notice application by the Official Receiver for public examination of the appellant under s 133[a] of the Insolvency Act 1986. The categories of persons who might be expected to have knowledge of a company's affairs specified in s 133(1) included officers of the company and those who were, or had been, concerned or had taken part in the promotion, formation or management of the company. The appellant successfully applied for an adjournment of the examination on the grounds that the provisions of the Confidential Relations Preservation (International Finance) Act 1996 of St Vincent (the CRPA 1996) required him to apply to the High Court in St Vincent for directions before supplying any confidential information relating to CP Ltd. The application in St Vincent was duly made but was adjourned on numerous occasions. The appellant applied to set aside the s 133 order. But it was upheld by the judge in November 2001 who found that it was unlikely that the CRPA 1996 would be construed in St Vincent so as to prevent the appellant disclosing at least most of the information sought. In March 2002 the High Court in St Vincent directed that the appellant should not give the evidence required by the Official Receiver in connection with the winding up of CP Ltd. In May 2002 the CRPA 1996 was repealed and a new statute came into force expressed to be for the purpose of making provision for assisting overseas regulatory authorities to obtain information from within St Vincent. The appellant later made a separate application for rescission of the s 133 order under r 7.47(1)[b] of the Insolvency Rules 1986 which provided that every court having jurisdiction to wind up companies could review, rescind or vary any order made by it in that jurisdiction. That application came before a second judge in July 2003, who, being satisfied that it was no longer unlawful in St Vincent for the

a Section 133, so far as material, is set out at [8], below

b Rule 7.47, so far as material, provides: '(1) Every court having jurisdiction under the [Insolvency Act 1986] to wind up companies may review, rescind or vary any order made by it in the exercise of that jurisdiction ...'

appellant to give the information sought by the Official Receiver, dismissed the application. The appellant appealed against both judgments. The issues before the Court of Appeal were (i) whether on a proper construction of s 133 the court was required to make an order for public examination on an application by the Official Receiver; and (ii) what was the proper approach on an application under r 7.47(1) to rescind such an order.

**Held** – (1) The mandatory language of s 133(3) required the court to grant the Official Receiver's application for public examination if it were satisfied that the person whose public examination was sought fell within the categories in s 133(1), unless the exceptional case arose where the examination order would serve no useful purpose; for example, where it could be seen, at the time of the application, that there were no questions which it would be proper for the court to put, or allow to be put, to the examinee (see [44], [53], below).

(2) Where it could be seen on an application under r 7.47(1) that there was no purpose to be served by the public examination that had been ordered, the court could set aside the order which it had made. It would be appropriate for the court to consider whether there was some factor which should lead it to conclude that, at the public examination, it would not be proper to put any questions or require any questions to be answered, such as that the examinee was liable to some sanction in a foreign jurisdiction which would make it unduly oppressive to require him to answer any questions put to him. If, however, the only purpose of the application was to assert that there would be some questions which could not be answered, then the convenient course was likely to be to leave those questions to be identified at the public examination. The appeals would accordingly be dismissed (see [54], [55], [57], [58], [61], below).

**Notes**

For public examination of officers and order for public examination, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue), paras 2298, 2300.

For the Insolvency Act 1986, s 133, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 829.

For the Insolvency Rules 1986, SI 1986/1927, r 7.47(1), see 3 *Halsbury's Statutory Instruments* (2001 issue) 610.

**Cases referred to in judgments**

*Avatar Communications Ltd, Re* (1988) 4 BCC 473.

*Douglas v Pindling* [1996] AC 890, [1996] 3 WLR 242, PC.

*Isaacs v Robertson* [1984] 3 All ER 140, [1985] AC 97, [1984] 3 WLR 705, PC.

*Richbell Strategic Holdings Ltd (in liq) (No 2)* [2000] 2 BCLC 794.

*Seagull Manufacturing Co Ltd (in liq), Re* [1991] 4 All ER 257, [1992] Ch 128, [1991] 3 WLR 307; *affd* [1993] 2 All ER 980, [1993] Ch 345, [1993] 2 WLR 872, CA.

*Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116, CA.

**Appeals**

The appellant, Bryan Jeeves, appealed (i) with permission granted by Chadwick LJ on 6 February 2002 from the decision of Burton J on 21 November 2001 ([2002] BPIR 428) dismissing the appellant's application to set aside or rescind the order of Mr Registrar Buckley for the appellant's public examination under s 133 of the Insolvency Act 1986 (the order) in connection with the winding up of Casterbridge Properties Ltd under an order of Park J made on 1 August

2000 and (ii) with permission of Jacob J from his decision on 2 July 2003 ([2003] EWHC 1731 (Ch)) dismissing the appellant's further application to rescind the order. The facts are set out in the judgment of Chadwick LJ.

*Lloyd Tamlyn* (instructed by *Druces & Attlee*) for Mr Jeeves.
*Richard Ritchie* (instructed by the *Treasury Solicitor*) for the Official Receiver.

*Cur adv vult*

30 July 2003. The following judgments were delivered.

**SIMON BROWN LJ.**

[1] Chadwick LJ will give the first judgment.

**CHADWICK LJ.**

[2] On 1 August 2000 an order was made by Park J in the High Court for the winding up of Casterbridge Properties Ltd (Casterbridge) under the provisions of the Insolvency Act 1986. The order was made on a petition presented by the Secretary of State, under s 124A of the 1986 Act, on 29 August 1999—that is to say, some 11 months earlier. Although an affidavit had been sworn on 15 October 1999 by the present appellant, Mr Bryan Jeeves, in opposition to the petition, in the event the petition was not opposed at the hearing before Park J.

[3] On 14 February 2001 the Official Receiver applied to the High Court, under s 133 of the 1986 Act, for an order for the public examination of Mr Jeeves. That application was made—as is usual in applications under s 133 of the Act—without notice to Mr Jeeves. He neither attended, nor was represented at, the hearing of the application on 27 February 2001 before Mr Registrar Buckley. The registrar made the order sought.

[4] By an application made to the High Court on or about 8 June 2001 Mr Jeeves sought an order that the registrar's order of 27 February 2001 be set aside; in the alternative, that that order be reviewed and rescinded pursuant to r 7.47(1) of the Insolvency Rules 1986, SI 1986/1925. That application came before Burton J in November 2001 ([2002] BPIR 428). His order dismissing the application is dated 22 November 2001—although it was, I think, made when he handed down his written judgment on the previous day. The first of the two appeals now before this court (under reference 2001/2697) is from that order of 22 November 2001.

[5] While that first appeal was pending—and in circumstances to which I shall need to refer in more detail later in this judgment—Mr Jeeves made a second application to the High Court, by notice dated 27 June 2002, for an order under r 7.47(1) of the 1986 rules that the order of Burton J dated 22 November 2001 be reviewed and rescinded or varied so as to provide that the registrar's order of 7 February 2001 be set aside. That application came before Jacob J on 2 July 2003 ([2003] EWHC 1731 (Ch)). He dismissed the application. The second of the appeals now before this court (under reference 2003/1596) is an appeal from that order of 2 July 2003.

THE STATUTORY FRAMEWORK

[6] Section 124A of the 1986 Act provides that, where it appears to the Secretary of State from reports made or information obtained under the statutory powers there set out that it is expedient in the public interest that a company should be wound up, he may present a petition for it to be wound up if the court

thinks it is just and equitable for it to be wound up. The power of the court to wind up a company if it is of opinion that it is just and equitable that the company should be wound up is conferred by s 122(1)(g) of the Act. The power to wind up under s 122(1)(g), on a petition presented by s 124A, is exercisable in respect of an 'unregistered company' (see s 221(1) and (5)). A company incorporated or registered outside Great Britain is an 'unregistered company' in that context. For an analysis of the circumstances in which the jurisdiction to wind up will be exercised in respect of a foreign company see the judgment of this court in *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116.

[7] Section 132 of the 1986 Act is in these terms:

> '(1) Where a winding-up order is made by the court in England and Wales, it is the duty of the official receiver to investigate—(a) if the company has failed, the causes of the failure; and (b) generally, the promotion, formation, business, dealings and affairs of the company, and to make such report (if any) to the court as he thinks fit.
>
> (2) The report is, in any proceedings, prima facie evidence of the facts stated in it.'

That duty arises where the company in respect of which a winding-up order has been made is an unregistered company as well as where the company is a company formed and registered under the Companies Act 1985 (see ss 222(1) and 229(1) of the 1986 Act).

[8] Section 133 of the 1986 Act must be read in conjunction with s 132. It gives to the Official Receiver power to require those who may be expected to have knowledge of the company's affairs to attend for public examination. The section is in these terms, so far as material:

> '(1) Where a company is being wound up by the court, the official receiver ... may at any time before the dissolution of the company apply to the court for the public examination of any person who—(a) is or has been an officer of the company; or (b) has acted as liquidator or administrator of the company or as receiver or manager ... of its property; or (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company.
>
> (2) Unless the court otherwise orders, the official receiver ... shall make an application under subsection (1) if he is requested in accordance with the rules to do so by—(a) one-half, in value, of the company's creditors; or (b) three-quarters, in value, of the company's contributories.
>
> (3) On an application under subsection (1), the court shall direct that a public examination of the person to whom the application relates shall be held on a day appointed by the court; and that person shall attend on that day and be publicly examined as to the promotion, formation or management of the company or as to the conduct of its business and affairs, or his conduct or dealings in relation to the company.
>
> (4) The following may take part in the public examination of a person under this section and may question that person concerning the matters mentioned in subsection (3), namely—(a) the official receiver; (b) the liquidator of the company; (c) any person who has been appointed as special manager of the company's property or business; (d) any creditor of the

a company who has tendered a proof ... in the winding up; (e) any contributory of the company.'

Failure, without reasonable cause, to attend for public examination (if an order has been made under s 133) is punishable as a contempt of court (see s 134(1) of the 1986 Act).

b [9] The conduct of the public examination remains under the control of the court. This is made clear by r 4.215 (Procedure at Hearing) in Ch 19 (Public Examination of Company Officers and Others) in Pt 4 of the 1986 rules. Sub-rule (1) is in these terms:

'The examinee shall at the hearing be examined on oath; and he shall answer all such questions as the court may put, or allow to be put, to him.'

c

[10] Further powers to obtain information are conferred by s 236 of the 1986 Act. Subsections (2) and (3) provide:

'(2) The court may, on the application of the office-holder, summon to appear before it—(a) any officer of the company, (b) any person known or d suspected to have in his possession any property of the company or supposed to be indebted to the company, or (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.

(3) The court may require any such person as is mentioned in subsection 2(a) to (c) to submit an affidavit to the court containing an e account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.'

In that context an 'office-holder' includes the Official Receiver, whether or not he is also the liquidator (see s 236(1)). A person who appears or who is brought f before the court under s 236 may be examined on oath, either orally or by interrogatories, concerning the company or the matters mentioned in s 236(2)(c) (see s 237(4) of the 1986 Act). Section 237(3) enables the court, if it thinks fit, to order that any person who, if within the jurisdiction of the court would be liable to be summoned to appear before it under s 236, to be examined in a place g outside the United Kingdom.

[11] Rule 7.47(1) of the 1986 rules provides that every court having jurisdiction under the 1986 Act to wind up companies may review, rescind or vary any order made by it in the exercise of that jurisdiction.

THE UNDERLYING FACTS

h [12] Casterbridge is a company incorporated in the British Virgin Islands but continued and registered in St Vincent and the Grenadines (SVG) as an international business company under the International Business Companies Act 1996. The sole director of Casterbridge—at least during the period from its registration in SVG until its winding up in this jurisdiction—was Corporate j Directors Ltd, a company incorporated in SVG. Mr Jeeves was one of nine directors of Corporate Directors Ltd. In his affidavit of 15 October 1999, sworn in opposition to the Secretary of State's petition, Mr Jeeves deposed that, since 1993 he had been president of the St Vincent Trust Service Ltd and the trustee of two trusts (the Mars Trust and the Blue Ridge Trust) which were (as he put it) 'the ultimate owners of the shares in Casterbridge'. It is plain from the contents of that affidavit that Mr Jeeves is a person who may be expected to have a detailed

knowledge as to the affairs of Casterbridge prior to 1999. It is plain, also, that he is a person who has been concerned in the management of Casterbridge and who falls within s 133(1)(c).

**[13]** The business of Casterbridge involved the buying and selling on of timeshare interests. Those included interests in a timeshare development at the Hever Golf and Country Club in Kent. It appears that timeshare accommodation was sold to the public through a United Kingdom company, Hever Worldwide Ltd. It was alleged in the Secretary of State's petition that moneys subscribed by the public (amounting to some £7m) for shares in Hever Worldwide and the rights to timeshare accommodation were transferred by Hever Worldwide to Casterbridge; and that Hever Worldwide was left with so-called 'occupation rights' of dubious title and value. The point is put at para 54 of the petition in these terms:

> 'A substantial proportion of moneys paid by the public to Hever Worldwide for ordinary point shares has been transferred (by means of invoices for occupation rights) by Hever Worldwide to Casterbridge, a company incorporated outside the jurisdiction, in relation to which it is impossible to obtain information without a court order, and which is effectively beneficially owned by interests connected with [Mr Ron Popely and Mr John Popely]. The money is transferred to Casterbridge by means of unparticularised invoices for "occupation rights" for which no proper valuation has been obtained, and some of which appear not even to belong to Casterbridge. Casterbridge has received a substantial proportion of the proceeds of the wrongdoing in relation to Hever Worldwide summarised ... above.'

That Casterbridge did receive substantial sums from Hever Worldwide is not disputed by Mr Jeeves. In his affidavit of 15 October 1999 he said:

> 'It is correct that Casterbridge sold occupation rights at the Hever and other resorts to Hever Worldwide for a sum of £988,000 and that Hever Worldwide acquired other occupation rights ... for a total sum of over £2m and that Casterbridge received payment for these. The important point is not whether Casterbridge legally owned all the occupation rights it contracted to sell: it is whether Casterbridge was in a position to procure the transfer to Hever Worldwide of those occupation rights. So far as I am aware it is not alleged that Casterbridge is in breach of its contract or that Hever Worldwide failed to receive that which it paid for. Casterbridge was in a position to procure the transfers of occupation rights and ... nothing has occurred which could be the subject of any criticism.'

**[14]** On 7 December 2000—following an interview with Mr Ron Popely, who (as Burton J observed) was then living in Turkish North Cyprus—the Official Receiver invited Mr Jeeves to answer questions which were sent to him in the form of a questionnaire. It was Mr Jeeves' failure to meet that request which led the Official Receiver to apply to the High Court, in February 2001, for his public examination. The order made by Mr Registrar Buckley required Mr Jeeves to attend for public examination on 6 April 2001. That was deferred, by agreement, to 11 May 2001. On 8 May 2001 Mr Jeeves applied for a further adjournment on the grounds—set out in his solicitor's affidavit of that date—that he was making an application to the High Court in St Vincent for directions under s 4 of the Confidential Relationships Preservation (International Finance) Act 1996. The

application to the court in St Vincent had been made on 4 May 2001 and was to be heard on 15 May 2001. On 10 May 2001 it was ordered that the public examination be adjourned. It has not yet taken place.

THE CONFIDENTIAL RELATIONSHIPS PRESERVATION (INTERNATIONAL FINANCE) ACT 1996

[15] The Confidential Relationships Preservation (International Finance) Act 1996 (Act No 17 of 1996 in the laws of SVG) (to which I shall refer as CRPA) was enacted on 7 October 1996 for the purpose of giving effect to the policy expressed in s 3(1):

> 'The public policy of the State is to protect and preserve the confidentiality, and to prevent the unauthorised disclosure, of all confidential information with respect to business of a professional nature which arises in or is created or disseminated within or is transported into the jurisdiction of the State.'

Section 4(1) of that Act required that—

> 'Whenever a person intends or is required to give evidence in, or in connection with, any proceedings being tried, inquired into, or determined by any court, tribunal or other authority (whether within or outside the State) of any confidential information within the meaning of this Act, he shall before so doing apply for and await directions from the Court.'

It was under that provision that Mr Jeeves applied to the High Court in St Vincent for directions. A 'professional person' who gave information in evidence other than as prescribed by the court in directions given under s 4 of CRPA was guilty of an offence and liable to a fine or imprisonment (see s 5(1) of that Act). It is not clear what (if any) directions were given by the High Court in St Vincent at that stage—that is to say, on 15 May 2001.

THE APPLICATION TO SET ASIDE THE ORDER FOR PUBLIC EXAMINATION

[16] The application of 8 June 2001—to set aside or rescind the registrar's order of 27 February 2001—was supported by a witness statement of that date signed by Mr Jeeves. He pointed out that he had lived in Liechtenstein since 1962; that, between 1992 and 2001 he was British Honorary Consul in Liechtenstein; and that he was an Officer of the Order of the British Empire. He challenged the order of 27 February 2001 on two grounds—which, as he said, were independent of the outcome of his application to the High Court in St Vincent. It was said, first, that the Official Receiver ought to have sought an order for private examination under s 236 of the 1986 Act, rather than an order for public examination under s 133 of that Act. Second, that if the Official Receiver had been right to apply for an order for public examination at all, he should have made the application on notice to Mr Jeeves. In para 21.5 of that witness statement Mr Jeeves explained why the requirement that he attend for public examination caused him severe prejudice and embarrassment. He said:

> 'As a result of the Insolvency Service contacting the Foreign Office concerning the affairs of Casterbridge I was asked by the Foreign Office and I did resign as the British Honorary Consul. In addition, the business which I operate, namely offshore companies and trusts is a small world where news spreads rapidly. Integrity, probity and confidentiality are vital to the running and retention of these businesses and the spectre of a public examination and

its impact on the confidence of my clients is one of extreme concern and embarrassment to me.'

THE JUDGMENT OF 21 NOVEMBER 2001

**[17]** At the time when the application of 8 June 2001 was heard by Burton J in November 2001 ([2002] BPIR 428), little progress had been made on Mr Jeeves' application to the High Court in St Vincent for directions under CRPA. Burton J described the position (at [6]):

'What has happened ... in St Vincent is manifestly unfortunate. It is in no way the fault of the applicant (nor of course of the Official Receiver), but it is clearly quite different from what Evans-Lombe J expected would be the case when he adjourned the public examination initially for a short period at the instance of the applicant, and notwithstanding the opposition of [the Official Receiver], on 10 May. After the three adjournments of the s 4 application in St Vincent to which I have referred, there was a further adjournment on 6 July until 28 September: the case was not listed on 28 September and was instead listed for 5 October: on 5 October it was further adjourned until 19 October: on 19 October further adjourned until 2 November, and on 2 November yet further adjourned because there was no judge available until 23 November when it presently stands for hearing.'

**[18]** The position, therefore, was that Burton J did not know—and could not have known—when he gave judgment on 21 November 2001, what directions the High Court in St Vincent might give on the application which Mr Jeeves had made under s 4 of CRPA. But, in a judgment of conspicuous care to which I pay respectful tribute, he examined the provisions of that Act, and the parties' submissions upon it, and reached the conclusions which he expressed (at [35]):

'(i) I am not in a position to construe the CRPA, but I am persuaded by the Official Receiver's case that, on the basis of the declared public policy in s 3(1), and allowing for the due protection by St Vincent of confidential professional advice, it cannot be likely that it will or should be construed so as to prevent the disclosing by the applicant of at least most of the information sought in this case ... (ii) Consequently, whereas the possibility that, unless relieved, the applicant may be at risk under the CRPA must be taken into account in the exercise of my discretion, I agree with [the Official Receiver] that this must be given very much less weight than that for which [Mr Jeeves] contends. I also conclude that as he has opposed the making, or continuing, of the order it is neither likely nor reasonable that he should be regarded as in breach of any duty nor of any professional obligation or standard if he was compelled to be examined. (iii) The relevance of the CRPA does not of course stop there. There remains the outstanding application under s 4 to the St Vincent court, which, by virtue of the previous adjournments, remains still unresolved. I hope and believe that there is in fact no need for what might otherwise be regarded as a stand-off between the two jurisdictions, or any kind of even possible double jeopardy for the applicant. Particularly now that, perhaps with the assistance of this judgment, the St Vincent court is in a position to appreciate the respects in which there is no impingement, nor intention to impinge, upon the public policy of the state of St Vincent, but a desire on the part of the Official

Receiver adequately to complete his investigation into the affairs of a company being wound up in England as a result of the carrying on of business by it in England, it may be that relief under s 4 will be granted by the court.'

[19] Burton J rejected the attack on the order of 27 February 2001 in so far as it was based on the absence of notice. He said (at [14]):

'I am satisfied that there is no need for me to doubt the propriety or appropriateness of the present standard procedure for an order to be sought without notice, accompanied by the appropriate Official Receiver's report where appropriate, pursuant to r 4.211(2), as was the case here, nor for me to resolve the issue between the parties on a fully argued basis (and indeed I encouraged the cutting short of oral argument on this point), because as there is before me an application to review or rescind the order under r 7.47 I have all the power and the material to decide whether I can or should discharge this order, now that it has been argued fully before me.'

[20] The judge then considered the basis upon which he should address the application to discharge an order made under s 133 of the 1986 Act. He reminded himself of the terms of s 133(3):

'On an application under subsection (1), the court shall direct that a public examination of the person to whom the application relates shall be held ...'

And he said (at [19]):

'[The court is indeed bound on the original] application by the Official Receiver to make an order ... but ... it is not bound to continue or uphold that order when there is an application under r 7.47: albeit that there would plainly not be the same exercise as on an entirely discretionary decision relating to a s 236 examination, because adequate weight must be placed upon the mandatory nature of the original order, the special role of the Official Receiver and in particular the special duties of the Official Receiver pursuant to s 132 ...'

[21] Burton J addressed the submissions which had been made to him on the application under r 7.47 of the 1986 rules on that basis. In expressing his conclusions, he emphasised that, although he accepted that he had power to discharge the order of 27 February 2001, he also accepted that 'because the order is ordinarily mandatory the onus of discharging it must lie on the applicant'. He rejected the contention that an order for private examination, under s 236 of the 1986 Act, would have been more appropriate. In particular, he recognised that there was a question whether an order under s 236 of the Act would have full extra-territorial effect; and he rejected the contention that the order for public examination was materially or unjustifiably more onerous than an order for private examination in the circumstances of this case. It is, I think, pertinent to set out his conclusions on what he described as 'the more general matters involved in the balancing exercise'. Those conclusions appear (at [47]):

'(i) I see no problem in ordering the examination when the applicant is resident in Liechtenstein. I take into account that the order cannot be directly enforced, but the Liechtenstein court will no doubt approach an application for the order to be enforced within the ordinary principles of

comity, when it is clear the order is made in favour of the Official Receiver to enable, in relation to a company being wound up by the English court, the proper investigation of its affairs in the circumstances set out in this judgment. As for the need for the applicant to come here, Liechtenstein is no great distance by air: and no case has been put forward that the applicant would be in any personal difficulties or at any hazard if he came to England. (ii) The connection with the UK is in my judgment fully established both by the winding-up order itself and the facts that I have seen, some of which I have set out in this judgment. (iii) The applicant is plainly not a "third party" and his role, on his own evidence, and the knowledge he clearly has about matters relevant to the carrying on of the business of Casterbridge in this country, are sufficiently established. I am further not in any way persuaded that the Official Receiver has failed to set out or explain what information is required and/or what information it is believed that the applicant can give, or has failed to show that he has taken any material steps which might have discovered any alternative way of eliciting the information. In so far as it is suggested that insufficient steps were taken with regard to the advertisement of the petition, that may well be so, but none of the criticisms of the Official Receiver in any way detract from the clear case that the applicant has information to give, and indeed, irrespective of any other steps, is the person with the most relevant information to give ...'

[22] The judge took into account the particular problem posed by the application then pending before the High Court in St Vincent. He returned to that matter (at [50]):

'I turn finally back to the St Vincent legislation. I have concluded, after taking into account all other matters urged before me, that a s 133 order was appropriate. Although there is no privilege against self-incrimination, I also take into account in my discretion the CRPA. For the reasons that I have given: (i) the risk of sanctions being taken against the applicant (the effective author of the St Vincent legislation) is in any event, even if it exists at all, considerably less than has been submitted, whether on a proper construction of the statute and its implementation or at all, and/or he may in any event be granted relief. (ii) The desirability and appropriateness of the obtaining of the information by the course proposed in any event in my judgment outweighs any such consideration. I do not believe that this court is in any way in conflict with the St Vincent court. One of our two courts has to resolve this matter first, and, given the unfortunate but it seems inevitable delays in the St Vincent proceedings, but in any event by virtue of the greater knowledge available to this court, where the jurisdiction of the winding-up in any event resides, that decision has been made by this court, and I hope will be of assistance to the St Vincent court in considering the question of relief. Whether or not however relief is granted, I conclude, taking all matters into account, and assuming in favour of the applicant that I have the discretion he urges, that I should exercise it in favour of upholding the s 133 order.'

THE APPLICATION FOR PERMISSION TO APPEAL TO THIS COURT

[23] The judge refused permission to appeal to this court, essentially on the grounds that he had exercised a discretion entrusted to him. Mr Jeeves applied to

this court for permission to appeal. The first four of the six grounds set out under s 7 of his appellant's notice dated 6 December 2001, were in these terms:

> '1. The learned judge erred in law in concluding that on a proper construction of s 133 ... of the 1986 Act ... on the Official Receiver applying for an order for a person's public examination under s 133 the court is bound to make the order sought.
>
> 2. The learned judge ought to have concluded that on a proper construction of s 133 (which construction, unlike the construction contended for by the Official Receiver, would be compatible with the provisions of art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), when the Official Receiver applies for an order for a person's public examination under s 133: (a) the court has a complete discretion as to whether or not to make the order sought; (b) the onus lies on the Official Receiver to satisfy the court that the order sought should be made; (c) save in exceptional circumstances, the Official Receiver should not apply for the order without notice to the proposed examinee; (d) the court should only make the order sought if satisfied both: (1) that the specific purposes of a public examination would be served by the making of such an order; and (2) that a public examination of the proposed examinee is reasonably required, after conducting a balancing exercise similar to that which it would carry out when deciding whether to make an order for private examination under s 236 of the 1986 Act.
>
> 3. The learned judge erred in law in concluding that in circumstances where the Official Receiver has obtained a without notice order for a person's public examination under s 133 and the proposed examinee applies under r 7.47 of the 1986 rules ... to rescind that order: (a) apparently because of the learned judge's aforementioned error of law in concluding that an order under s 133 is "ordinarily *mandatory*" the onus lies on the proposed examinee to satisfy the court that the order for his public examination should be rescinded; and (b) the court should not conduct a balancing exercise similar to that which it would carry out when faced with an application by a proposed examinee to rescind a without notice order obtained by the Official Receiver or liquidator for their private examination under s 236, but rather should place greater weight on the "mandatory nature of the original order" and the special role and duties of the Official Receiver.
>
> 4. The learned judge ought to have concluded that when a proposed examinee applies under r 7.47 for rescission of an order, obtained without notice, for their public examination under s 133: (a) the onus lies on the Official Receiver to satisfy the court that the order obtained without notice should be continued and not rescinded; and (b) the court should only continue the order and not rescind it if satisfied both: (1) that the specific purposes of a public examination would be served by the continuation of the order; and (2) that a public examination of the proposed examinee is reasonably required, after conducting a balancing exercise similar to that which it would carry out when deciding whether to continue or rescind an order obtained without notice for a private examination under s 236.'

**[24]** Ground 5 of the grounds of appeal challenged the judge's conclusions as to the effect of s 4 of CRPA. Ground 6 set out, under 17 subparagraphs, matters

of which it was said that the judge failed to take any or any sufficient account in deciding whether to uphold the order for public examination.

**[25]** The application for permission to appeal came before me on paper. It was coupled with an application to adduce further evidence. On 6 February 2002 I gave permission to appeal limited to grounds 1–4. I was satisfied that this court should have the opportunity (i) of deciding whether, on the proper construction of s 133 of the 1986 Act, a court to which an application for an order for public examination is made by the Official Receiver is required to make the order sought; and (in the light of its decision on that ground) (ii) of giving guidance as to the proper approach to an application under r 7.47 of the 1986 rules for an order rescinding an order made under s 133 of that Act. I refused permission to appeal on grounds 5 and 6; for the reason that, if the judge's approach to the application before him was correct in principle, there was no real prospect of persuading this court that it should interfere with a decision that he had reached in the exercise of his discretion. And I refused permission to adduce further evidence on the ground that that evidence was either evidence which could have been put before the judge at the hearing in November 2001 or evidence which, if it had been put before the judge at that hearing, was unlikely to have had any material effect on his decision.

**[26]** The application for permission to appeal on grounds 5 and 6 was renewed at an oral hearing before this court (Charles J and myself) on 12 March 2002. In the meantime, on 20 February 2002, the High Court in St Vincent had made an order—on the application for directions made to it on 4 May 2001—declaring that Mr Jeeves was a 'professional person' for the purposes of CRPA and was 'competent to prosecute the application for directions'. The application for directions was stood over for further hearing to a date and time to be arranged. On 7 March 2002 very shortly before the hearing fixed in this court for 12 March 2002, Mr Jeeves made a further application in St Vincent—pursuant to s 108 of the International Business Companies Act 1996—for determination of the questions whether the order for the winding up of Casterbridge, made in London on 1 August 2000, had had the effect of winding up the company in St Vincent; and whether Casterbridge was a company in good standing in St Vincent. The declaration of good standing was made by the High Court of St Vincent on the following day, 8 March 2002. Paragraph 2 of the order in St Vincent made that day gave the directions sought under s 4 of CRPA by the application of 4 May 2001. The paragraph was in these terms:

> 'Pursuant to section 4 of the Confidential Relationships Preservation (International Finance) Act 1996 (Number 17 of 1996) Directions are hereby given to the Second-named Applicant BRYAN JEEVES that the evidence required by the Official Receiver (UK) in connection with the purported winding up of Casterbridge Properties Ltd shall not be given.'

**[27]** No copy of the judgment upon which that order was made has been provided to this court. It is impossible to tell whether the judge when making the order on 8 March 2002 had been made aware of the matters which Burton J had set out so carefully in his judgment of 21 November 2001. That order of 8 March 2002 was put before this court at the hearing on 12 March 2002. This court took the view that the order made in St Vincent on 8 March 2002 undermined (in part, at least) the basis upon which Burton J had exercised his discretion on 21 November 2001; and that—in the circumstances that counsel had not come prepared to argue the points of principle identified in my order of 6 February

2002—the appropriate course was to allow the applicant to make a further application to the High Court, under r 7.47(1) of the 1986 rules, for a review of the order of 22 November 2001 and for a further review of the order of 27 February 2001. The court had in mind that, if there were to be argument as to the effect in this jurisdiction of the order made in St Vincent on 8 March 2002, it was convenient that that argument should take place (in the first instance) in the High Court rather than in this court so that any facts relevant to that argument could be found on the basis of evidence as to the laws of St Vincent. Accordingly we adjourned the appeal, the renewed application for permission to rely on grounds 5 and 6 of the appellant's notice and the application to adduce further evidence until after that further application had been made.

THE EXCHANGE OF INFORMATION ACT 2002

[28] The further application under r 7.47(1) of the 1986 rules was made on 27 June 2002. In the meantime, however, there had been new legislation in SVG. On 30 May 2002 the Exchange of Information Act 2002 was enacted and came into force. The legislative purpose of that Act, as appears from the long title, was to make provision for assisting overseas regulatory authorities to obtain information from within SVG. Section 9 of that Act repealed the CRPA. Prima facie, at least, the repeal of CRPA removed the basis upon which para 2 of the order of 8 March 2002 had been made by the High Court in St Vincent.

THE REPORT OF THE JOINT EXPERT

[29] It was in those circumstances that, on 15 November 2002, an order was made in the High Court in London for the instruction of a joint expert to report on the questions: (i) whether the repeal of CRPA was retrospective, and (ii) the effect of the repeal on the order made in St Vincent on 8 March 2002, with reference, in particular, to Mr Jeeves' present and future obligations in relation to public examination.

[30] The joint expert reported on 7 February 2003. She explained that, until 2002, the cornerstone of the policy of the government of SVG so far as it concerned the protection of confidential information was set out in s 3(1) of CRPA—to which I have already referred. But she went on to say this:

> 'On 30 May 2002 the [Exchange of Information Act 2002] was signed by the Governor General and came into force on the same date when it was published in an extraordinary issue of the Government Gazette. The scope and intent of the EIA is completely different from that of the CRPA. Its object is "to make provision or assisting overseas regulatory authorities to obtain information from St Vincent and the Grenadines and other related matters". Although there is no public policy declaration in the EIA, the legislation was enacted in response to severe criticisms and sanctions from certain countries, including England and the putting of [SVG] on the so-called black list of the OEDC countries. By being on this black list SVG was/is adversely affected as an offshore financial centre. Any local bank that had offshore companies, especially offshore banks, as customers were denied the facility and convenience of corresponding banking relationships by banks in the United Kingdom and elsewhere.'

[31] The joint expert advised that the repeal of CRPA did not have retrospective effect; and that, although CRPA had been repealed, there was no doubt that the order of 8 March 2002 still stood and should be obeyed unless and

until it was set aside by the court. She referred to the opinion of the Judicial Committee of the Privy Council in *Isaacs v Robertson* [1984] 3 All ER 140, [1985] AC 97.

**[32]** She then considered the practical effect of Mr Jeeves giving evidence on public examination notwithstanding the order of 8 March 2002. She said:

> 'Arguably given the present policy of the government of St Vincent and the Grenadines and the repeal of the CRPA it is unlikely that Mr Jeeves will be prosecuted or even pursued civilly for contempt of court by any government department or regulatory authority in SVG if he did in fact breach the St Vincent order and give the evidence required by the Official Receiver.'

But she made it clear that she was not suggesting that Mr Jeeves could be advised to disregard the order of 8 March 2002. She said this:

> 'Mr Jeeves could himself apply to the court in SVG to have the St Vincent order set aside. The repeal of the CRPA should make this application relatively uncomplicated. The other parties involved in the application for directions before Bruce-Lyle J were the Attorney General's Office (represented by the Solicitor General) and the Offshore Finance Authority (represented by Louise Mitchell Esq now Offshore Finance Inspector). In SVG both offices fall under the portfolio of the Prime Minister respectively as Minister of Legal Affairs and Minister of Finance. It is therefore highly unlikely that either office will oppose an application by Mr Jeeves to set aside the St Vincent order. Further, even if a private individual party or entity with an interest in the matter sought to object to his application to set aside the St Vincent order, Mr Jeeves could rely on this dictum of Lord Keith of Kinkel who delivered the judgment of the Privy Council in *Douglas v Pindling* [1996] AC 890 at 902, [1996] 3 WLR 242 at 251: "The confidentiality continues to be personal to the customer in the same way as if the [Banks and Trust Companies Regulation Act 1965] had not been passed. The only balance which requires to be made is that between the public interest in the administration of justice or the promotion of the work of a commission of inquiry and the customer's personal interest. If the public interest appears on good grounds to require disclosure the customer's interest must give way." This case is not directly on point but helps to illustrate that the courts willingly accept that even protected rights must in some circumstances give way to the public interest. In the case of Casterbridge and corporate directors it is my opinion that public interest will have to take precedence over any right that anyone or any entity associated with either company may seek to protect pursuant to the St Vincent order. Alternatively the Attorney General's office or the Offshore Finance Authority, through the proper channels, could be asked to make the abovementioned application to set aside the St Vincent order. For reasons already given it would be extremely difficult for them to refuse such a request and even more difficult for the High Court of SVG to refuse to set aside the St Vincent order.'

THE JUDGMENT OF 2 JULY 2003

**[33]** The further application under r 7.47(1) was heard by Jacob J on 2 July 2003 ([2003] EWHC 1731 (Ch)). He referred to the joint expert's report and asked himself whether, in the light of that report, there was a real risk that attendance

for public examination in this jurisdiction would expose Mr Jeeves to sanctions for breach of the order of 8 March 2002. He concluded that there was no real risk, even while the order stood; and that, in any event, Mr Jeeves could, if he chose, remove any vestige of risk by taking the obvious step of applying to have the order of 8 March 2002 set aside following the repeal of CRPA. The joint expert had advised that such an application would be 'relatively uncomplicated' and would not be opposed by the authorities in SVG. Jacob J dismissed the application. But, on the basis that there was to be an appeal to this court from the order of 22 November 2001 in any event, he gave permission to appeal from his own order.

THE FURTHER APPLICATION IN ST VINCENT

[34] In the light of the joint expert's advice that an application to set aside the order of 8 March 2002 would succeed, and following the observations by Jacob J in his judgment that that was an obvious course for Mr Jeeves to take if he wished to remove any perceived risk that he would be exposed to sanctions in SVG for breach of that order, it might have been expected that he (Mr Jeeves) would make a further application to the High Court in St Vincent. It was no surprise, therefore, when this court received a letter from solicitors acting for Mr Jeeves, dated 25 July 2003, stating that—

> 'Our client is making an application, in the light of the Order of Mr Justice Jacob dated 2nd July 2003, to the High Court of St Vincent and the Grenadines ... concerning the Order made by Mr Justice Frederick Bruce-Lyle on 8th March 2002.'

[35] Nor was it any surprise to find, when the court sat to hear these appeals on Monday 28 July 2003, that there was a formal application to adjourn this hearing on the grounds that Mr Jeeves was making an application to the High Court in St Vincent. The application to adjourn was supported by a witness statement, signed by a solicitor and dated 28 July 2003, which contained the paragraph:

> 'I respectfully request that any decision on the appeals listed for hearing on 28 July 2003 be deferred pending the outcome of the applicant's application to the High Court of St Vincent and the Grenadines.'

But it was a surprise to find, on examination of the copy application exhibited to that witness statement, that the application to the High Court in St Vincent was not being made by Mr Jeeves. The application, dated 25 July 2003, was made by St Vincent Trust Services Ltd and Corporate Directors Ltd. The application seeks a declaration that Mr Jeeves would be in contempt of court if he breached the order of 8 March 2002 by attending a public examination pursuant to the order of the High Court in London. It appears that that application is to be heard on 9 October 2003.

[36] We refused the application to adjourn this hearing. It is now some three years since the order to wind up Casterbridge; and nearly two-and-a-half years since the order for public examination was made on 27 February 2001. It is time that the question whether or not Mr Jeeves should be required to submit to public examination in respect of the affairs of Casterbridge is resolved in this court. It seems clear that Mr Jeeves does not, himself, intend to apply to set aside the order made in St Vincent under CRPA, notwithstanding the repeal of that Act. We have the benefit of the joint expert's report, in which she has advised

that such an application would succeed. For my part, I find her reasons compelling. It seems plain that there is no longer any basis for the continuation of an order made under CRPA. Nor can I see any basis for the application made in St Vincent by St Vincent Trust Service Ltd and Corporate Directors Ltd; in particular, I cannot see what proper interest those companies have in seeking a declaration that Mr Jeeves would be in contempt of court if he were to act in breach of an order which was not made for their protection and which, on the evidence, he could readily have set aside if he chose.

THE ISSUES ON THESE APPEALS

**[37]** With that lengthy account of the circumstances in which these appeals come before this court, I turn to identify the issues which are for decision. But, before addressing those issues, I should mention that neither the application for permission to appeal from the order of 22 November 2001 on ground 5 in the appellant's notice of 6 December 2001, nor the application of 11 January 2002 to adduce further evidence, are now pursued. It is recognised, on behalf of Mr Jeeves, that ground 5 has been overtaken by events; and that the evidence which needs to be before the court was put in on the further application under r 7.47(1) before Jacob J and will be considered in the context of the appeal from his order of 2 July 2003.

**[38]** The matters before the court, therefore, were: (i) the appeal from the order of 22 November 2001 on grounds 1–4 in the appellant's notice; (ii) the application for permission to appeal from that order on ground 6 of the appellant's notice; and (iii) the appeal from the order of 2 July 2003.

**[39]** We have already indicated, in the course of argument, that we will not give permission to appeal from the first order on the basis of ground 6. As I have said, that ground goes to the exercise of his discretion by Burton J. If this court were to hold that he had exercised his discretion on a false basis—as contended in grounds 1 to 4—then ground 6 would become otiose. This court would be required to exercise its own discretion in the light of the factors (which might include factors within ground 6) which appeared to it material. But, if the court holds that Burton J has correctly identified the principles upon which his discretion was to be exercised, then there is nothing in ground 6 which persuades me that this court should entertain an appeal against the exercise of a discretion which, plainly, Parliament has entrusted to a judge of the High Court. Further, the purpose of this court's order of 12 March 2002 and the further application to Jacob J under r 7.47(1) of the 1986 rules was to enable a judge of the High Court to exercise his discretion afresh in the light of the changed circumstances. In the events which have happened, the relevant exercise of discretion under r 7.47(1), as it seems to me, is that of Jacob J. If, as counsel appeared to accept, Jacob J was not asked to consider the matters in ground 6 of the appellant's notice of 6 December 2001, Mr Jeeves cannot now be heard to complain that they were not taken into account by that judge when he exercised his discretion on 2 July 2003. Mr Jeeves cannot, now, raise those matters on an appeal from Jacob J; and, as I have said, the particular factors which Burton J did or did not take into account, and the weight which he gave to them, have been overtaken by events.

**[40]** Further, I should say at this stage that an appeal against Jacob J's decision, on the material before him, that Mr Jeeves was at no real risk of sanctions in SVG if he complied with the order for public examination made on 27 February 2001 is not capable of being sustained. As the judge pointed out, the evidence of the

joint expert was clear. The removal of any perceived risk in St Vincent lay in Mr Jeeves' own hands. If he sought to have the order of 8 March 2002 set aside, his application would be successful. He cannot rely on a risk which it is within his power to remove by asserting that it is not in his commercial interests to be seen to be seeking to remove it.

[41] The issues which need to be determined on these appeals are those identified in my order of 6 February 2002: (i) whether, on the proper construction of s 133 of the 1986 Act, a court to which an application for an order for public examination is made by the Official Receiver is required to make the order sought; and (ii) what is the proper approach to an application under r 7.47(1) of the 1986 rules for an order rescinding an order made under s 133 of that Act. It is to those issues that I now turn.

IS THE COURT REQUIRED TO MAKE AN ORDER FOR PUBLIC EXAMINATION ON AN APPLICATION BY THE OFFICIAL RECEIVER UNDER SECTION 133 OF THE 1986 ACT

[42] It is plain that, at the least, the court is required to satisfy itself on an application by the Official Receiver under s 133(1) of the 1986 Act: (i) that the company is being wound up by the court; and (ii) that the person whose public examination is sought falls within one or other of the categories set out under paras (a)–(c) of that subsection. That is emphasised by the provisions in r 4.211(2) and (4) of the 1986 rules:

> '(2) Where the application relates to a person falling within section 133(1)(c) (promoters, past managers, etc), it shall be accompanied by a report by the official receiver indicating—(a) the grounds on which the person is supposed to fall within that paragraph ...
>
> (4) In a case to which [para (2) applies], the court shall rescind the order if satisfied by the person to whom it is directed that he does not fall within section 133(1)(c).'

[43] No doubt it was thought that there was a need to make specific provision for cases within para (c) of s 133(1), because it was in those cases that disputes were most likely to arise. But, given the extended meaning of 'officer'—which includes 'any person occupying the position of director by whatever name called' (see ss 741(1) and 744 of the Companies Act 1985 and s 251 of the 1986 Act)—it is not difficult to envisage circumstances in which the court might be required to decide, also, whether a person fell within para (a) of s 133(1). On those grounds alone, it is wrong to describe the function of the court under s 133(3) as being that of applying 'a rubber stamp' to the application of the Official Receiver.

[44] But, if satisfied that the person whose public examination is sought falls within one or other of the categories set out in paras (a)–(c) of s 133(1) of the 1986 Act, is the court required by the mandatory language of s 133(3) to make the order sought? In my view the answer to that question must be a qualified affirmative. The court must keep in mind the purposes of public examination; and that the examinee will be examined on oath and will be required to answer 'all such questions as the court may put, or allow to be put, to him'. In the wholly exceptional case in which it could be seen, at the time of the application for public examination, that there were no questions which it would be proper for the court to put, or to allow to be put, to the examinee at the hearing of the examination—or that there were no purposes to be served by such an examination—the court should decline to make the order. The reason is simple: the court should do

nothing in vain. If the order for public examination can serve no useful purpose, it should not be made. Subject to that qualification, however, it seems to me that the court is required to make the order sought. If there are particular questions or areas of inquiry to which objection can be taken, that can be raised and debated at the public examination itself—or, if more convenient, at a preliminary hearing. But it is, I think, only in the very rare case in which it can be seen at the time of the application that there is no proper purpose to be served by a public examination that the court would be justified in refusing to make the order which the Official Receiver—or, in a case under s 133(2), the requisite majority of the creditors and contributories—considers to be needed if the Official Receiver is to carry out the duties imposed on him by s 132(1) of the Act.

[45] In reaching that conclusion I have had regard to the legislative history of s 133 of the 1986 Act; to the comparable provisions in bankruptcy; and to the recommendations of the Review Committee on Insolvency Law and Practice chaired by Sir Kenneth Cork (*Insolvency Law and Practice: Report of the Review Committee* (1982) (Cmnd 8558)).

[46] The provisions now in s 133 of the 1986 Act were first introduced, in a different form, as s 8 of the Companies Act 1890. They were re-enacted in the Companies Act 1908, 1929 and 1948. They appear in the 1948 Act as s 270(1). The subsection was in these terms:

> 'Where an order has been made in England for winding up a company by the court, and the official receiver has made a further report under this Act stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation, the court may, after consideration of the report, direct that that person or officer shall attend before the court on a day appointed by the court for that purpose and be publicly examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as officer thereof.'

[47] The further report referred to in that subsection was a report made under s 236(2) of the 1948 Act, stating whether, in the opinion of the Official Receiver, any fraud had been committed by any person in its promotion or formation or by any officer of the company in relation to the company since its formation and setting out any other matters which he thought desirable to bring to the court's notice.

[48] The provisions in s 270(1) of the 1948 Act were the subject of comment and recommendation by the Cork Committee, in its report published in 1982, under the heading 'Public examination':

> '653. Under the existing law and procedure a public examination can only be held in a winding up case if the Official Receiver makes "a further report" to the Court under section 236(2) of the Act of 1948 alleging fraud in relation to the company; in these circumstances the Court may order a public examination of the person against whom the allegations have been made. In practice, the provisions enabling a public examination to be held are no longer invoked. A public examination does not appear to have been held since 1935.

654. We believe that this approach to the public examination requires to be reviewed. If, as we recommend, the whole purpose of a Compulsory Winding up Order is to deal with cases which are of sufficient gravity to justify a full investigation, then, we believe, a public examination has a role to play in the proceedings. We attach importance to a public examination for individual debtors in the event of a Bankruptcy Order being made and we consider that it would be undesirable if a similar provision was not available in the Compulsory Winding Up of an insolvent company, for use where the Court felt it to be appropriate.

655. A public examination during the course of Compulsory Winding Up proceedings should, as in Bankruptcy, be intended to serve three principal purposes: (a) to form the basis of reports which the Official Receiver may have to submit to the Department concerning the affairs of the company; for example, concerning possible offences by officers of the company and others; (b) to obtain material information for the administration of the estate which cannot as well be obtained privately; and (c) to give publicity, for the information of creditors and the community at large, to the salient facts and unusual features connected with the company's failure.

656. We believe, as did the Jenkins Committee, that the revival of the public examination as a factor to be reckoned with in winding up proceedings is desirable. By exposing serious misconduct, it will help to promote high standards of commercial and business morality and will also serve as a form of sanction against former officers of a failed company who have not adequately assisted the Official Receiver and the liquidator in the course of their respective investigations and administration of the company's affairs.'

[**49**] Section 270(1) of the 1948 Act was re-enacted as s 563 of the 1985 Act, in substantially the same terms. In particular, s 563 of the 1985 Act continued to use the word 'may' in conferring upon the court power to make an order; and it continued to require a report evidencing fraud. But when those provisions came to be incorporated in the 1986 insolvency legislation—as s 133—two significant changes were made. First, public examination was to be available in all cases and not merely in cases where there was a report alleging fraud; and, second, Parliament enacted—by sub-s (3)—that, on an application for a public examination, the court 'shall', not merely 'may', make an order. In making that latter change Parliament must have recognised that the word 'may' continued to be used in relation to private examinations under s 236.

[**50**] In my view the clear statutory purpose behind the change that was made in the 1986 legislation—in recognition of the recommendations—was, first, to make greater use of public examination in cases where companies were being wound up by the court and, second, to assimilate the practice in corporate insolvency to that which had existed in individual insolvency since at least the Bankruptcy Act 1869 (see s 19 of that Act). For the 70 years prior to 1986 the relevant provisions were those in s 15(1) of the Bankruptcy Act 1914, which required that a public examination shall be ordered by the court whenever the court made a receiving order, unless the debtor were a lunatic or suffered from such mental or physical affliction as in the opinion of the court made him unfit to attend his public examination (see s 15(10) of the 1914 Act).

[51] Public examination in bankruptcy was mandatory save in the circumstances set out in s 15(10) of the 1914 Act, until the enactment of the Insolvency Act 1976. Section 6(1) of that Act provided that the court might, if it thought fit, make an order dispensing with the public examination of a debtor under s 15 of the 1914 Act. In determining whether to make an order dispensing with public examination the court was to have regard to all the circumstances of the case including, in particular: (a) whether the debtor had made full disclosure of his affairs; (b) whether he had been adjudged bankrupt on a previous occasion; (c) the number and nature of his debts; (d) whether his bankruptcy would for any reason be a matter of public concern; and (e) such other matters as might be prescribed for the purposes of the subsection under the Bankruptcy Rules. But it is pertinent to note that an order dispensing with public examination could not be made under s 6(1) of the 1976 Act except on the application of the Official Receiver (see s 6(2) of that Act). So the position in bankruptcy prior to 1986 was that public examination was the norm. The relevant provisions in relation to individual insolvency are now contained in s 290 of the 1986 Act. They are, in all material respects, the same as those in relation to corporate insolvency, contained in s 133 of that Act—see, in particular, s 290(3) of the 1986 Act.

[52] In my view, Parliament intended that public examination should be ordered in corporate insolvency—should the Official Receiver think it appropriate—as in individual insolvency. That is why it enacted s 133 in terms which were so markedly different from those which had gone before. That view of the effect of s 133 of the 1986 Act has been adopted by judges of the Companies Court in *Re Seagull Manufacturing Co Ltd (in liq)* [1991] 4 All ER 257 at 265–266, [1992] Ch 128 at 140–141, in *Richbell Strategic Holdings Ltd (in liq) (No 2)* [2000] 2 BCLC 794 at 799 and in *Re Avatar Communications Ltd* (1988) 4 BCC 473 at 474. To my mind, those judges were correct to take the view that they did.

[53] Accordingly, in answer to the first of the issues raised, I would hold that the court is required to make an order for public examination if the conditions set out in s 133(1) are satisfied, unless it is satisfied that there is no useful purpose to be served by such an examination.

THE APPROACH TO BE TAKEN ON AN APPLICATION TO RESCIND UNDER RULE 7.47(1) OF THE 1986 RULES

[54] In the light of the view which I have taken as to the approach which the court should adopt on an application under s 133 of the 1986 Act, the approach which it should adopt on a subsequent application under r 7.47(1) of the 1986 rules is not, I think, in doubt. If an application is made without notice under s 133 of the Act, the court will not have the opportunity to consider the matters which the proposed examinee may wish it to take into account in support of a contention that no useful purpose will be served by a public examination. Rule 7.47(1) provides an opportunity for the court to consider representations by the proposed examinee at a hearing in advance of the public examination itself. So, where it can be seen on an application under r 7.47(1) that there is indeed no purpose to be served by the public examination that has been ordered, the court may set aside the order which it has made.

[55] On an application under r 7.47(1) it would be appropriate, as it seems to me, for the court to consider a submission that the examinee was liable to some sanction in a foreign jurisdiction which would make it unduly oppressive to require him to answer any questions put to him at the public examination; in

other words, to consider whether there was some factor which should lead the court to conclude that, at the public examination, it would not be proper to put any questions, or to require any questions to be answered. And, in the rare circumstances in which it could be seen that there were simply no questions that could be asked and answered at a public examination, it might be appropriate to discharge the order on an application under r 7.47(1). But, if the only purpose of the application is to assert that there will be some questions which cannot be answered, then the convenient course is likely to be to leave those questions to be identified at the public examination.

**[56]** It is, I think, of some significance that the provisions formerly enacted in s 6(1) of the 1976 Act have not been carried into the 1986 insolvency code, either in relation to individual bankruptcy or in relation to corporate winding up. Parliament may be taken to have determined that, in the first place, it was for the Official Receiver to determine whether the circumstances required a public examination; and, if so, to apply for an order. But the matters set out in s 6(1) of the 1976 Act are matters which might be expected to be relevant to a decision whether or not a public examination would serve some useful purpose; and, in my view it would be appropriate for the court to take those matters into account on an application under s 375(1) of the 1986 Act (the statutory successor of s 198(1) of the 1914 Act—to which express reference is made in s 6(2) of the 1976 Act). Rule 7.47(1) of the 1986 rules applies the principle of review and rescission to corporate insolvency; and it must, I think, follow, that a court can take account, on an application under r 7.47(1), of matters analogous to those which would be relevant on an application under s 375(1) of the Act. The court should also, as it seems to me, have regard (in a case like the present) to the purpose to be served by a public examination—identified at para 655(c) of the Cork Report.

CONCLUSION

**[57]** For these reasons I would dismiss both these appeals. I am satisfied that, on a proper understanding of the approach to be adopted on an application under r 7.47(1) of the 1986 rules, there is no basis upon which the order of 27 February 2001 could be set aside.

**RIX LJ.**

**[58]** I agree.

**SIMON BROWN LJ.**

**[59]** I have found myself truly shocked by the lengths to which this appellant has been prepared to go to avoid a public, or indeed any other, examination into his knowledge of and dealings with Casterbridge Properties Ltd. Perhaps I should not have been. Perhaps all is fair in insolvency litigation no less than in love and war. But to promote an application to the courts of St Vincent to declare that the appellant would be in contempt there were he to obey this court's order, when a release from the St Vincent court order theoretically putting him at risk of such contempt is his for the asking, quite aside from his transparent twelfth-hour efforts thereby once again to postpone the hearing of these appeals, strikes me as in the highest degree disingenuous, and for my part I strongly deprecate it.

**[60]** With regard to Chadwick LJ's very full discussions of the substantive questions of law arising on this appeal, I wish to make but a single observation. A s 133(1) application will come before the court on an ex parte basis. That being so, it seems to me that rarely, if ever, will there be a case where the court will be sufficiently alive to the detailed circumstances of the case to be justified in declining to make the mandatory order ordinarily required by s 133(3) on the ground that no useful purpose would be served by it, ie because no question whatever could properly be put at the public examination applied for.

**[61]** These paragraphs, however, are essentially by the way. For the reasons given by Chadwick LJ, with all of which I respectfully agree, these appeals must clearly be dismissed.

*Appeals dismissed.*

Dilys Tausz Barrister.

# igroup Ltd v Ocwen and others

[2003] EWHC 2431 (Ch)

CHANCERY DIVISION (COMPANIES COURT)

LIGHTMAN J

13, 14, 23 OCTOBER 2003

*Company – Charge – Registration – Rectification of register – Omission or mis-statement of particular – Whether statutory power to rectify register extending to information particulars submitted on prescribed forms by applicant for registration – Companies Act 1985, ss 401, 403, 404.*

The defendant companies were the subsidiary and associated companies of the claimant. Both the claimant and the defendant companies carried on the business of mortgage lending to members of the public. In the course of that business, the defendant companies borrowed moneys from various banks and gave security to them by way of debentures. The debentures charged the defendant companies' rights and interests under the mortgages which they held over their customers' properties. Prescribed particulars of the charges were duly delivered to the Registrar of Companies. Those forms were drafted in sufficiently general terms as to disclose no personal information about the customers. The defendant companies carried out a securitisation programme which involved the equitable assignment of their interest in the mortgage loans to a number of special purpose vehicles. As part of that process, the defendant companies' solicitors sent to the registrar various prescribed forms relating to (i) deeds of release of certain properties from the charges that the defendants had previously given to their lenders (the 403b forms) and (ii) new charges which they had granted to lending banks or security trustees (the 395 forms). The forms referred to, and had attached to them, a number of schedules. Although they did not need to, those schedules contained accurate personal information relating to the customers, eg their names, addresses, the price paid for their properties, the original advances, the current balances of their mortgage loans, the payment dates, the monthly payment amounts and the interest rates charged. On receipt of the forms, the registrar made appropriate entries on the register of charges of the particulars referred to in s 401(1)[a] of the Companies Act 1985 and the memoranda of satisfaction referred to in s 403(1)[b] of that Act. The claimant was concerned that the disclosure of the personal information in the forms might constitute a breach of duty owed by it or the defendant companies to the customers. It therefore brought proceedings for rectification or amendment of the forms, contending that the inclusion of unnecessary information fell within the court's power, under s 404[c], to rectify a 'mis-statement of any particular with respect to

a Section 401, so far as material, is set out at [9], below

b Section 403, so far as material, provides: '(1) The registrar of companies, on receipt of a statutory declaration in the prescribed form verifying, with respect to a registered charge,—(a) that the debt for which the charge was given has been paid or satisfied in whole or in part, or (b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, may enter on the register a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking (as the case may be) ...'

c Section 404, so far as material, is set out at [11], below

any ... charge or in a memorandum of satisfaction'. Alternatively, the claimant sought rectification under the court's inherent jurisdiction. On the hearing of the application, which was supported by the defendant companies but opposed by the registrar, the court was required to determine whether it had jurisdiction to make the order sought, and in particular whether its jurisdiction under s 404 was restricted to entries on the face of the register of charges or extended to the forms and schedules thereto.

**Held** – The power of rectification granted to the court by s 404 of the 1985 Act was limited to correcting mistakes of omission or commission in the entry of any particular with respect to a mortgage or charge or in a memorandum of satisfaction made by the registrar on the register of charges maintained by the registrar under s 401. It did not extend to mistakes otherwise than in a particular entered on the register, and accordingly did not extend to the information particulars entered on a form 395 or a form 403b by or on behalf of an applicant for registration. The references in s 404 to 'any particular with respect to any ... charge' and to 'a memorandum of satisfaction' were references to the particulars that the registrar was required to enter on the register of charges under s 401(1), and to the memorandum of satisfaction that the registrar could enter on the register of charges under s 403. It followed in the instant case that the court had no power to grant the relief claimed under s 404. Nor did the court have any inherent power of rectification since there was binding authority that such a power was wholly inconsistent with the limited statutory jurisdiction to order rectification under s 404. Accordingly, the application would be dismissed (see [16], [19], [26], [27], [33], below).

**Notes**

For rectification of the register of charges, see 7(2) *Halsbury's Laws* (4th edn) (1996 reissue) para 1314.

For the Companies Act 1985, ss 401, 403, 404, see 8 *Halsbury's Statutes* (4th edn) (1999 reissue) 460, 461, 462.

**Cases referred to in judgment**

*Calmex Ltd, Re, Calmex Ltd v C Lila Ltd* [1989] 1 All ER 485.

*Exeter Trust Ltd v Screenways Ltd* [1991] BCLC 888, CA.

*R (on the application of Robertson) v Wakefield Metropolitan DC* [2001] EWHC 915 (Admin), [2002] LGR 286, [2002] QB 1052, [2002] 2 WLR 889.

*R v Registrar of Companies, ex p Central Bank of India* [1986] 1 All ER 105, [1986] QB 1114, [1986] 2 WLR 177, CA.

**Cases referred to in skeleton arguments**

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA.

*Calgary and Edmonton Land Co Ltd v Dobinson* [1974] 1 All ER 484, [1974] Ch 102, [1974] 2 WLR 143.

*Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.

*Établissements Georges et Paul Levy v Adderley Navigation Co Panama SA* [1980] 2 Lloyd's Rep 67.

*Heywood v BDC Properties Ltd (No 2)* [1964] 2 All ER 702, [1964] 1 WLR 971, CA.

*Norman v Hardy* [1974] 1 All ER 1170, [1974] 1 WLR 1048.

*Northern Developments (Holdings) Ltd v UDT Securities Ltd* [1977] 1 All ER 747, [1976] 1 WLR 1230.
*Nye (CL) Ltd, Re* [1970] 3 All ER 1061, [1971] Ch 442, [1970] 3 WLR 158, CA.
*Oyston v Blaker* [1996] 2 All ER 106, [1996] 1 WLR 1236, CA.

**Claim**

By a claim form issued on 6 November 2002 under CPR Pt 8, the claimant, igroup Ltd, sought, as a person interested, the rectification or amendment of a number of prescribed forms delivered by the first to ninth defendants, Ocwen (an unlimited company), igroup2 Ltd, igroup3 Ltd, igroup4 Ltd, igroup5 Ltd, igroup6 Ltd, Originated Mortgage Loans 1 plc, Originated Mortgage Loans 2 plc and Originated Mortgage Loans 3 plc (collectively the defendant companies), to the tenth defendant, the Registrar of Companies. The defendant companies, which were subsidiary and associated companies of the claimant, supported the application, and were not represented. The facts are set out in the judgment.

*Matthew Shankland* (barrister) of *Weil, Gotshal & Manges* for the claimant.
*Richard Snowden QC* (instructed by the *Treasury Solicitor*) for the registrar.

*Cur adv vult*

23 October 2003. The following judgment was delivered.

**LIGHTMAN J.**

INTRODUCTION

[1] This is the hearing of a Pt 8 claim by igroup Ltd (the claimant), as a person interested, seeking rectification or amendment of a number of forms 395 and 403b prescribed by the Companies (Forms) Regulations 1985, SI 1985/854 (the Forms) that were delivered to the Registrar of Companies (the registrar) on behalf of the first to ninth defendant companies. The defendant companies are its subsidiary and associated companies and support the application. The claimant's case is that the schedules attached to the Forms contained some unnecessary (but entirely accurate) personal information relating to their customers (the Customers) whose mortgages were the subject matter of the charges in question. The claimant asks for an order that the schedules to the forms 395 simply be removed altogether and that the schedules to the forms 403b be replaced by new schedules. The tenth defendant, the registrar, opposes the application. The issue before the court is whether the court has jurisdiction to make such an order either under s 404 of the Companies Act 1985 (the Act) or its inherent jurisdiction. References in this judgment to sections are to sections in the Act.

[2] The claimant has been represented by Mr Matthew Shankland and the registrar by Mr Richard Snowden QC. They have both afforded me invaluable assistance in deciding this case.

FACTS

[3] The claimant and the defendant companies carry on the business of mortgage lending to Customers who are members of the public. In the course of that business, the defendant companies borrowed moneys from various banks and gave security to the banks by way of debentures. The debentures charged the defendant companies' rights and interests under the mortgages which they

held over the Customers' properties. Prescribed particulars of the charges were duly delivered to the registrar in accordance with s 395 of the Act. The forms were drafted in sufficiently general terms as to disclose no personal information about the Customers.

[4] From June 1999 the defendant companies carried out a securitisation programme which involved the equitable assignment of their interest in the mortgage loans to a number of special purpose vehicles. As part of this process, the solicitors instructed on behalf of the defendant companies sent to the registrar the Forms, being various forms 403b relating to deeds of release of certain properties from the charges that the defendant companies had previously given to their lenders and various forms 395 relating to new charges which they had granted to lending banks or security trustees. The Forms referred to and had attached to them a number of schedules (the Schedules) that not merely accurately identified the properties released from the charges or which were the subject of the new charges, but also variously contained entirely accurate personal information relating to the Customers such as their names, their addresses, the prices paid for their properties, the original advances, the current balances of their mortgage loans, the payment dates, the monthly payment amounts and the interest rates charged (the Information). For whatever reason the solicitors who prepared the Forms plainly took a deliberate decision to use schedules supplied by the claimant containing the Information (namely the Schedules) and to refer to those Schedules in the body of the Forms. They could have prepared forms acceptable to the registrar using different schedules that did not contain the Information, as the defendant companies had done on their applications for registration made prior to June 1999. But they did not do so. On receipt of the Forms, the registrar made appropriate entries on the register of charges of the particulars referred to in s 401(1) and the memoranda of satisfaction referred to in s 403(1). There is no suggestion that such entries were inaccurate or incomplete in any way.

[5] On learning of the disclosure in the Forms of the Information the claimant commenced these proceedings. The particular concern of the claimant prompting the proceedings is not so much prejudice to the claimant or the defendant companies, although the claimant's evidence suggests that they might suffer prejudice if competitors or others seek to use the Information to market products to the Customers without their consent. No suggestion is made that this has actually happened. The claimant's real concern is for the Customers, and in particular to mitigate the consequences of the disclosure already made. Such mitigation is considered to be called for because the disclosure may constitute a breach by the claimant or the defendant companies of duties owed to the Customers of confidence and under the Data Protection Act 1998 or an interference with the Customers' human rights. The claimant relies on the possible existence of these breaches of duty and the possible interference in support of the contention that the court has jurisdiction to order the deletion of the Information from the Forms and Schedules and should exercise that jurisdiction. The registrar disputes that the court has the jurisdiction to make any such order.

THE STATUTORY PROVISIONS

[6] Chapter 1 of Pt XII of the Act contains the statutory provisions relating to registration of companies' charges with the registrar and in the chargor companies' registers of charges. Part XXIV sets out the functions of the registrar

in relation to the keeping of company records. Both Parts are relevant on this application.

*(a) Registration with the registrar*

**[7]** Section 395(1) provides that certain (in fact most) charges created by a company registered in England and Wales shall be void:

> '... unless the prescribed particulars of the charge together with the instrument (if any) by which the charge is created or evidenced, are delivered to or received by the [registrar] for registration in the manner required by this Chapter within 21 days after the date of the charge's creation.'

**[8]** The 1985 regulations provide in reg 4(2) that the particulars prescribed for the purposes of s 395(1) are the particulars contained in Pt I of Sch 4 and in particular form 395. Form 395, headed 'Particulars of a mortgage or charge' pursuant to s 395, requires the form to be completed by inserting the company number, the name of the company, the date of creation of the mortgage or charge, the description of the instrument (if any) creating or evidencing the amount secured by it, the names and addresses of the mortgagees or persons entitled to it and short particulars of the property mortgaged or charged.

**[9]** Section 401(1) provides for the registrar to keep a register in prescribed form, of all charges requiring registration under Pt XII, Ch 1 of the Act. It provides as follows:

> '**401.** *Register of charges to be kept by registrar of companies.*—(1) The registrar of companies shall keep, with respect to each company, a register in the prescribed form of all the charges requiring registration under this Chapter; and he shall enter in the register with respect to such charges the following particulars—(a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, the particulars specified in section 397(1) [including the total amount secured by the whole series, the date of the resolution authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined, a general description of the property charged, and the names of the trustees (if any) for the debenture holders], (b) in the case of any other charge—(i) if it is a charge created by the company, the date of its creation, and if it is a charge which was existing on property acquired by the company, the date of the acquisition of the property, and (ii) the amount secured by the charge, and (iii) short particulars of the property charged, and (iv) the persons entitled to the charge.'

Section 401(2) provides that the registrar shall give a certificate of any charge registered in pursuance of the Chapter and that such certificate shall be conclusive evidence that the requirements of the Chapter as to registration have been satisfied.

**[10]** Section 403 provides that the registrar, on receipt of a statutory declaration in the prescribed form verifying the satisfaction (in whole or in part) of the secured debt or the release of part of the charged property from the charge, may enter on the register a 'memorandum of satisfaction'.

**[11]** Section 404 contains the statutory provision for rectification of the register. The provision is concerned with 'rectification' of the register (though, not exclusively rectification). This is clear not merely by reason of the terms of the sub-heading to s 404, but because of the concluding words of sub-s (2). It is of

course also concerned with extensions of time for registration. Section 404 provides as follows:

> '*Rectification of register of charges.*—(1) The following applies if the court is satisfied that the omission to register a charge within the time required by this Chapter or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief.
>
> (2) The court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended or, as the case may be, that the omission or mis-statement shall be rectified.'

*(b) Registration in the chargor company's register*

**[12]** Section 407 requires every limited company to keep at its registered office a register of charges and to enter on it all charges specifically affecting property of the company. The entry must in each case give a short description of the property charged, the amount of the charge and (except in case of securities to bearer) the names of the persons entitled to it. Failure to register does not invalidate a charge, but an officer of the company knowingly or wilfully authorising or permitting the omission of an entry required to be made in pursuance of the section is liable to a fine. Section 408 provides that creditors and members of the company have a right to inspect any instrument creating a charge requiring registration under the Chapter and the register of charges shall be open to inspection by any person.

*(c) Registrar's records*

**[13]** Section 707A of the Act requires the registrar to keep the originals of documents delivered to the registrar for ten years and s 709 entitles anyone to inspect the records kept by the registrar for the purposes of the Act, and this includes the original of any document delivered to the registrar where the record kept by the registrar of the contents of the document is illegible or unavailable. These provisions apply to forms (and accordingly schedules to forms) submitted to the registrar on an application for registration of a mortgage or charge. As a matter of practice and quite exceptionally the registrar does not keep the original charge documents or copies of them and accordingly these are not available for inspection. A creditor or member may however, as I have already said, inspect copies of the charge documents at the company's registered office and in principle anyone should be entitled to inspect the charge documents if registered at the Land Registry (see the Land Registration Act 2002).

JURISDICTION UNDER s 404

**[14]** It is plain on a reading of s 404 that the jurisdiction to order rectification under s 404 only exists if (i) there has been an 'omission or mis-statement' and (ii) that omission or mis-statement has been 'of any particular with respect to any such charge or in a memorandum of satisfaction'. I must consider whether these two conditions are satisfied in this case beginning with the second of the conditions.

[15] There is no complaint of any omission, but of mis-statement. The 'mis-statement' of which complaint is made by the claimant is not in respect of any entry on the face of the register of charges, but in the Forms and the Schedules. The issue accordingly arises whether the jurisdiction of the court under s 404 is restricted to entries on the face of the register of charges or extends to the Forms and the Schedules thereto.

[16] Notwithstanding Mr Shankland's submissions to the contrary I am satisfied that the references in s 404 to 'any particular with respect to any ... charge' and to 'a memorandum of satisfaction' are references to the particulars that the registrar is required to enter on the register of charges under s 401(1), and to the memorandum of satisfaction that the registrar may enter on the register of charges under s 403. The wording of s 404, 'any particular with respect to any ... charge' mirrors the wording in s 401(1), 'he shall enter in the register with respect to such charges the following particulars'. And a 'memorandum of satisfaction' can only be a reference to an entry made on the register of charges by the registrar under s 403, because the concept of a memorandum of satisfaction does not appear anywhere else. Accordingly, the power of rectification granted to the court by s 404 is limited to correcting mistakes of omission or commission in the entry of any particular with respect to a mortgage or charge or in a memorandum of satisfaction made by the registrar on the register of charges maintained by the registrar under s 401. It does not extend to mistakes otherwise than in a particular entered on the register and accordingly does not extend to the information particulars entered on a form 395 or a form 403b by or on behalf of an applicant for registration under s 395(1).

[17] Mr Shankland sought to overcome this hurdle by arguing that forms 395 and 403b are necessarily part of the register of charges or can be made part of the register of charges by the registrar choosing to enter certain of the particulars by reference to the Forms. In support of this contention the claimant prayed in aid the fact that the contents of the Forms may be necessary information to spell out and understand the full (or any) meaning from the particulars registered. In this context he referred to the note at the top of the pages of the register: 'Searchers may find it desirable to refer to the mortgage documents microfiche for more detailed particulars'; and the note on the Registry's website under the heading 'Company Charges and Mortgages' in relation to the process for registering charges: 'If you omit or mis-state any detail in the documents registered, then you should apply to the court to correct under section 404 of the Act: Rectification of the register of charges.'

[18] There is no basis in law for that submission. The mere fact that a (necessarily short) entry on the register of charges indicates that further details can be found in another document does not make that other document part of the register of charges. As Mr Snowden pointed out, it cannot, for example, sensibly be suggested that a reference on the register to a debenture makes that document part of the register and so empowers the court to rectify the debenture under s 404. Nor can the notes written by the registrar in an effort to provide helpful guidance operate to convert the material referred to into (in effect) a continuation sheet or addendum to the register.

[19] In a word, the Forms are not part of the register of charges and s 404 of the Act has no application to the Forms or the Schedules thereto, and the court has no jurisdiction under s 404 to rectify them. The Forms once received by the registrar under ss 707A and 709 have to be retained by the registrar as part of the records kept by the registrar and made available in copy or original form for

inspection by any person. There is not merely absent any provision for 'rectification' of such documents: the provision for their preservation as part of the registrar's record and for their availability to public inspection is inconsistent with any amendment being made to them.

**[20]** I now turn to the question whether the first condition has been satisfied and accordingly whether there has been an omission or mis-statement within the meaning of s 404. As I have already said, the claimant does not contend that there has been any 'omission' from the Forms. Its case is that the inclusion of unnecessary information on the Forms is a 'mis-statement' within the meaning of s 404 because the inclusion (which rendered the Information available to the public) potentially was or potentially would occasion a breach of duty owed to the Customers. The proposition regarding a breach of duty was advanced in tentative form for reasons of self-preservation because the claimant does not wish to admit breach and expose itself and its associated companies to any liability to the Customers.

**[21]** I do not think that I really need be concerned with propositions advanced in such a tentative form. Since no case is made by the claimant that a breach of duty or interference has actually occurred, it cannot be part of my duty on this application to resolve whether it has or has not. Indeed it is scarcely practicable for me to do so without a positive case to this effect being advanced. In a word the claimant's case in this regard is embarrassing. The most I can do in respect of them is to say that, whilst the claimant may have reason to feel concern, on the evidence before me the existence of any breach of duty or infringement is far from obvious.

**[22]** The first suggested possible breach of a duty is of confidence owed by the claimant and defendant companies to the Customers in respect of the Information. The inclusion of the Information in the Forms or Schedules makes the Information publicly available, for the public have a right to inspect the Forms under ss 707A and 709. The evidence before me is insufficient to establish the existence of any duty of confidence owed by the claimant or the defendant companies to the Customers in respect of the Information. All I am told is the fact that the claimant and the defendant companies would not have wished the Information to have been included in the Forms or the Schedules and accordingly made publicly available if they had realised what was being done and that an alternative was available. I am far from satisfied that the claimant or the defendant companies assumed any duty of confidence in relation to the Information or that (if any duty was assumed) it precluded disclosure of the Information to the registrar in the way it was disclosed on registration of a sub-mortgage. In any event the registrar cannot have owed any duty of confidence to the Customers or have been concerned with the existence of any such confidence in performing faithfully her duties under the Act or have been concerned to filter out on registration information on the Forms or in the Schedules which may be confidential to third parties.

**[23]** The second suggested possible breach is of the Data Protection Act 1998. It is unnecessary to examine that complicated legislation in any detail. It is sufficient to say that it appears highly dubious whether the disclosure of the Information in the Forms by the defendant companies constituted any breach of its provisions. But in any event it is clear that there was no breach by the registrar in effecting the registration and retaining for inspection by the public the Forms and Schedules, for s 34 of the 1998 Act provides an exemption from the non-disclosure provisions if the data consists of information which the data

controller is obliged (as the registrar is obliged) by or under any enactment to make available to the public for inspection.

[24] The third suggested possible breach is by the registrar of s 6 of the Human Rights Act 1998 which provides that it is unlawful for a public authority to act in a way which is incompatible with a right under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). The relevant convention right is art 8(1) which provides that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8(2) provides an exception where the interference is necessary in the interests of the economic well-being of the country. The only authority cited in this context was the judgment of Maurice Kay J in *R (on the application of Robertson) v Wakefield Metropolitan DC* [2001] EWHC 915 (Admin), [2002] LGR 286, [2002] QB 1052. In *Robertson*'s case it was held that for a public body to require electors to include their names and addresses on the electoral register and to adopt the practice of selling the register to commercial concerns without affording the individual elector a right of objection breached the electors' right to respect for his private life. The facts of the present case are far removed from those under consideration in that case. The Information has not been (as the information was in *Robertson*'s case) exacted by a public authority for one purpose and then used or exploited for another. The Information is a form of a statement of the accounts between the defendant companies and their customers. I cannot think that disclosure of the Information for proper business purposes and in particular in pursuit of an obligation to register a charge can engage art 8(1). But in any event any interference with that right is surely justified as in accordance with law, necessary in the interests of the economic well-being of the country (the maintenance of an accurate and complete record of filings at Companies House) and proportionate. In particular it is necessary that the public have the means of access to information as to the subject matter of the charges granted by the defendant companies so that they can deal with those companies on a properly informed basis. That is the rationale for the registration provisions of the Act to which I have referred. I have considered whether it is significant for present purposes that the Forms and Schedules open to inspection in the case are more informative than they might have been. I have reached the conclusion that it is not significant. It cannot be a matter for the registrar to undertake the quite impossible task of deciding in the case of each application for registration whether or not apparently relevant information disclosed needs to be dispensed with. But in any event the rationale of the statutory provisions is that registration shall be informative. The fact that the registrar for good and practical reasons may perforce accept applications and forms which are less informative cannot mean that objection can be taken to acceptance of more informative forms and applications which more fully achieve the statutory objective.

[25] Accordingly there appears to me to be no substance in the suggestion that the disclosure or consequent public availability of the Information constitutes any form of wrongdoing by the defendant companies, still less the registrar. But in any event even if there were any such wrongdoing as is suggested, I cannot see how such wrongdoing could render the disclosure of the Information a 'mis-statement' entitling the court to exercise its jurisdiction to rectify the register under s 404. There is nothing stated which is erroneous or wrong and there is no allegation that there is. The complaint is about the telling of the truth.

[26] Accordingly for the reasons which I have given the court has no jurisdiction to grant relief claimed under s 404.

INHERENT JURISDICTION

[27] In the alternative the claimant contends that, if s 404 does not give the court jurisdiction to order rectification of the Forms and their Schedules, the court has an inherent jurisdiction to order such rectification. This submission is unmaintainable, for in the case of *Exeter Trust Ltd v Screenways Ltd* [1991] BCLC 888, the Court of Appeal expressly held that the existence of the limited statutory jurisdiction to order rectification under s 404 was wholly inconsistent with any suggestion that the court has any inherent power of rectification.

[28] The claimant seeks to escape from the decision in the *Exeter Trust* case by submitting that *Re Calmex Ltd, Calmex Ltd v C Lila Ltd* [1989] 1 All ER 485 is authority for the proposition that the court has an inherent jurisdiction to order the registrar to rectify documents held by the registrar; that the *Exeter Trust* case only decided that s 404 was a statutory fetter upon the exercise of that inherent jurisdiction in relation to the register of charges; and that the Court of Appeal in the *Exeter Trust* case referred to the *Calmex* case with approval. Neither of the first two propositions are correct. The *Calmex* case merely established (if ever authority were required for the proposition) that the court has a supervisory jurisdiction over the registrar and can in judicial review proceedings make orders enforcing the performance by the registrar of the registrar's public duties.

[29] The *Calmex* case was a case in which the company in question had been the subject of a winding-up order that had been forwarded to the registrar and entered on the registrar's records relating to the company in accordance with s 130(1) of the Insolvency Act 1986. It turned out that the winding-up order had been made entirely by mistake as a result of a confusion between similarly named companies, and that the company that had ostensibly been wound up had not even been served with the petition. Hoffmann J held that the proceedings and winding-up order were a complete nullity.

[30] Hoffmann J then went on to deal with the question whether an order could be made for the removal of the winding-up order from the registrar's records (see [1989] 1 All ER 485 at 488):

> 'Finally, counsel for the registrar submitted that the court had no jurisdiction to tell the registrar to remove documents from the register. I would be surprised if a company had no remedy against the registrar if he chose to include in the file a document which was prejudicial to the company and which he had no statutory duty to keep. And I have held that, on the true construction of s 130(1) of the 1986 Act, the registrar has no duty to retain entered in his records a winding-up order which the court has declared to be a nullity. I suspect that the remedy would be by way of judicial review, but counsel for the registrar said that the registrar did not wish to take any point on the procedure by which the matter has been brought before the court, but contended that even by way of judicial review there was no jurisdiction. In my judgment the court does in principle have jurisdiction according to ordinary public law principles to control the way in which the registrar carries out his statutory duties, subject to any specific exclusions of that jurisdiction or the evidence on which it could be founded, as in *R v*

*Registrar of Companies, ex p Central Bank of India* [1986] 1 All ER 105, [1986] QB 1114.'

[31] The *Calmex* case was a case dealing with the question of whether the registrar should retain in the registrar's records a particular document (namely the winding-up order) which was a nullity. It was not a case like the present dealing with whether it might be permissible to order the registrar to rectify or alter a document held by the registrar. Hoffmann J held that the registrar had no statutory duty to keep such a nullity and therefore should not do so. It was not a case like the present which is concerned with the question of how the registrar should deal with valid documents, namely the Forms and Schedules that had been duly delivered in accordance with the relevant legislation and properly relied upon by the registrar in the discharge of the registrar's statutory functions and which the registrar is under a statutory duty to retain as part of the registrar's records available for public inspection.

[32] In a word, Hoffmann J held in the *Calmex* case that the registrar had a statutory duty to remove from the registrar's records the nullity and the court in exercise of its supervisory jurisdiction would enforce that duty. In the present case, far from there being any public duty to rectify, the registrar is under a public duty to retain the Forms and Schedules in their present form. There are no grounds alleged or shown for invoking the court's jurisdiction by way of judicial review. The *Calmex* case accordingly affords no support for the proposition that the court has inherent jurisdiction to make the order sought.

CONCLUSION

[33] For the above reasons this application must be dismissed.

*Application dismissed.*

Celia Fox Barrister.

# P v BW

## [2003] EWHC 1541 (Fam)

FAMILY DIVISION

BENNETT J

5, 6, 18 JUNE, 2 JULY 2003

*Child – Court proceedings in relation to child – Proceedings in private – Publication of information – Right to fair trial – Whether court proceedings in private in relation to child contrary to right to fair trial – Children Act 1989, s 97 – Human Rights Act 1998, Sch 1, Pt I, art 6, Family Proceedings Rules 1991, r 4.16(7).*

Section 97(2)[a] of the Children Act 1989, which provides that no person shall publish any material which is intended to, or likely to, identify any child as being involved in legal proceedings in which any power under the 1989 Act may be exercised by the court with respect to that or any other child unless the court is satisfied that the welfare of the child requires it, is compatible with art 6(1)[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provides for the right to a fair trial, including the right to a public hearing. Rule 4.16(7)[c] of the Family Proceedings Rules 1991, which provides that unless the court directs otherwise, a hearing of proceedings under the 1989 Act, or a directions appointment in proceedings under the 1989 Act, shall be in chambers, is in conformity with art 6 of the convention (see [46], [47], below); *Re P-B (a minor) (child cases: hearing in open court)* [1997] 1 All ER 58 and *B v UK* [2001] 2 FCR 221 considered; *Clibbery v Allan* [2002] 1 All ER 865 applied.

**Notes**

For privacy for children in proceedings and for the right to a public hearing, see 5(2) *Halsbury's Laws* (4th edn reissue) para 836 and 8(2) *Halsbury's Laws* (4th edn reissue) para 138, respectively.

For the Children Act 1989, s 97, see 6 *Halsbury's Statutes* (4th edn) (2003 reissue) 558.

For the Family Proceedings Rules 1991, r 4.16, see 12 *Halsbury's Statutory Instruments* (2002 issue) 154.

**Cases referred to in judgment**

*Axen v Germany* (1984) 6 EHRR 195, [1983] ECHR 8273/78, ECt HR.
*B v UK* [2001] 2 FCR 221, ECt HR.
*Campbell v UK* (1984) 7 EHRR 165, [1984] ECHR 7819/77, ECt HR.
*Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] 2 WLR 1511.
*G (minors) (celebrities: publicity), Re* [1999] 3 FCR 181, CA.
*Handyside v UK* (1976) 1 EHRR 737, [1976] ECHR 5493/72, ECt HR.
*Klass v Germany* (1978) 2 EHRR 214, [1978] ECHR 5029/71, ECt HR.
*P-B (a minor) (child cases: hearing in open court), Re* [1997] 1 All ER 58, CA.
*Pretto v Italy* (1984) 6 EHRR 182, [1983] ECHR 7984/77, ECt HR.
*R (Court of Appeal: order against identification), Re* [1999] 3 FCR 213, CA.

a Section 97, so far as material, is set out at [9], below
b Article 6, so far as material, is set out at [10], below
c Rule 4.16, so far as material, is set out at [17] below

*R v Central Independent Television plc* [1994] 3 All ER 641, [1994] Fam 192, [1994] 3 WLR 20, CA.
*R v Chief Registrar of Friendly Societies, ex p New Cross Building Society* [1984] 2 All ER 27, [1984] QB 227, [1984] 2 WLR 370, CA.
*Riepan v Austria* [2001] Crim LR 230, [2000] ECHR 35115/97, ECt HR.
*Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, HL.
*Silver v UK* (1983) 5 EHRR 347, [1983] ECHR 5947/72, ECt HR.
*Sutter v Switzerland* (1984) 6 EHRR 272, [1984] ECHR 8209/78, ECt HR.
*Szücs v Austria* (1998) 26 EHRR 310, ECt HR.
*Werner v Austria* (1998) 26 EHRR 310, [1997] 21835/93, ECt HR.

**Application**

The applicant, P, applied in January 2003 for a joint residence order in respect of his infant child and for trial of the application in open court with public pronouncement of judgment and a declaration of incompatibility of s 97(2) of the Children Act 1989 with, inter alia, art 6 of the European Convention for the Protection of Human Rights 1950 (as set out in Sch 1 to the Human Rights Act 1998) and on 17 March 2003 for permission to apply for judicial review of, inter alia, r 4.16(7) of the Family Proceedings Rules 1991, as being incompatible with, inter alia, art 6(1) of the convention. The respondent, BW, the child's mother, opposed the applications. By order of Hughes J on 29 May 2003 the Crown was invited to be heard in the proceedings. Bennett J handed down judgment in the application for residence in private. The facts are set out in the judgment.

The applicant appeared in person.
The respondent appeared in person.
*Stephen Cobb QC* appeared for the Crown.

*Cur adv vult*

2 July 2003. The following judgment was delivered.

**BENNETT J.**

[1] In January 2003 the applicant, the child's father, applied for a joint residence order in respect of his 12-year-old son. The respondent, the child's mother, opposes it. In his application the applicant applied also for:

> '3. Trial in open court with public pronouncement of judgment
> 4. Declaration of incompatibility of s 97(2) of the Children Act, 1989, with arts 6 and 10 ECHR.'

By a supplementary application dated 17 March 2003 the applicant moved for an order of certiorari to quash r 4.16(7) of the Family Proceedings Rules 1991, SI 1991/1247, and rr 4.23(1) and 10.20(3) so far as they prevent disclosure or inspection respectively of Children Act judgments, without leave of the judge or the district judge. It was said that those rules are incompatible with arts 6(1) and 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[2] On 5 June 2003 I heard argument on those applications from the applicant in person, the respondent in person and from Mr Stephen Cobb QC, who appeared on behalf of the Crown pursuant to an invitation by the court on 29 May 2003.

**[3]** This judgment on those and other legal issues is being handed down in open court but has been anonymised. I direct that nothing should be done or said which might lead to the identity of the child being revealed.

**[4]** It is appropriate to give a very short recitation of the background of this case. In 1986 the applicant and the respondent began to cohabit. In 1990 their child, who is the subject of these proceedings, was born. In January 1992 the applicant and the respondent married. The marriage quickly foundered. In 1995 the parties separated and the child thereafter lived with the respondent. The parties were divorced in December 1995. Proceedings were initiated in respect of the residence of the child. An application was made that the whole of the evidence, submissions and judgment should be in open court. The judge refused that application. The applicant appealed. His appeal was decided on 20 June 1996. The Court of Appeal dismissed it, see *Re P-B (a minor) (child cases: hearing in open court)* [1997] 1 All ER 58. In August 1996 the judge, having heard the evidence, decided that it was in the best interests of the child that a residence order should be granted to the respondent. The applicant did not seek to appeal that decision.

**[5]** The father was dissatisfied with the decision of the Court of Appeal and initiated an application to the European Court of Human Rights (the European Court) alleging a violation of his rights under arts 6 and 10 of the convention. His application was consolidated with another case and the two cases were orally argued on 14 November 2000. On 24 April 2001 the European Court gave its decision and found by a majority (five votes to two) that there had been no violation of art 6 and found unanimously that it was not necessary to consider separately the complaint under art 10 (see *B v UK* [2001] 2 FCR 221).

**[6]** Since the separation in 1995 the child has always lived with the respondent. The applicant had contact with the child from the separation until he voluntary chose not to have contact with the child between August 1996 and the beginning of 1999. Contact was then resumed. In early 2003 the father decided to initiate an application for joint residence and to challenge the validity of s 97 of the Children Act 1989.

**[7]** This judgment gives my reasons for (a) dismissing the applicant's applications with reference to a declaration of incompatibility with the convention, (b) why the argument in relation to the applications on the 5 June was heard in chambers, and (c) why this judgment has been anonymised and why the judgment in relation to the substantive issue of residence of the child will be given in chambers, ie privately.

**[8]** Section 4 of the Human Rights Act 1998 provides as follows:

> '(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.'

**[9]** Section 97 of the 1989 Act provides as follows:

> '(1) Rules made under section 144 of the Magistrates' Courts Act 1980 may make provision for a magistrates' court to sit in private in proceedings in which any powers under this Act may be exercised by the court with respect to any child.

(2) No person shall publish any material which is intended, or likely, to identify—(a) any child as being involved in any proceedings before the High Court, a county court or a magistrates' court in which any power under this Act ... may be exercised by the court with respect to that or any other child; or (b) an address or school as being that of a child involved in any such proceedings.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he did not know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.

(4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.

(5) For the purposes of this section—"publish" includes:—(a) include in a programme service (within the meaning of the Broadcasting Act 1990); or (b) cause to be published; and "material" includes any picture or representation.

(6) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.'

Subsections (7) and (8) are not germane.

**[10]** The applicant has submitted that that section infringes both arts 6 and 10 of the convention. Article 6(1) provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

**[11]** Article 10 provides:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

**[12]** The applicant submitted that he wanted the proceedings to be in public. He is a 'victim' in that he is prevented by s 97 from publishing information identifying or likely to identify (a) his own child and (b) other children in other proceedings and which he does wish to publish as a writer, editor and

communicator. He further submitted that he is a 'victim' because he is prevented from receiving information of this kind from those who would wish to impart it to him in relation to their own proceedings involving their children. He says he faces a threat of prosecution under s 97 of the 1989 Act as a result of publishing a pamphlet 'Contact', five issues of which he exhibited in the bundle of authorities placed before me. He submitted, in my judgment correctly, that s 97 applied to the proceedings which he launched in January 2003.

[13] He submitted that s 97 infringed both arts 6 and 10. There was no justification for invoking any of the exceptions either in art 6 or art 10. He drew to my attention a number of cases in particular *R v Central Independent Television plc* [1994] 3 All ER 641, [1994] Fam 192, *Re G (minors) (celebrities: publicity)* [1999] 3 FCR 181 and *Re R (Court of Appeal: order against identification)* [1999] 3 FCR 213. In particular he drew my attention to a passage in *Re G* [1999] 3 FCR 181 at 190 where Thorpe LJ said:

> 'The extent to which family proceedings in our jurisdiction are conducted in private hearings has been the subject of considerable recent criticism and there are powerful arguments for more openness.'

He also cited part of the judgment of Hoffmann LJ (as he then was) in *R v Central Television* [1994] 3 All ER 641 at 651–652, [1994] Fam 192 at 202–203:

> 'There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word "nevertheless". The judge then goes on to explain that there are other interests which have to be balanced against press freedom. And in deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested. He may even advert to the commercial motives of the newspaper or television company compared with the damage to the public or individual interest which would be caused by publication. The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute. Furthermore, in order to enable us to meet our international obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), it is necessary that any exceptions should satisfy the tests laid down in art 10(2). They must be "necessary in a democratic society" and fall within certain permissible categories, namely—"in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for

the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, for maintaining the authority or impartiality of the judiciary." It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.'

**[14]** He also drew my attention to para 97 of the judgment of the European Court in *Silver v UK* (1983) 5 EHRR 347 at 376–377 where it was said:

'On a number of occasions, the Court has stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions. It suffices here to summarise certain principles: (a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable", or "desirable" [see *Handyside v UK* (1976) 1 EHRR 737 at 753–754 (para 48)]; (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention [para 49]; (c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" [paras 48–49]; (d) those paragraphs of Article of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted [see *Klass v Germany* (1978) 2 EHRR 214 at 230–231 (para 42)].'

**[15]** He submitted that it would be for the Crown to justify why it would be necessary in a democratic society for hearings involving children to be held in private. He submitted that in Scotland courts routinely hear children cases in public and there is no restriction. Since therefore it was impossible for the Crown to justify any of the exceptions in arts 6 and 10 it would follow that s 97 of the 1989 Act should be declared incompatible with those provisions in the convention. He robustly challenged pronouncements of the courts that it is not in children's interests for matters about children to be heard in public. He submitted that there was no justification for saying that children would be embarrassed or teased or bullied as a result of publicity. To that end he called Mr O'Connor who, as I understood it from his evidence, has two children and is separated from their mother. He told me that his children had no concerns and were very relaxed, indeed almost excited, about being seen on television. They had not experienced any bullying or teasing and indeed their mother is a teacher at their school. They have suffered no distress he told me. His children are seven and five years old respectively.

**[16]** The second theme of the applicant's submissions was that the hearing should be in public and that r 4.16(7) of the 1991 rules was in direct contravention of arts 6 and 10 of the convention. He submitted that it was not an abuse of the process to re-litigate that matter even in the light of the decision of the European Court in his own case in 2001 to which I have already referred. He argued that as the original domestic proceedings took place in 1996 prior to the incorporation into English domestic law of the convention, I was not strictly bound by the

decision of the European Court in respect of the present proceedings and that the decision of the European Court was inconsistent with other European Court jurisprudence and ought not to be followed. *a*

**[17]** Rule 4.16(7) of the 1991 rules provides as follows: 'Unless the court otherwise directs, a hearing of, or directions appointment in, proceedings to which this Part applies shall be in chambers.'

**[18]** The applicant emphasised, by reference to certain authorities, the importance of public proceedings. He drew my attention to *Sutter v Switzerland* (1984) 6 EHRR 272, and to a passage in the judgment of the European Court which said (at 277 (para 26)): *b*

> 'The public character of proceedings before the judicial bodies referred to in Article 6(1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.' *c* *d*

He further referred me to the well-known passage in the speech of Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417 at 477, [1911–13] All ER Rep 1 at 30, who said:

> 'It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself while trying under trial."' *e* *f*

Lord Shaw further referred to the words of Hallam.

**[19]** The nub of the applicant's submission is contained in para 30 of his written submissions. I quote: *g*

> 'However, the Human Rights Act 1998 is in force and for the reason set out in the applications of P and B for referral to Grand Chamber of the adverse decision of the Third Chamber which upheld r 4.16(7) and the current practice, and for the reasons given in the dissenting judgment in the Third Chamber, it is submitted that the English courts are now bound by art 6(1) to make public trial the norm in child cases and without any exceptions at all to publicly pronounce judgment in them.' *h*

**[20]** Before turning to consider these submissions it is appropriate that I should refer to the Court of Appeal decision in *Re P-B* [1997] 1 All ER 58. In her judgment Butler-Sloss LJ (as she then was) said (at 60): *j*

> 'In support of his arguments he [ie the applicant] has relied upon a line of cases which set out the importance of open justice in the courts and in particular upon the decision in *Scott v Scott* ... In that case the House of Lords considered the jurisdiction to hear a nullity suit in camera. The principle of the open administration of justice was clearly and trenchantly asserted in the

speeches ... Viscount Haldane LC said: "While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an instant only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic." (See [1913] AC 417 at 437, [1911–13] All ER Rep 1 at 9.) The appellant recognised the long-established procedure in wardship and sought to distinguish the hearing of wardship cases in private from all other children cases. He is not, in my view, able to sustain that distinction. The paramount duty expressed by Viscount Haldane LC is now found in s 1 of the 1989 Act in words very similar to the previous Guardianship of Minors Acts, that "the welfare of the child shall be the court's paramount consideration" ... The appellant relied also upon the views of several members of the judiciary given in lectures or articles in support of hearing children cases in open court ... However, to my knowledge, there is no judgment to the effect that a court should always or even regularly hear family cases in public. The practice in children cases has been and is to the contrary despite the views of some judges which are irrelevant to the decision we have to make as to the meaning and proper application of para (7) (of r 4.16 of the 1991 rules).'

**[21]** Butler-Sloss LJ continued (at 61):

'The appellant has also addressed us upon the European Convention on Human Rights and Fundamental Freedoms ... and has suggested that family proceedings in the English jurisdiction are in conflict with arts 6 and 10 of the Convention.'

Butler-Sloss LJ then set out the relevant provisions of arts 6 and 10 and continued:

'It would seem to me that the present procedures in family proceedings are in accordance with the spirit of the convention. The long-established practice in the English High Court and county court hearing applications for custody/access, (now called residence/contact) or wardship has been and remains to hear the whole of the evidence in private. In the High Court, which hears the more difficult cases and those which create public interest, judgment will often be given in public either in part or in whole where the court believes there to be a public interest in the case or to give guidance to practitioners.'

**[22]** Butler-Sloss LJ concluded her judgment (at 62):

'In answer to the appellant's second point that the exercise of discretion should always be in favour of hearings in open court, it would seem to me that he is directing his arguments to the wrong forum. The wording of para (7) is clear. The exercise of discretion remains in the hands of the trial judge and it is a matter for the judge in each case to exercise that discretion

if called upon to do so. In the absence of an application to hear the case in open court and unusual circumstances, the normal position would remain, as recognised by the wording of the sub-paragraph, that the evidence would be heard in private.'

**[23]** In the European Court the applicant and his co-applicant alleged 'violations of their rights to a public hearing and public pronouncement of judgment under art 6(1) of the convention and of their right to freedom of expression under art 10' (see the court's judgment in *B v UK* [2001] 2 FCR 221 at 224 (para 3)). Between paras 19 and 22 (at 227–228) the European Court set out the facts underlying the application of the applicant. The European Court (at 228–230 (paras 23–26)) referred to the hearing and judgment in the Court of Appeal and the outcome of the case in front of the county court judge in August 1996.

**[24]** The European Court briefly summarised (at 232–233 (para 34)) the submissions of the applicant, namely that the public's right to attend the hearing was an essential safeguard against judicial arbitrariness and helped maintain confidence in the administration of justice. Openness was particularly important in cases involving the residence of children in view of the wide discretion afforded to judges, the inevitability that judges decide such cases in accordance with their own personal values and morality, and the heavy reliance placed on the views of court welfare officers. The court noted that his application for residence was 'run of the mill' but he nevertheless submitted that, even as such, it merited exposure to public scrutiny.

**[25]** The European Court's majority judgment was as follows (at 233–234):

'38. The proceedings which the present applicants wished to take place in public concerned the residence of each man's son following the parents' divorce or separation. The Court considers that such proceedings are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interest of justice. To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment.

39. The applicants submit that the presumption in favour of a private hearing in cases under the Children Act should be reversed. However, while the Court agrees that art 6(1) states a general rule that civil proceedings, inter alia, should take place in public, it does not find it inconsistent with this provision for a state to designate an entire class of case as an exception to the general rule where considered necessary in the interests of morals, public order or national security or where required by the interests of juveniles or the protection of the private life of the parties (see *Campbell v UK* (1984) 7 EHRR 165, paras 86–87), although the need for such a measure must always be subject to the Court's control (see, for example *Riepan v Austria* [2001] Crim LR 230, [2000] ECHR 35115/97 (para 34)). The English procedural law can therefore be seen as a specific reflection of the general exceptions provided for by art 6(1).

40. Furthermore, the English tribunals have a discretion to hold Children Act proceedings in public if merited by the special features of the case, and the judge must consider whether or not to exercise his or her discretion in this respect if requested by one of the parties. Turning to the facts before it, the

> Court notes that ... In the second applicant's case [I interpolate ie the applicant in the instant case] the judges at first instance and on appeal gave careful consideration and detailed explanations of their reasons for holding that the proceedings should continue in chambers (see paras 21 and 23 above).
>
> 41. In conclusion, therefore the Court does not consider that the decision in each applicant's case to hold the hearing of his application for the residence of his son in chambers gave rise to a violation of art 6(1) of the Convention.'

[26] So far as art 10 was concerned, the court referred to its findings in connection with art 6(1) ([2001] 2 FCR 221 at 236 (para 52)) and did not find it necessary to examine the complaint under art 10 separately.

[27] Sir Nicolas Bratza agreed with the majority of the court in finding that there had been no violation of the convention. As to the complaint concerning the holding of the proceedings in private he fully shared the reasoning of the majority (at 237):

> '... the decisive point in my view being in that both cases the county court judge exercised his independent discretion to exclude the public from the substantive hearing in the interests of the children concerned.'

[28] The dissenting opinion of two of the seven judges of the European Court was to the effect that private hearings can be justified only if the needs of the particular case so demand and that has to be decided by the court in any specific case where such an issue arises. The exceptional decision to hold a private hearing cannot be decided in abstracto or by reference to a category of cases; it must be determined in concreto by reference to the particular facts of a case. The dissentients wholly disagreed with the view of the majority that a state can designate an entire class of case as an exception to a general rule. Furthermore the dissentients were of the view that the decisions to hold private hearings in the applications in front of them were not taken by reference to any specific facts applicable to the relevant proceedings, but were the direct result of implementing a general rule of law in the absence of any concrete criteria. They believe that the legal ruling in England to the effect that unless the court otherwise directs hearings of family cases should be in camera is the reverse of what art 6 demands, namely that in civil proceedings the hearings must be held in public unless the court (and not any general rule of law) decides, exceptionally, in the light of the particular facts nature or circumstances of the concrete case before it to exclude the press or public from all or part of the trial on any of the grounds specified in art 6.

[29] It was accordingly submitted by the applicant before me that the correct approach of 'trial courts' is only to accede to a request for the trial or part of it to be in chambers if the child's interests or the protection of the private life of the parties positively required that or if the interests of justice would otherwise be prejudiced. The test was a high one. Special reasons now had to be given to justify departure from the principle of open justice. Mere discomfort or embarrassment or loss of privacy was not enough; there had to be such harm that no reasonable citizen fully instructed in democratic principles rights and duties could be expected none the less to participate in a public trial.

[30] The applicant put before me the requests of himself and of his co-applicant before the European Court for referral of the decision of the Third Chamber to the Grand Chamber, pursuant to the provisions of art 43 of the Rules of Court of the European Court of Human Rights. The request in both the applicant and the co-applicant's case, was refused on 5 September 2001. The applicant submitted to

me that the majority had not decided the case by reference to the particular facts, that there had been a fundamental departure from the normal canons of interpretation of the court and to put it generally, was wrong. In other words he sought to reopen in front of me the very points that had been decided adversely to him by the European Court in 2001. He sought to persuade me that I should reject the reasoning of the majority of the Third Chamber and follow the reasoning of the dissentient minority. So far as the request for referral to the Grand Chamber of his co-applicant was concerned he specifically relied upon para 3(b), namely that the Third Chamber's decision that art 6(1) allowed a state to designate an entire class of cases as an exception to the general rule was clearly contrary to the wording of art 6(1) and was well beyond any permissible restriction to the right to a public hearing accepted by the European Court to date.

[31] At the conclusion of the submissions of the applicant the respondent indicated that she was content to wait and listen to the submissions of Mr Cobb and to see if she wished to add anything to them.

[32] Mr Cobb began his submissions by reminding me that the Crown was not a party to the proceedings as such and that he had no instructions to ask for the Crown to be joined straight away. He had attended pursuant to the request of Hughes J expressed in his order of 29 May 2003.

[33] He made two general submissions. The first went to the application for a declaration of incompatibility. He submitted that there was nothing in the 1989 Act which absolutely prevented publication of material intended or likely to identify any child as being involved in any proceedings before the courts. It was only if the court refused to exercise its discretion to permit publication was there a ban on publication of such material. He pointed out that r 4.16(7) also involved the court exercising its discretion. Similarly with rr 4.23 and 10.20(3), he submitted that there was nothing in any of the above rules which prevented publication in the right case, ie where the court gave its leave. He reminded me that art 6 spoke of not just a 'public hearing' but a 'fair and public hearing'. 'Fair' could mean, in an appropriate case, without the threat of public gaze and/or publicity. Article 8 of the convention gave a right to respect for private and family life. That was, in the appropriate case, a counterbalance to a public hearing provided for in art 6. He submitted that if the presumption in English law, namely that children cases are to be heard in private unless the court permit otherwise, was to be reversed, that could lead to delay. There could be many applications by worried and distraught parents to the court to restrict publicity. Litigation could become more uncertain. Costs would be likely to increase.

[34] The second general observation was to the effect that the answers to the applications of the applicant, both as to incompatibility and that hearings should be in public, were to be found in the decision of the European Court in *B v UK* decided in 2001, to which I have already referred extensively. He accepted that s 97 of the 1989 Act was not referred to in that decision. But he pointed out that s 12 of the Administration of Justice Act 1960 was referred to (see the decision of the majority [2001] 2 FCR 221 at 231 (para 30)) which provides that the publication of information relating to proceedings before any court sitting in private would not of itself be a contempt of court except in relation to, inter alia, proceedings brought under the 1989 Act. Mr Cobb therefore submitted that it would be wholly artificial to say that because s 97 of the 1989 Act was not addressed by the European Court in 2001 the issue of its compatibility with the convention was at large.

[35] Mr Cobb submitted that the legal issues in front of me were identical to the issues in front of the European Court in 2001. He took me through a number of paragraphs of the decision of the majority in an endeavour to make that submission good. It is quite apparent that he is correct in that submission. The same case that has been put to me by the applicant was put to the European Court by the applicant and his co-applicant in 2000 and 2001 and was rejected by the majority. In his submission the decision disposes of the applicant's application in this case both as to incompatibility of s 97 and of his application that the matter should be heard in open court.

[36] Mr Cobb further referred me *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] 2 WLR 1511. It is common ground that that case did not involve children. The woman in the case sought a non-molestation order against the man and an occupation order in respect of a flat. The hearing was conducted in chambers. Newspaper articles appeared giving the woman's view of the facts including direct quotations from the man's sworn written evidence. The man argued, on his application for a continuation of ex parte injunctions, that chambers proceedings in the Family Division were held in private for substantive and substantial reasons, and that matters relating to proceedings held in chambers should not be made public. The judge dismissed the application and discharged the injunction. The man appealed. There were three main issues in the case (see the judgment of Dame Elizabeth Butler-Sloss P at [2002] 1 All ER 865 at [14]) one of which is relevant to the instant case, namely whether proceedings held in chambers are private in the sense that the public can properly be excluded. That issue was discussed by Dame Elizabeth Butler-Sloss P between [16] and [50] inclusive of her judgment. She said:

> '[47] Part IV of the 1991 rules deals with children applications under the Children Act 1989. There is no disagreement that children applications fall to be determined in private. Confidentiality in wardship cases was specifically recognised in *Scott v Scott* ([1913] AC 417 [1911–13] All ER Rep 1), and s 12(1)(a) of the Administration of Justice Act 1960 treated children cases as an exception to the general rule of publication of court proceedings; see below. The procedure in children cases is set out in careful detail in the 1991 rules and the confidentiality of all aspects of the proceedings, the evidence of the parties, the reports filed, and the documents disclosed is specifically provided for in r 4.23, headed "Confidentiality of documents".'

She then set out r 4.16(7). She continued:

> '[48] The public is almost always excluded from children proceedings which almost invariably remain confidential, subject to judgments, made suitably anonymous in cases of wider interest, being given in public or made available for publication.'

[37] Dame Elizabeth Butler-Sloss P said under 'The European Convention for Human Rights':

> '[81] In my judgment there is nothing in art 6 of the convention which requires all cases, willy nilly, to be heard in open court. To hear them in private and to debar publication of the proceedings heard in private must be necessary in a democratic society and proportionate to that necessity. The European Court recognised in *B v UK* [2001] 2 FCR 221 that the art 6 requirements to hold a public hearing was subject to exceptions.'

She quoted para 37 of the decision of the European Court ([2001] 2 FCR 221 at 233) and continued:

> 'The Human Rights Act 1998 and the European jurisprudence underline our own long-established principles of open justice which are entirely in conformity with the convention and which our exceptions do not, in my judgment, breach.'

**[38]** I accept that Thorpe LJ did not specifically refer to [81] of Dame Elizabeth Butler-Sloss P's decision. In his judgment ([2002] 1 All ER 865 at [86]) he said he had had the advantage of reading in draft the judgment of Dame Elizabeth Butler-Sloss P and he was in complete agreement with the first 51 paragraphs. He had nothing to add on the issue. On a fair reading of the Thorpe LJ's judgment I can see nothing in it whatsoever which in any way questions Dame Elizabeth Butler-Sloss P's dicta at [81].

**[39]** Keene LJ agreed that the appeal should be dismissed for the reasons given by Dame Butler-Sloss P. He said:

> '[123] On the topic of hearings taking place in public or private, I would endorse the need to scrutinise more closely than has happened in practice in the past whether a hearing in private can be justified. Of course, in many cases in the Family Division, especially those involving children, there can be no doubt that the hearings should take place in private, and this situation is reflected in the Family Proceedings Rules 1991 ...'

**[40]** Mr Cobb submitted that the passages that I have quoted were powerful dicta, albeit not the ratio of that case, which I cannot ignore. He submitted that the Court of Appeal has adopted the reasoning and decision of the European Court in *B v UK*. He further submitted it would be perverse to rely at this hearing on the minority judgment of the European Court, and upon the arguments addressed in the requests for referral to the Grand Chamber which were turned down on 5 September 2001.

**[41]** I am indebted to the applicant for having produced to me the relevant rules of the European Court. Rule 24, 5(a) provides that the panel of five judges of the Grand Chamber called upon to consider requests under art 43 are to be composed of the President of the European Court, the presidents or vice-presidents of the sections other than the section which was constituted the chamber that dealt with the case and one further judge designated in rotation from among the judges other than those who dealt with the case in the chamber. It therefore appears that the five judges who considered the request of the applicant and co-applicant for a referral to the Grand Chamber consisted of judges who were not the judges who sat and decided the case of the applicant and co-applicant in the Third Chamber.

**[42]** The respondent in her submissions adopted the submissions of Mr Cobb and urged me to hear the matter as to residence in private. She reminded me that none of the previous litigation involving the child had been heard in open court and that it was not in the interests of the child for the matter now to be heard in public. In cross-examination she said that had the hearing been in open court she would not have withdrawn from the case.

**[43]** At the conclusion of those arguments I rose and considered the matter further in my room. I returned to court and stated that for the reasons which I would give in a judgment at a later date I refused the applications of the applicant in relation to the declaration of incompatibility and for the hearing of evidence

and submissions to be heard in public. I indicated that I would hear the parties at the conclusion of the hearing whether the judgment on the applicant's applications which I had just refused and on his application for residence in respect of the child was to be given in public or private or partly in public and partly in private and whether, if in public they should be anonymised. I further indicated that I would give my reasons why I had excluded the public from the application of the applicant that his arguments about the case being heard in public should themselves be heard publicly.

[44] Section 2(1) of the Human Rights Act 1998 provides:

> '2. *Interpretation of Convention Rights.*—(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights ... whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.'

[45] It follows that the court determining the application for a declaration of incompatibility of s 97 and for the hearing to be heard in public must take into account the decision of the European Court in *B v UK* to which I have extensively referred.

[46] In the instant case there seems to me to be a number of important factors. First, the Court of Appeal in *Re P-B (a minor) (child cases: hearing in open court)* [1997] 1 All ER 58 stated that r 4.16(7) was within the spirit of the convention and that it reflected a long-established practice in the High Court and county court of hearing children cases in private. Second, the majority of the European Court in *B v UK* specifically stated that r 4.16(7) was not inconsistent with art 6(1) of the convention. Third, as I read the decision of the majority of the court, the decision was specifically in relation to the facts of the case of the applicant and to the facts of his co-applicant. Fourth, the European Court said that the judge in each case had specifically exercised control over the proceedings in that it had exercised its discretion, as had, in the case of the applicant, the Court of Appeal, and as in the case of the co-applicant, by the single judge on seeking leave to appeal. Fifth, the request for a referral of the decision to the Grand Chamber was refused by a panel of judges who had no connection with the applications to the European Court, in conformity with the European Court's rules. Sixth, the Court of Appeal in *Clibbery v Allan* specifically adopted or endorsed the European Court's approach to children's cases. I agree that the dicta in that case, in so far as they refer to children cases, were strictly speaking obiter but none the less they are highly persuasive. Seventh, in any event, and with respect, I agree with the judgment of the majority and the observations in the concurring judgment of Sir Nicolas Bratza in *B v UK*. Eighth, I reject the applicant's contention that *B v UK* is contrary to earlier European Court jurisprudence. Earlier authorities, to which the applicant has referred, were specifically cited to the European Court. If the applicant's contention is correct, then it is surprising, to say the least, that the request for referral to the Grand Chamber was dismissed. Ninth, I agree with Mr Cobb that s 97 of the 1989 Act is not an absolute prohibition and the court can be specifically asked to exercise its discretion to permit the identity of the child to be published. If the court is not asked to exercise its discretion or, is asked to exercise its discretion but declines to do so, then s 97(2) bites and the material there referred to cannot be published. Tenth, whilst the dicta in the decisions of the English courts and of the European Court referred to in [13], [14], and [18],

hereinbefore, must be given all due respect, the fact is that those authorities are not directly concerned with the issues before me and cannot outweigh or override the Court of Appeal's decision in *Re P-B*, the European Court's decision in *B v UK*, and the dicta of the Court of Appeal in *Clibbery v Allan*. Eleventh, in reality the arguments addressed to me by the applicant were put to the European Court and rejected.

**[47]** It therefore seems to me that the submissions of the applicant as to declaration of incompatibility are bound to fail. Accordingly I dismiss the applicant's application for such a declaration. Furthermore, in my judgment, for the reasons that I have endeavoured to give, r 4.16(7) is in conformity with art 6 of the convention. So far as any alleged violation of art 10 of the convention is concerned I propose to adopt the reasoning of the European Court ([2001] 2 FCR 221 at 236 (para 52)), namely in the light of findings which I have made I do not find it necessary to examine the complaint under art 10 separately. Further, it seems to me that the applicant's application for certiorari in relation to rr 4.16(7), 4.23(1) and 10.20(3) of the 1991 rules made in his supplemental application of 17 March 2003 are doomed to failure and accordingly I refuse the applicant permission to apply for judicial review.

**[48]** However that does not dispose of the matter because it is essential that I exercise my discretion as provided for under r 4.16(7). In my judgment it would be a wholly faulty exercise of discretion to allow the evidence and submissions in the joint residence application to have been heard in public. I say that for the following reasons. First, so far as the child in this case and his parents are concerned all matters in the English courts in relation to him specifically have so far been heard in chambers, or if they have been heard in public then they have been heard in public only in respect of legal matters and in any event suitably anonymised. Second, both the respondent and the child could legitimately expect that that practice would continue in this application. I specifically refer myself to art 8 of the convention which provides for the protection of the privacy of the child. Third, in order for me to gain as full and as accurate a picture as possible of this case, of the facts, and of the options available to me it is, in my judgment, essential that the parents, the children and family reporter and other witnesses should feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment. Fourth, in the instant case there has been a breakdown in the relationship between the applicant and the child such that the child does not wish to see the applicant, at least for the moment. In my judgment, for the hearing as to joint residence to be in public would be contrary to the child's best interests and might well have the effect of widening rather than healing the breach between the applicant and his child. Fifth, the applicant specifically accepted that his case as to joint residence was 'run of the mill' and that there were no exceptional or unusual features. Sixth, the practice embodied in r 4.16(7) is long established and should not be lightly disregarded. I should say, in that connection, that although I heard the evidence of Mr O'Connor I did not find it helpful or persuasive.

**[49]** Accordingly I ruled that the evidence and submissions should be heard in private.

**[50]** At the conclusion of the evidence and submissions in relation to joint residence on 6 June 2003 I indicated to the applicant and respondent that I was minded, subject to any further submissions, to give a judgment in relation to the declaration of incompatibility and in relation to the convention matters in open court subject to it being anonymised. The respondent had no objection to that

course of action. I further indicated to the applicant that, having given that judgment in open court which could well be a matter of public interest, I was minded not to give my judgment as to joint residence in public but in private. The applicant wished to argue those matters further. Accordingly a further short hearing was arranged and took place on Wednesday 18 June 2003.

**[51]** At that hearing, where I restricted the applicant to one hour of oral argument, given that he had put in a very extensive written submission (and a supplementary submission), the applicant made several points, orally and in writing, which I summarise. (1) The Human Rights Act 1998 has radically altered the position in English law and the courts have *no choice* (the applicant's own emphasis) but to pronounce judgment in public in all cases before them. (2) Rule 4.16(7) and *Re P-B* are 'statutorily overruled' so far as concerns judgment. (3) *B v UK* is wrong, being totally out of tune with other pronouncements of the European Court (see the authorities referred to in paras 81–95 inclusive of his supplementary skeleton argument) including the judgment of Sir Nicolas Bratza. (4) I must/should follow the dissenting judgment of the minority in *B v UK*. (5) The dicta in *Clibbery v Allan*, to which I have already referred, are obiter and, in any event, wrong. (6) The applicant relied upon numerous English authorities but he encapsulated his submissions by referring to the dicta of Donaldson MR in *R v Chief Registrar of Friendly Societies, ex p New Cross Building Society* [1984] 2 All ER 27 at 31, [1984] QB 227 at 235:

> '*Hearing in camera*
>
> The whole of the proceedings before Webster J were conducted in camera ... When he gave judgment, he did so in camera ... In this highly unusual situation, the first question which we had to ask ourselves was whether and to what extent it would be right that the proceedings in this court should also be in camera. It is fundamental to British justice as we know it, and as our forebears have known it, that the Queen's courts are open to all. And when I say that they are open to all I do not limit this to those who have business in the courts. The judges administer justice in the Queen's name on behalf of the whole community. No one is more entitled than a member of the general public to see for himself that justice is done. Nevertheless it is well settled that occasions can arise when it becomes the duty of the court to close its doors. This problem was considered in depth by the House of Lords in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1. The guidance which I get from their Lordships' speeches can be summarised as follows. The general rule that the courts shall conduct their proceedings in public is but an aid, albeit a very important aid, to the achievement of the paramount object of the courts, which is to do justice in accordance with the law. It is only if, in wholly exceptional circumstances, the presence of the public or public knowledge of the proceedings is likely to defeat that paramount object that the courts are justified in proceedings in camera. These circumstances are incapable of definition. Each application for privacy must be considered on its merits, but the applicant must satisfy the court that nothing short of total privacy will enable justice to be done. It is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice.'

(It should be noted that the Court of Appeal did decide in that case to hear the appeal in camera, but gave judgment in open court.)

**[52]** As to whether the judgment/s should be anonymised, the applicant submitted that a public judgment necessitated no anonymity. He conceded that in truly exceptional cases (which he submitted his joint residence application was not) where justice would be impossible to attain, it might be necessary to conceal the identity of a party or witness. But, generally speaking, art 6(1) did not permit any censoring of judgments.

**[53]** I reject his submissions. The 1998 Act, whether because of its provisions and/or because it incorporated the convention into English domestic law, does not mandate that the English courts have no choice but to pronounce judgment in public in all cases before them. Rule 4.16(7) and *Re P-B* are not overruled, statutorily or in any way at all. They are part of English family law jurisprudence. I decline the applicant's invitations to rule that the majority decision of the European Court in *B v UK* was wrong or was contrary to earlier authority of the European Court, and to follow the judgment of the dissentients. I have already followed *Clibbery v Allan* earlier in this judgment.

**[54]** In *B v UK* [2001] 2 FCR 221 at 235–236 the majority said:

> '45. The Court recalls its long standing case-law that the form of publicity given under the domestic law to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of art 6(1) (see the above-mentioned *Sutter* judgment ((1984) 6 EHRR 272), para 33). Thus in the *Sutter* case, for example, it found that the publicity requirement under art 6(1) was satisfied by the fact that anyone who could establish an interest could consult or obtain a copy of the full text of the judgments of the Military Court of Cassation, together with the fact that the court's most important judgments were published in an official collection (para 34).
>
> 46. The Court further recalls its above finding that, in view of the type of issues requiring to be examined in cases concerning the residence of children, the domestic authorities were justified in conducting these proceedings in chambers in order to protect the privacy of the children and the parties and to avoid prejudicing the interests of justice. It agrees with the government that to pronounce the judgment in public would, to a large extent, frustrate these aims ...
>
> 48. Having regard to the nature of the proceedings and the form of the publicity applied by the national law, the Court considers that a literal interpretation of the terms of art 6(1) concerning the pronouncement of judgments would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of art 6(1), which is to secure a fair hearing (see *mutatis mutandis*, the above-mentioned *Sutter* judgment, para 34).
>
> 49. The Court thus concludes that the Convention did not require making available to the general public the residence judgments in the present cases, and there has been no violation of art 6(1) in this respect.'

**[55]** Sir Nicolas Bratza in his concurring judgment stated that in the end he was persuaded that in the present cases there had been sufficient compliance with the requirements of art 6 in relation to the judgments being given in private. In particular he said (at 238):

> '(2) It is well established that art 6(1) of the Convention must be read as a whole. There is, as the majority judgment recognises, a logical relationship between the public nature of the proceedings and the public pronouncement

of the judgment which is the result of those proceedings. If the public may legitimately be excluded from the hearing for the purpose of protecting the interests of children or the private lives of parties to a matrimonial dispute, the requirement that the judgment should be pronounced publicly should not be interpreted in such a way to undermine that protection. It seems to me that it is not a satisfactory answer to this point to argue that the judgment could be entirely anonymised so that it contained no details capable of identifying the parties or the children concerned and/or abridged to the point where only the operative part of the court's decision was made public. Even if such a course could be said to be adequate to protect the interests of the children or the parties concerned, it is difficult to see how the publication of a judgment so anonymised and abridged could be said to serve the aim of public scrutability of judicial proceedings.'

[56] In my judgment, a further passage in Sir Nicolas Bratza's concurring judgment demolishes the applicant's submission that *B v UK* was contrary to earlier European Court authorities. He said (at 239):

'(3) It is, moreover, clear from the case-law of this Court that, despite its unqualified terms, the requirement that the judgment shall be pronounced publicly has been interpreted with some flexibility, the Court emphasising that: "in each case the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Art 6(1)." (see *Pretto v Italy* (1984) 6 EHRR 182, para 26; and see, most recently, *Szücs v Austria* and *Werner v Austria* (1998) 26 EHRR 310). Thus, for example, in *Axen v Germany* (1984) 6 EHRR 195 (at para 32) public delivery of a decision of a Supreme Court was held to be unnecessary, the requirements of art 6 being met by the public pronouncement of the judgments of the lower courts. More immediately relevant to the present case, in its *Sutter* judgment, the Court held the requirements of art 6 to be satisfied by the fact that "anyone who could establish an interest could consult or obtain a copy of the full text of the judgment of the Military Court of Cassation". It is true that the *Sutter* judgment has been subject to some extra-judicial criticism. Nevertheless, there is nothing in my view in the subsequent case-law of the Court to cast doubt on the authority of the decision: on the contrary, the case was expressly cited without disapproval in the *Campbell v UK* judgment itself ((1984) 7 EHRR 165) and, more recently, in the *Szücs* and *Werner* judgments referred to above.'

[57] Further on in his judgment Sir Nicolas said (at 239):

'(4) The county court judgments in the present case, concerned as they were with contested applications held in camera for residence orders in respect of young children and involving details of the private lives of the parties, fell clearly within the category of judgment to which limited public access might be regarded as justified.'

[58] In the dissenting opinion the judges recalled the obligation under art 6 to pronounce judgments publicly and that obligation is expressed in unqualified terms. The minority said (at 244–245):

'The majority's reasoning appears at first sight reasonable. However, what has taken place in a private hearing does not have to be fully reflected in a

publicly pronounced judgment and care can be taken to ensure that names and other information which might lead to identification of the parties or detail about the family's personal life can be omitted from the judgment, without affecting the clarity of the approach and the solution given by the court to the issues arising in the case, which should be made public in order to achieve the purpose of public scrutiny.'

**[59]** As to that part of the dissenting opinion quoted in [58], above, in the instant case it is quite unworkable. The applicant agreed fully with me that it was impossible not to fully reflect in a judgment the evidence and submissions that had taken place in private. Nor was it possible to omit details about the family's personal life from such a judgment. He agreed that editing is simply not possible.

**[60]** In my judgment if I were to allow my judgment in the joint residence application to be published, even if it were anonymised, it would to a large extent frustrate the aims that have sought to be achieved by conducting the hearing of the evidence and submissions in private. The detail of such a judgment would, in my view, make it perfectly clear which child was being discussed or from which it could easily inferred or deduced about which child the case concerned. Such would certainly not be in the interests of the child and could well lead to the widening not healing of the rift that currently prevails in the relationship between the applicant and his child. I reject the applicant's submission to the contrary.

**[61]** At the very beginning of the hearing on 5 June the applicant submitted to me that he wished to make his arguments in respect of the declaration of incompatibility and as he put it 'open justice', in public and asked that the court be opened so that the public could come in. The respondent objected. She submitted that this was really all about the child and was a private matter. Mr Cobb submitted that the application for a declaration of incompatibility and for the matter to be heard in open court had been made within Children Act proceedings and thus it came within r 4.16(7).

**[62]** In my judgment there were no valid grounds for exercising my discretion so that the public could be admitted to what in effect was a preliminary submission within a matter involving a child. It does not follow that merely because that preliminary application involved the convention and/or was for a declaration of incompatibility that that part of the proceedings should be open to the public. In any event, since the European Court placed great emphasis upon the judge at first instance exercising his discretion in relation to the facts of the particular case, it seemed to me that there was a real danger that if I heard the preliminary application in public and I then decided to hear the matters as to evidence and submissions as to residence in private, that the damage might already have been done and sufficient w

ould have been known by the public about the intimate facts of the case as to make it impossible to follow the long-established procedure in the English courts which is to generally hold those proceedings in private.

**[63]** I have therefore decided, in the exercise of my discretion, to give this judgment publicly, but suitably anonymised, and with the direction contained in [3], above. I will now hand down my judgment in the residence matter but in private.

*Applications dismissed.*

Victoria Parkin Barrister.

# R (on the application of McFetrich) v Secretary of State for the Home Department

[2003] EWHC 1542 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
SCOTT BAKER LJ AND PITCHFORD J
7 MAY, 30 JUNE 2003

*Sentence – Mandatory life sentence – Murder – Tariff – Transfer of claimant from prison in Scotland to prison in England – Tariff fixed by Secretary of State of greater length than that recommended by trial judge in Scotland – Effect of transfer on tariff recommendation – Whether imposition of longer tariff heavier penalty than the one applicable at the time offence committed – Criminal Justice Act 1961, s 26(4) – Human Rights Act 1988, Sch 1, Pt I, art 7.*

The claimant was sentenced by a Scottish court to life imprisonment for murder. In 1997, the claimant, at his request, was transferred to a prison in England under s 26 of the Criminal Justice Act 1961. By s 26(4)[a] a person transferred was 'treated for the purposes of detention, release, supervision, recall or otherwise' as if the sentence which had been imposed 'had been an "equivalent sentence" passed by the court in the place to which he was transferred.' At the date of transfer no tariff period had been set in Scotland. The Secretary of State consulted the trial judge, who recommended a tariff of eight years. The Lord Chief Justice of England and Wales, however, was of the opinion that had the claimant been convicted in England the tariff would have been fixed at 10 to 11 years. In 2000, the Secretary of State set a tariff of 12 years. Following representations from the claimant's solicitor, the Secretary of State, on 4 October 2002, maintained that decision. The claimant applied for judicial review, arguing that he was being required to serve a longer tariff in England than he would have had to serve had he remained in Scotland which violated his rights under art 7[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), which provided, inter alia, that a penalty for a criminal offence heavier than the one applicable at the time the offence was committed should not be imposed.

**Held** – Article 7 of the convention was not concerned with the machinery for carrying out a penalty, but rather the penalty itself. The mischief that the article was designed to prevent was the imposition by the state of criminal liability for an act which did not attract such liability at the time it was committed or a penalty greater than the maximum permitted when the offence was committed. The penalty for murder was life imprisonment and was unaffected by the tariff-setting process which was concerned with the period to be served for retribution and deterrence. The tariff-setting process did not spell out the actual period to be served, merely the minimum period. The court had to look at the penalty that could have been imposed and compare it with what was actually

a Section 26(4), so far as material, is set out at [6], below
b Article 7, so far as material, is set out at [10], below

imposed. In the instant case, the claimant faced a sentence of life imprisonment for the murder he had committed in Scotland. He still faced that sentence following his transfer to England. The fact that there was some evidence that at the material time tariffs generally were somewhat lower in Scotland was irrelevant. Indeed the Secretary of State was obliged by s 26(4) of the 1961 Act to set the tariff as he had. The language of the subsection was clear. The prisoner was to be treated as if his life sentence had been passed by a judge sitting in a court in England. Furthermore, the subsection was drafted to cover all aspects of the sentence. That was clear from the words 'treated for the purposes of detention, release, supervision, recall or otherwise'. The section was looking beyond merely the detention element of the sentence. Moreover as the only sentence for murder that could be 'passed by a court' was one of life imprisonment, the phrase 'equivalent sentence' was not to be read as meaning the sentence of life imprisonment and the tariff. It followed that the application for judicial review would be dismissed (see [16], [17], [20], [21], [24], [27], [28], [32], [35], [37], [38], below).

*Hogben v UK* App No 11653/85 (3 March 1986, unreported) considered.

**Notes**

For the prohibition of retrospective laws see 8(2) *Halsbury's Laws* (4th edn reissue) para 148.

Section 26(4) of the Criminal Justice Act 1961 is repealed by the Crime (Sentences) Act 1997, s 65(2), Sch 6, but by virtue of art 5(6) of the Crime (Sentences) Act 1997 (Commencement No 2 and Transitional Provisions) Order 1997 SI 1997/2200 remains in force in respect of any person who on 1 October 1997 was in any part of the United Kingdom by virtue of an order made under Pt III of the 1961 Act for so long as that order has effect.

For the Human Rights Act 1998, Sch 1, Pt I, art 7 see 7 *Halsbury's Statutes* (2002 reissue) 554.

**Cases referred to in judgments**

*Coeme v Belgium* App no 32492/96 (22 June 2000, unreported), ECt HR.

*Hogben v UK* App No 11653/85 (3 March 1986, unreported), E Com HR.

*R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837, [2002] 3 WLR 1800.

*R (on the application of Uttley) v Secretary of State for the Home Dept* [2003] EWHC 950 (Admin), [2003] All ER (D) 130 (Apr); *rvsd* [2003] EWCA Civ 1130, [2003] 4 All ER 891, [2003] 1 WLR 2590.

*Welch v UK* (1995) 20 EHRR 247, [1995] ECHR 17440/90, ECt HR.

**Application**

The claimant applied for judicial review of (i) the decision of the Secretary of State for the Home Department, dated 15 September 2000, setting a tariff of 12 years to satisfy the requirements of retribution and deterrence in respect of the claimant's conviction for murder; and (ii) the decision of the Secretary of State, dated 4 October 2002, to reject the claimant's representations and maintain the tariff set at 12 years. The facts are set out in the judgment of Scott Baker LJ.

*Hugh Southey* (instructed by *Stephensons*, Salford) for the claimant.

*Sarah-Jane Davies* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*Cur adv vult*

30 June 2003. The following judgments were delivered.

**SCOTT BAKER LJ.**

[1] On 27 February 1995 the claimant pleaded guilty in the High Court in Edinburgh to murder. The judge, Lord Abernethy, sentenced him to life imprisonment. The victim was the claimant's wife from whom, at the time of the offence, he was separated. In September 1997, at his request, the claimant was transferred to prison in England under s 26(1) of the Criminal Justice Act 1961.

[2] Following transfer the Secretary of State for the Home Department consulted the trial judge, the Lord Justice Clerk, acting on behalf of the Lord Justice General, and the Lord Chief Justice of England and Wales. The trial judge recommended a tariff of eight years, with which the Lord Justice Clerk agreed. However, the Lord Chief Justice said:

> 'If this defendant had been convicted of murder in England and Wales, on the facts summarised in the Scottish reports, I would expect a tariff somewhat longer than eight years to be recommended. Plainly this was a case in which there was a highly fraught emotional background arising out of the disputes concerning the children and the accusations made against the defendant, and that background would to some extent be recognised as mitigating the gravity of the offence. But this was a very savage attack on the deceased, carried out with a knife which it appears the defendant had taken with him to her address. On the facts as summarised, and having regard to the defendant's plea of guilty, I would expect a tariff term in England and Wales to be fixed at 10–11 years. I question whether a shorter term would be thought to meet the requirements of retribution and general deterrence.'

[3] On 15 September 2000 the Secretary of State set a tariff of 12 years. He said:

> 'The Secretary of State does not accept that a tariff of eight years, as recommended by the trial judge and the Lord Justice General, is sufficient to satisfy the requirements of retribution and deterrence for your offence. He has attached weight to the fact that you carried out a savage attack on your wife with a knife which you had taken with you to the scene. He has also attached weight to the fact that the attack took place in front of your elder son. The Secretary of State has also attached weight to the fact that, by going to your wife's new home and there killing her, you abused the information as to her whereabouts that came to you through the legal process in relation to custody of your son. Having regard to all the circumstances of your case, the Secretary of State has concluded that a tariff of 12 years is necessary to satisfy the requirements of retribution and deterrence for your offence.'

[4] On 18 September 2002 the claimant's solicitors wrote asking for an urgent review, submitting that a tariff of eight years should be imposed in line with the trial judge's recommendation, supported by the Lord Justice Clerk and that in any event the tariff should not exceed the maximum of 11 years recommended by the Lord Chief Justice.

[5] In a letter dated 4 October 2002 the Secretary of State rejected those representations. The tariff was therefore maintained at 12 years. The claimant seeks judicial review, both of the original decision to set the tariff at 12 years and of the subsequent decision to maintain it.

[6] The relevant provisions of s 26 of the 1961 Act, as amended, are as follows:

'(1) The responsible Minister may, on the application of a person serving a sentence of imprisonment or detention in any part of the United Kingdom, make an order for his transfer to another part of the United Kingdom or to any of the Channel Islands or the Isle of Man, there to serve the remainder of his sentence, and for his removal to an appropriate institution there.

(2) Where a person has been sentenced to imprisonment or detention in any part of the United Kingdom or in any of the Channel Islands or the Isle of Man, the Secretary of State may, without application in that behalf, make an order for his transfer to any part of the United Kingdom, there to serve the remainder of his sentence, as the case may be, and for his removal to an appropriate institution in that part of the United Kingdom ...

(4) Subject to the following provisions of this section, a person transferred under this section to any part of the United Kingdom or to any of the Channel Islands or the Isle of Man there to serve his sentence or the remainder of his sentence, shall be treated for the purposes of detention, release, supervision, recall or otherwise, as if that sentence (and any other sentence to which he may be subject) had been an equivalent sentence passed by a court in the place to which he is transferred.'

**[7]** By virtue of art 5(6) of the Crime (Sentences) Act 1997 (Commencement No 2 and Transitional Provisions) Order 1997, SI 1997/2200, these provisions remain in force in respect of any person who on 1 October 1997 was in part of the United Kingdom by virtue of an order made under Pt 3 of the 1961 Act, for so long as that order has effect. The claimant was, as I have said, transferred to England in September 1997.

**[8]** The release of mandatory life prisoners in England and Wales is governed by s 29 of the Crime (Sentences) Act 1997 which provides that:

'(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not one to whom section 28 above applies.

(2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice.'

This section replaced s 35(2) and (3) of the Criminal Justice 1991 Act, which was in identical terms.

**[9]** The offence of murder falls into a special category for, unlike other offences, the sentence is prescribed by law. Under s 1 of the Murder (Abolition of Death Penalty) Act 1965 the sentence is life imprisonment. The position is no different in Scotland from England. In practice, however, only a small proportion of those convicted of murder remain in prison for the rest of their life. The prisoner serves a minimum period in prison to reflect retribution and deterrence in respect of the crime (known as the tariff). Thereafter he continues to be detained until such time as he is regarded as safe to be released on life licence.

**[10]** The claimant's underlying complaint is that he will serve a longer tariff in England than he would have served had he remained in prison in Scotland. Thus he would have been eligible for parole on an earlier date had he remained in Scotland. This, it is submitted, violates his rights under art 7 of the European Convention for the Protection Human Rights and Fundamental Freedoms 1950

(as set out in Sch 1 to the Human Rights Act 1998). The two decisions fixing and maintaining a tariff of 12 years are unlawful. Article 7(1) provides:

> 'No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

THE ENGLISH PROCEDURE

**[11]** The tariff is ordinarily fixed by the Secretary of State soon after the trial and following recommendations from the trial judge and the Lord Chief Justice. Towards the end of the tariff element of his sentence, the prisoner's case is referred by the Secretary of State to the Parole Board for its consideration. Save in exceptional cases, a prisoner will not be released on life licence unless he has first spent a period of at least two years being tested in open conditions. Hence the first reference to the Parole Board is usually about two years before the tariff has expired.

THE SCOTTISH PROCEDURE

**[12]** At the time with which this case is concerned, ie prior to the implementation of the Convention Rights (Compliance) (Scotland) Act 2001 the procedure for mandatory life prisoners in Scotland was different from that in England. In Scotland, prior to 2001, the position of mandatory life prisoners was governed by s 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, which was similar in effect to s 29 of the 1997 Act in England and Wales. However, the material difference in procedure was that there was no formal tariff-setting process either by the judge or the Secretary of State for Scotland. A Preliminary Review Committee (PRC) recommended to the Scottish ministers the date for the first review by the Parole Board of an adult mandatory life prisoner's suitability for release on life licence. This committee, which was non-statutory, met in private and was set up by the Secretary of State for Scotland to review all mandatory life sentence cases in Scotland at about the end of the fourth year of the sentence. The PRC was chaired by a senior civil servant and comprised the Chairman of the Scottish Parole Board, the High Court judge who at the time was a member of the Board, a psychiatrist member of the Board and a senior member of the Scottish Prison Service. The issue for the PRC to consider was when the prisoner's suitability for release should first be considered by the Board and consideration was given to the seriousness of the murder, assessment of risk and the prisoner's response to custody. In assessing each case the PRC took into account a wide range of information, including the trial judge's comments and any minimum recommendation made by him, the prisoner's own representations and any previous consideration by the PRC. There were normally two meetings of the PRC each year, each considering some 20 cases. In each case a recommendation would be made to Scottish ministers. The prisoner would be notified of this and invited to make any further representations before a decision was taken whether to accept the Committee's recommendation as to the timing of the first review by the Parole Board.

**[13]** Once a case was referred to it by the Scottish ministers, the Parole Board carried out a review of the prisoner's suitability for release on life licence, focussing on the issue of risk to the public. It then made a recommendation to ministers whether or not the prisoner should be released. Ministers then looked to the

judiciary for advice as to whether or not the requirements of justice and deterrence would be satisfied if the prisoner was released in accordance with the Board's recommendation. The prisoner was then informed of the recommendation and the judiciary's views and invited to make representations before the Scottish ministers took their decision.

**[14]** The position in Scotland changed under the 2001 Act with the introduction of a judicial tariff-setting process (see paras 12 and 13 of Pt 1 of the Schedule to the 2001 Act). As at March of this year the Scottish courts had set tariffs in approaching 95% of the cases of adult mandatory life sentence prisoners, in Scotland, the average tariff being just over 13 years.

**[15]** From the above it will be appreciated that at the time with which this case is concerned both jurisdictions had a tariff setting system but the mode of operation was different. The material difference between the English procedure and the Scottish procedure was that in England the tariff was set very soon after the sentence was passed, so that the prisoner knew from very early in his sentence the minimum period he would have to serve before release on life licence. In Scotland the prisoner did not have that knowledge until well into his sentence. However, the point taken by Mr Southey, who has appeared for the claimant, is, he submits, one of substance rather than procedure and it is that Scottish life prisoners generally and Mr McFetrich in particular generally serve shorter periods in custody for retribution and deterrence (the tariff) than those in England. Mr Southey submits that this is plainly illustrated by the fact that in the present case both the trial judge and the Lord Justice Clerk recommended a tariff of eight years whilst the Lord Chief Justice recommended one of ten or eleven. In the claimant's case he was transferred to England under s 26(1) of the 1961 Act before the PRC reviewed his case. Thus he came with no tariff set and his tariff was set by the Secretary of State after he had been transferred to England.

SECTION 26

**[16]** On the face of it the wording of s 26(4) appears clear. The prisoner is to be treated as if he had been sentenced by a court in the place to which he is transferred. In other words the claimant is to be treated as if his life sentence had been passed by a judge sitting in a court in England. Furthermore, the subsection is drafted to cover all aspects of the sentence. This is clear from the words 'treated for the purposes of detention, release, supervision, recall or otherwise'. The section is looking beyond merely the detention element of the sentence. In the case of a life sentence release, supervision and recall are all potentially relevant matters. A life sentence lasts for the whole of the prisoner's life. After he is released he remains subject to the terms of his life licence. There is more to a life sentence than just the tariff element for retribution and deterrence. Ms Davies, who has appeared for the Secretary of State, emphasises that in setting the tariff he was doing precisely what the section required him to do, treat the claimant as if he had been sentenced by a court in England. Had he not followed the ordinary practice he would have been in breach of s 26.

**[17]** Mr Southey's argument is that the phrase 'equivalent sentence' in s 26(4) must be read as meaning the sentence of life imprisonment *and* the tariff, because under s 3 of the 1998 Act legislation has to be read and given effect to in accordance with the convention and any other interpretation gives rise to a risk of non-compliance with art 7. I am unable to read the subsection in this way. It will be seen that the subsection refers to 'an equivalent sentence passed by a court in the place to which he is transferred'. The words 'passed by a court' are in my

view important. The only sentence that can be passed for murder is one of life imprisonment. The claimant was a mandatory lifer in Scotland. Once he is transferred, he is to be treated for the purposes described in the section as if his life sentence had been imposed by a court in England. The tariff is not a creature of statute (see Lord Bingham of Cornhill in *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46 at [6]–[8], [2002] 4 All ER 1089 at [6]–[8], [2003] 1 AC 837). Mr Southey's argument runs up against other difficulties because no tariff was ever set in Scotland. His case never reached the PRC and it is impossible to know what its decision would have been had it done so. Mr Southey's answer to this is that there was nothing to prevent the Secretary of State from routing the case through the PRC and the Secretary of State for Scotland. Such a course however seems to me to be completely at odds with the plain wording of the section.

**[18]** Mr Southey's argument really, I think, comes to this. When a prisoner transfers from one jurisdiction to another he brings his tariff with him and in a case such as the present one where no tariff has been set it should be set in the transferring country even after transfer. Thus Mr McFetrich's case should have gone to the PRC and then the Secretary of State for Scotland with the result that he would have had a lesser tariff than 12 years. But this seems to me to run counter to the section. The problem is that the inter-relationship between the PRC, Scottish ministers and the Scottish Parole Board is different from that between the Secretary of State and the Parole Board in England.

**[19]** Mr Southey was forced to accept in argument that as a domestic construction point he really had no pre-Human Rights Act argument on s 26(4). He could only get his argument on its feet on the basis that the subsection had to be read compliantly with art 7.

ARTICLE 7

**[20]** I turn therefore to consider whether the circumstances of this case have violated art 7. In order to establish a violation of art 7 the claimant must show that a heavier penalty has been imposed on him than the one that was applicable at the time he committed the offence. By s 1 of the Murder (Abolition of Death Penalty) Act 1965, the penalty for murder is mandatory life imprisonment. That was so at the time the offence was committed and has remained so ever since. The position is the same in Scotland as in England. Article 7 is concerned with retrospectivity and the word 'penalty' is in my view referring to the whole penalty rather than to its constituent elements. The penalty is a life sentence and the fact that some prisoners, perhaps the vast majority, are released during their lifetime does not prevent the sentence from being a life sentence. Even after release the sentence continues for the prisoner is on licence for the rest of his life and liable to recall to prison. If he is recalled to prison he will inevitably serve a greater period in custody than the original tariff.

**[21]** A sentence of life imprisonment is different from a determinate sentence because it contains separate elements aimed (i) at retribution and deterrence and (ii) at the protection of the public. It is, in my judgment, however, not possible to equate the period to be served for retribution and deterrence (the tariff) with the penalty for the offence. Put slightly differently, art 7 is not concerned with the machinery for carrying out the penalty but rather with the penalty itself. Release on licence (parole) relates to the execution of the sentence but the actual sentence remains life imprisonment. The penalty of life imprisonment is unaffected by the tariff-setting process. The tariff-setting process does not spell

out the actual period to be served, it sets the minimum period. The actual period served by the prisoner will depend on when it is safe to release him and whether, having been released, he is recalled.

**[22]** Support for this approach is to be found in the European jurisprudence. In *Welch v UK* (1995) 20 EHRR 247, the applicant was convicted in 1988 of drug offences committed in 1986. The judge passed a sentence of imprisonment and imposed, pursuant to an Act that came into force in 1987, a confiscation order. The court said (at 261 (para 27)) that the concept of penalty in art 7 was an autonomous convention concept and that to render the protection of art 7 effective the court had to remain free to go behind appearances and assess for itself whether a particular measure amounted in substance to a 'penalty' within the meaning of the provision. The court said (at 263 (para 34)):

> 'Finally, looking behind appearances at the realities of the situation, whatever the characterisation of the measure of confiscation, the fact remains that the applicant faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted.'

**[23]** Perhaps of greater significance is *Hogben v UK* App No 11653/85 (3 March 1986, unreported), where the Commission rejected the application as manifestly ill-founded. The Commission said:

> '3. The Commission recalls that the applicant was sentenced to life imprisonment in 1973 for committing a murder in the course of a robbery. It is clear that the penalty for this offence at the time it was committed was life imprisonment and thus no issue under art 7 arises in this respect.
>
> 4. Furthermore, in the opinion of the Commission, the "penalty" for purposes of art 7(1), must be considered to be that of life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the imprisonment as opposed to the "penalty" which remains that of life imprisonment. Accordingly, it cannot be said that the "penalty" imposed is a heavier one than that imposed by the trial judge.'

**[24]** In the present case the claimant faced a sentence of life imprisonment for the murder he committed in Scotland. He still faced that sentence following his transfer to England. How long an individual life sentence prisoner actually services in custody depends on many factors, one of them being the tariff he is given. The fact that there is some evidence that at the material time tariffs generally were somewhat lower in Scotland is in my view nothing to the point.

**[25]** Mr Southey relies on *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] 4 All ER 1089, [2003] 1 AC 837 in support of his proposition that tariff is to be equated to penalty. In *Anderson's* case the Secretary of State had fixed a longer tariff than that recommended by the judiciary and this was challenged by an application for judicial review on the ground that in fixing the tariff the Secretary of State had acted incompatibly with art 6(1) of the convention. It was argued on behalf of Mr Anderson that fixing the tariff for a

convicted murderer was legally indistinguishable from the imposition of sentence. Lord Bingham accepted this, saying (at [24]):

> 'It is clear beyond doubt that the fixing of a convicted murderer's tariff, whether it be for the remainder of his days or for a relatively short time only, involves an assessment of the quantum of punishment he should undergo.'

Lord Steyn said (at [52]):

> 'A decision fixing the tariff in an individual case is unquestionably a decision about the level of punishment which is appropriate. Mellifluous words cannot hide this reality.'

**[26]** *Anderson*'s case was a case concerning not art 7 but art 6. The House of Lords decided that in fixing the tariff the Secretary of State was performing a sentencing function and that in doing so he had breached Mr Anderson's rights under art 6 to have a sentence imposed by an independent and impartial tribunal. *Anderson*'s case was concerned only, however, with the punitive element of the sentence, namely fixing the tariff for retribution and deterrence, the minimum period to be served. It was not concerned with the whole sentence, namely the mandatory life sentence that had been imposed by the trial judge and it is the whole sentence, including that element imposed to protect the public for the rest of the defendant's life, that is in reality the penalty referred to in art 7.

**[27]** Some help in construing art 7 is in my judgment to be found in looking at its purpose. The mischief that art 7 is designed to prevent is the imposition by the state of (i) criminal liability for an act which did not attract such liability at the time it was committed or (ii) a penalty greater than the maximum permitted when the offence was committed. In the present case not only has the maximum penalty remained unchanged, the penalty has throughout been mandatory life imprisonment. As the European Court of Human Rights said in *Coeme v Belgium* App no 32492/96 (22 June 2000, unreported) (para 145):

> 'The court must therefore verify that at the time when the accused prisoner performed the act which led to him being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision ...'

**[28]** That test is met in the present case. The tariff is but an element of the sentence, the minimum period that person must serve. The court has to look at the penalty that could have been imposed and compare it with what was actually imposed. In this case they were the same, life imprisonment. As was pointed out in argument, when the offence was committed the tariff was both unknown and incapable of being known. The same would be true in the case of a determinate sentence. When the offender commits the offence he knows or can ascertain, the maximum penalty but he cannot know what actual penalty will be imposed.

**[29]** In the course of argument Pitchford J made the point that it is difficult to identify any retrospectivity in the present case. All that has happened is that the claimant has, at his own request moved to England. The situation can be tested in this way. Suppose the Secretary of State after the tariff has been set at say 12 years, discovers that the prisoner has committed another murder under a different name and increases the tariff from 12 years to 20 years. Where is a breach of art 7 in such circumstances? The appropriate comparison is between

the actual penalty and what could have been imposed when the offence was committed. In each instance in the present case the answer is life imprisonment.

**[30]** After the conclusion of the hearing Mr Southey drew the court's attention to *R (on the application of Uttley) v Secretary of State for the Home Dept* [2003] EWHC 950 (Admin), [2003] All ER (D) 130 (Apr). He submits it supports his argument. Moses J had to consider whether the application of statutory provisions requiring a prisoner to be released on licence, that were not applicable at the date of the offence, violated art 7. The claimant had been sentenced to 12 years' imprisonment for various sex offences. Moses J held that they did not. He said (at [8]):

> 'The essential question is whether the statutory imposition of the licence constituted the imposition of a penalty greater than that which would have been imposed at the time he committed the offences.'

He said it was plain that the purpose of a licence was to enable a long-term prisoner to stay out of trouble, both for his own benefit and for the benefit of the community and so that he did not again lose his liberty. He said (at [15]):

> 'I conclude that the nature and purpose of the licence are such that they dominate the factors which go to the conclusion as to whether the imposition of a licence is a penalty or not. The imposition of a licence is designed to protect the public once an prisoner is released, and assist in preventing the prisoner from committing further offences.'

**[31]** Mr Southey submits that the logical conclusion from this is that a tariff is a penalty because any detention following breach of licence is preventative and not part of a penalty. I am unable to read the decision in this way. *Uttley*'s case was a determinate sentence case. It was not concerned with tariff. The difference in the present case is that Mr McFetrich was sentenced to life imprisonment.

**[32]** In short, my conclusion on the art 7 issue is that the penalty envisaged in art 7(1) in the case of murder committed by an adult is the mandatory sentence of life imprisonment. The general level of tariff for particular types of murder has changed from time to time, so has the level of sentence for many offences where there is a maximum determinate sentence. An obvious example is causing death by dangerous driving, but that in my view is nothing to the point. The claimant, when he committed the offence, was liable to the penalty of life imprisonment and so he was when the Secretary of State fixed a 12-year tariff. There is no breach of art 7.

**[33]** There are other practical problems about the claimant's argument. No tariff was ever in fact fixed by Scottish ministers. The very highest the argument can be put is that the Scottish judges were recommending a tariff of eight years which was lower than that recommended by the Lord Chief Justice and that therefore it is likely, if the claimant had remained in Scotland, that he would have served a shorter period in custody before being considered for parole. The truth is that in Scotland his case never reached the PRC and one simply does not know at what stage his case would have been referred to the Scottish Parole Board. Also, although there is a difference between the judicial recommendations and the tariff imposed, this is no different from any case in which the Secretary of State does not accept the judicial recommendations as to tariff (see, for example, *R (on the application of Anderson) v Secretary of State for*

*the Home Dept* [2002] 4 All ER 1089, [2003] AC 837 where the judges recommended 15 years and the Secretary of State imposed 20 years).

**[34]** In the course of argument Ms Davies made the following points, each of which seems to me to present a difficulty for Mr Southey's contention that art 7 has been violated. (i) When the claimant committed the offence there was no tariff that was applicable. (ii) When passing sentence the judge said nothing about the length of time the claimant should serve in prison. (iii) There was at the time in Scotland no formal tariff-setting process, either by the judiciary or the Secretary of State for Scotland. (iv) Had the claimant remained in Scotland his case would have been referred to the PRC after approximately four years for it to consider recommending when his case should first be referred to the Parole Board. The PRC would not at that time have had the recommendations of either the trial judge or the Lord Justice Clerk. (v) It can only be speculation what the PRC would have recommended. There is no basis for constructing a notional tariff. (vi) The evidence is that the PRC took about eight years as a benchmark, adding for some factors and substituting for others. It is again speculative how the balancing exercise would have been carried out in the present case. (vii) Even if the case had been referred to the Parole Board it is impossible to know whether it would have recommended release. It would not have had the recommendation of the trial judge or the Lord Justice Clerk. (viii) The recommendations of the trial judge and the Lord Justice Clerk were in fact made as part of the process for setting a tariff in England. There is no way in which those recommendations can retrospectively affect the applicable penalty at the time the offence was committed. (ix) Absent the transfer to England, one simply does not know when the trial judge and the Lord Justice Clerk's views would have been sought. (x) In the present case one is left, on the claimant's argument, with what might have happened in the past had the claimant not asked to be transferred to an English prison.

**[35]** All this, so it seems to me, leads to the conclusion that the highest the claimant can put his case is that if he had remained in Scotland there is a possibility that he would in fact have served a shorter period for retribution and deterrence than will be the case with a 12-year tariff in England. But that is a long way from the imposition of a heavier penalty than the one that was applicable when he committed the killing.

**[36]** Mr Southey's main line of attack was against the Secretary of State's decision in October 2002 not to review the tariff of 12 years that he had set in September 2000. The reason for this was that the tariff had been set shortly before the 1998 Act came into force, which was on 2 October 2000 and he was faced with the obstacle of s 22(4). That obstacle was in my view insuperable. With the 2002 decision he has a different problem. There he has to show that the Secretary of State in maintaining the tariff acted incompatibly with convention rights. The short answer is that there was no violation of art 7, which is the only right in focus. Had there been a violation, s 6(2)(a) of the 1998 Act would have prevented the Home Secretary's action from being categorised as unlawful because the true meaning of s 26(4) of the 1961 Act is such that he could not have acted differently.

CONCLUSION

**[37]** Although there were at the material time different tariff settings arrangements in place in Scotland from those in England and although there is evidence that some mandatory life sentence prisoners were likely to receive a

somewhat shorter tariff in Scotland than in England, there has been no violation of art 7 of the convention. The Secretary of State was entitled, indeed obliged, by virtue of s 26(4) of the 1961 Act to set the tariff in the manner that he did. The true penalty imposed on the claimant was one of life imprisonment. That was the penalty to which he was liable when he committed the murder and that was the sentence that was imposed upon him. In my judgment the claim for judicial review must fail.

**PITCHFORD J.**

[38] I agree.

*Application dismissed.*

Dilys Tausz Barrister.

# Steward v Director of Public Prosecutions

[2003] EWHC 2251 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
MAURICE KAY AND CRANE JJ
30 JULY 2003

*Magistrates – Jurisdiction – Re-opening case to rectify mistake – Justices ruling no case to answer due to mistaken belief as to admissibility of evidence – Justices rescinding decision and convicting defendant – Whether justices functi officio.*

*Road traffic – Driving while unfit to drive through drink – Evidence – Medical evidence – No evidence called from doctor taking specimen of blood at police station – Whether requirement for doctor to give evidence mandatory – Road Traffic Offenders Act 1988, s 16(2).*

The defendant was arrested and taken to a police station following a positive roadside breath test. The alcohol levels in the specimens of breath provided by the defendant were such that he was entitled to elect for those specimens to be replaced by a specimen of blood. The authorised intoximeter officer arranged for the police surgeon, Dr B, to take the blood. The officer observed Dr B obtain the defendant's consent and take two specimens of blood. The defendant was charged with being in charge of a motor vehicle after consuming so much alcohol that the proportion of it in his blood exceeded the prescribed limit contrary to s 5(1)(a) of the Road Traffic Act 1988. At trial, the officer gave evidence, as did the authorised analyst. The latter produced his certificate relating to the proportion of alcohol found in the blood specimen. At the end of the prosecution case, the justices ruled that there was no case to answer. Their reasons were that as the analyst's certificate had not been served at least seven days before the hearing, the evidence of analysis of the blood was inadmissible and therefore an essential element of the offence was missing. Thereafter, the prosecution pointed out that the certificate was not in dispute and had been accepted under s 9 of the Criminal Justice Act 1967 and read out to the court. Once their mistake had been explained to them and agreed by all, the justices found that there was a case for the defendant to answer. The defendant then submitted that the police officer's evidence was not capable of being substituted for the attendance of Dr B or a duly signed statement from him under s 16(2) of the Road Traffic Offenders Act 1988[a]. The justices found the case proved and convicted the defendant. He appealed by way of case stated. On appeal, the defendant submitted, inter alia, that from the moment the justices ruled that there was no case to answer, they were functi officio, and that the utterance of the words 'no case to answer' amounted to an acquittal. He also contended that s 16(2) was mandatory and that there could be no evidence about consent or the qualifications of the medical practitioner save from the medical practitioner himself.

**Held** – (1) Justices were entitled to re-open a case, despite acceding to a submission of no case to answer, where they had made a mistake and all parties agreed that there had been an error. In those circumstances, the process of the

a Section 16(2), so far as material, is set out at [14], below

adjudication had not been completed and the justices were not functi officio. Moreover, common sense and policy favoured immediate rectification without the cost and delay of an appeal by way of case stated (see [9]–[11], below); *R v Essex JJ, ex p Final* [1962] 3 All ER 924 distinguished.

(2) Section 16(2) of the Road Traffic Offenders Act 1988 was not in mandatory terms, and did not preclude evidence being given from another source as to consent or the qualifications of the medical practitioner. That was made plain by the use of the word 'may' in the section, and having regard to its purpose, which was to provide a way of enabling the prosecution to present evidence at minimal cost and inconvenience. In the instant case, there had been evidence that the police officer had been present and had witnessed the defendant consenting to the procedure. That evidence had been sufficient to found a conviction. Accordingly, the appeal would be dismissed (see [15], below).

**Notes**

For the doctrine of functus officio and procedure for admissing evidence of specimens of blood taken by medical practitioners, see respectively 29(2) *Halsbury's Laws* (4th edn reissue) para 766, and 40(2) *Halsbury's Laws* (4th edn reissue) para 694.

For the Road Traffic Offenders Act 1988, s 16(2), see 38 *Halsbury's Statutes* (4th edn 2001 reissue) 1033.

**Cases referred to in judgments**

*R v Essex JJ, ex p Final* [1962] 3 All ER 924, [1963] 2 QB 816, [1963] 2 WLR 38, DC.

*S (an infant) v Manchester City Recorder* [1969] 3 All ER 1230, [1971] AC 481, [1970] 2 WLR 21, HL.

**Case stated**

Gary David Steward appealed by way of case stated from an adjudication of Portsmouth Magistrates' Court on 22 January 2003 whereby he was convicted of an offence contrary to s 5(1)(a) of the Road Traffic Act 1988. The questions for the opinion of the High Court were: (i) whether the justices were entitled to re-open the case after finding that there was no case for the defendant to answer; (ii) whether in the absence of a certificate from a medical practitioner certifying that a sample of blood had been taken from the defendant with his consent or oral evidence from the medical practitioner, the justices were entitled to rely upon other evidence to show that such a sample had been taken; and (iii) whether there was evidence upon which the justices were entitled to convict the defendant. The facts are set out in the judgment of Maurice Kay J.

*John Lofthouse* (instructed by *Coffin Mew and Clover*, Portsmouth) for the defendant.

*Stephen Parish* (instructed by the *Crown Prosecution Service*) for the prosecution.

**MAURICE KAY J.**

[1] This is an appeal by case stated from an adjudication of a magistrates' court sitting at Portsmouth on 22 January this year. The defendant, Gary David Steward, faced a charge that on 6 August 2002 he had driven a motor vehicle on the M27 after consuming so much alcohol that the proportion of it in his blood, namely 97 mg of alcohol in 100 m of blood, exceeded the prescribed limit contrary to s 5(1)(a) of the Road Traffic Act 1988. He pleaded not guilty and the

trial occurred on 22 January. Eventually the justices found the case proved. They fined the defendant £500 plus costs, endorsed his licence and disqualified him for 12 months.

[2] The evidence came mainly from two police officers, PC Davis and PC Jackson. It was PC Davis who had encountered the defendant on the M27 and who administered the breath test at the roadside; that test proving to be positive. The defendant was then arrested and taken to Fareham Police Station. The evidence of PC Jackson related to events at the police station. The case stated contains these findings:

> 'We found the following facts form the sworn evidence of PC Jackson: (a) He was the authorised intoximeter operator who undertook this procedure in respect of the defendant at the police station. The defendant provided two specimens of breath; the lower of the two readings was 41 microgrammes of alcohol in 100 millilitres of the breath. (b) The defendant then elected for the specimen to be replaced by a specimen of blood. (c) He [PC Jackson] arranged for Dr Bell, police surgeon, to attend. (d) He observed Dr Bell obtain the defendant's consent to blood being taken and then Dr Bell actually take two specimens of blood from the defendant. (e) One sample of blood was given to the defendant. (f) PC Jackson took the second sample from Dr Bell at 21.58 hrs.'

The remaining findings in relation to his evidence concern the transmission of the samples and is not material to this appeal.

[3] The other witness who gave evidence (by way of witness statement) was Dr Trotter, an authorised analyst. He produced his certificate relating to the proportion of alcohol found in the blood specimen. At the end of the prosecution case a submission of no case to answer was made on behalf of the defendant. The contention was that there had been no oral evidence or a certificate from Dr Bell, and that therefore there was no evidence upon which the defendant could be convicted.

[4] The justices heard rival submissions and then retired. When they came back, the case stated records:

> 'We ruled there was no case to answer on the basis we believed that Dr Trotter's certificate should have been served at least seven days before the hearing. The evidence of analysis of the blood was therefore inadmissible. Therefore an essential element of the offence was missing ... (a) Upon the decision of no case to answer being announced, the prosecuting solicitor asked which certificate was referred to by the Bench; upon the chairwoman's reply that it was the analyst's certificate, he stated (and it was agreed by the defence) that the statement of the analyst was not in dispute, and had been accepted under s 9 of the Criminal Justice Act 1967 and read to the court. The issue was as to the absence of evidence from Dr Bell to prove that he was a medical practitioner and that the samples had been taken with the defendant's consent. (b) We sought advice from the legal adviser as to whether we could now review our decision. The legal adviser advised us that we were able to review our decision. (c) As the basis of our decision of no case to answer was that we believed that a certificate by Dr Trotter had to be served at least seven days before the hearing, or otherwise the certificate by him ... was inadmissible ... we realised that we had erred in finding no case to answer on this basis. (d) The prosecution

clarified that the certificate/statement by Dr Bell was not necessary because PC Jackson had observed the consent being given and was aware Dr Bell was a police surgeon.' a

Once their mistake had been explained to them and agreed by all, after further consideration the magistrates found that there was a case for the defendant to answer, despite the fact that the prosecution had not produced any statement or certificate from Dr Bell and he had not given evidence. The case stated then refers to the fact that PC Jackson had given evidence that the blood samples were taken by Dr Bell at the election of the defendant, and that PC Jackson had been present when the blood samples were taken. The case therefore proceeded. b

[5] The defendant did not give or call any evidence. It seems that the defendant's solicitor submitted, either following the reconsideration or in final submissions, that the magistrates were not entitled to re-open the case after finding that there was no case to answer. The submission was made that PC Jackson's evidence was not capable of being accepted in substitution for the attendance of Dr Bell or a duly signed statement from him under s 16(2) of the Road Traffic Offenders Act 1988. It was further submitted that there was insufficient evidence upon which they were entitled to convict the defendant. c d

[6] However, they found the case proved. The case stated explains:

'In this case, the prosecution relied on the evidence of PC Jackson that the two blood samples were taken by Dr Bell from the defendant, with his consent. We were satisfied on this evidence that the sample was taken from the defendant with his consent by a medical practitioner. PC Jackson had given evidence a police surgeon was arranged and this was Dr Bell. Therefore the evidence of the taking of the blood sample was admissible.' e

A little later:

'We were entitled to reverse our decision ... because we had not finished hearing the case and it became quite clear that we made our decision on the submission of no case to answer on the mistaken belief that it was Dr Trotter's certificate that was in issue ... We found there was sufficient evidence to satisfy us beyond reasonable doubt that the defendant was guilty of the offence charged.' f g

[7] The appeal to this court is put on three bases. The first ground of appeal relates to the magistrates proceeding to hear the case after finding that there was no case to answer. In short, the submission of Mr Lofthouse, on behalf of the defendant, is that from the moment the magistrates ruled that there was no case to answer, the magistrates were functi officio. He submits that the utterance of the words 'no case to answer' amounted to an acquittal. He points out that under s 9 of the Magistrates' Court Act 1980 a magistrates' court in a summary trial has only two choices: either to convict the accused or to dismiss the information. He submits that by the utterance 'no case to answer' the information was dismissed. In support of this submission he refers to *R v Essex JJ, ex p Final* [1962] 3 All ER 924, [1963] 2 QB 816. In that case, having heard the evidence and retired to consider it, the magistrates returned and announced that the case had been proved and that a fine of £3 would be imposed. At that point the defendant's solicitor began to make submissions to the effect that the case had not been proved, adverting to factual evidence that was or was not before the court. He succeeded in persuading the Bench to reconsider their verdict. When they did so, h j

the justices dismissed the information. The Divisional Court held that the justices had erred in so doing because they were functi officio and had no jurisdiction to substitute an acquittal for a conviction or vice versa. Lord Parker CJ said:

> 'It is, I think, perfectly clear that what the chairman of the bench announced amounted to a conviction ... it is perfectly clear that the justices intended to, and were understood to, find that the case against the defendant had been proved and to inflict a fine of £3.' See [1962] 3 All ER 924 at 925, [1963] 2 QB 816 at 820.

Counsel for the defendant had contended for a principle to the effect that if, before dispersing, a matter was drawn to the attention of the Bench which would make them change their minds, they were at liberty to do so and substitute an acquittal. Lord Parker CJ said:

> 'There is, I think, clearly no statutory power to enable them to do so, nor do I for my part think that there is any inherent power. They are, in my judgment, functi officio the moment they have announced their decision, however inconvenient the result may be.' See [1962] 3 All ER 924 at 926, [1963] 2 QB 816 at 821.

Gorman J agreed, as did Salmon J, who said:

> 'It is quite plain on authority that once a decision by magistrates is announced in open court, that decision so announced amounts either to an acquittal or to a conviction, as the case may be. Once the magistrates have convicted or acquitted, they are functus officio and cannot alter their decision.' See [1962] 3 All ER 924 at 927, [1963] 2 QB 816 at 823.

Mr Lofthouse additionally relies on *S (an infant) v Manchester City Recorder* [1969] 3 All ER 1230, [1971] AC 481, to which I shall make brief reference later.

**[8]** Mr Lofthouse also observes that the 1980 Act contains provisions permitting a magistrates' court to reopen a case to rectify mistakes. Those provisions are to be found in s 142. However, they do not extend to the circumstances of the present case. This leads to the submission that if Parliament had intended a case to be re-opened, in the manner in which it was in the present case, it would have extended the power of rectification to cover such circumstances.

**[9]** In my judgment, the position for which Mr Lofthouse contends is highly schematic and artificially so. As Crane J observed in the course of submissions, it is a matter of chance as to whether magistrates begin a ruling with references to the evidence with the intention of only making clear their finding of no case at the end, or whether, as here, the conclusion preceded the reasons.

**[10]** In the former case, if the solicitor had spotted an error in the course of the review of the evidence it is a matter of chance as to whether he would have interrupted immediately or waited until the end. This is not a case like *Ex p Final* where a Bench was persuaded to re-open the case and, in effect, hear further submissions as to the evidence. It is a case of an error having been identified, having been agreed by the defendant's solicitor and having been admitted to by the magistrates. I do not consider that that comes within the principles set out in *Ex p Final*, or in the case of *S* [1969] 3 All ER 1230 at 1240, [1971] AC 481 at 498 in which Lord MacDermott referred to the point where 'the process of adjudication ... had been completed and was effective in point of law' as the cut-off point.

[11] In my judgment that point had not been reached in this case. In making that statement I also have in mind the fact that at the time of *Ex p Final* it was not usual for magistrates to give reasons at all and, therefore, the announcement of the decision one way or the other was laconic in the extreme. Now that the giving of reasons is common, the process of adjudication is extended. Mr Lofthouse suggests that there are also strong policy reasons for this court to adopt the approach taken in *Ex p Final*, the policy being one of discouragement of attempts at second bites at the cherry. However, there are also strong policy reasons for taking a broader view. Where, as here, magistrates make a mistake and both parties agree, and the magistrates agree that they have made such a mistake, policy and common sense favour its immediate rectification without the cost and delay of an appeal by case stated.

[12] For all these reasons, I do not accept the first ground of appeal advanced by Mr Lofthouse. I turn, therefore, to the second ground.

[13] Mr Lofthouse puts it in this way. No evidence was called from or provided by Dr Bell. By s 15(4) of the Road Traffic Offenders Act 1988 'A specimen of blood shall be disregarded unless it was taken from the accused with his consent by a medical practitioner'. Mr Lofthouse submits that the legislation is a careful and complete code and requires that the issues of the taking of a blood specimen (a) by a medical practitioner and (b) with the consent of the accused cannot be established without evidence from the medical practitioner either by oral evidence or by certificate.

[14] The certificate process is governed by s 16 of the Road Traffic Offenders Act 1988 and, in particular, s 16(2), which provides:

> 'Subject to subsections (3) and (4) below, evidence that a specimen of blood was taken from the accused with his consent by a medical practitioner may be given by the production of a document purporting to certify that fact and to be signed by a medical practitioner.'

The submission advanced by Mr Lofthouse is essentially that s 16(2) is mandatory and that there can be no evidence about consent or the qualifications of the medical practitioner, save from the medical practitioner himself usually through the certification there provided for. His submission is that the legislation is permissive as to whether the doctor's evidence is oral or by way of certification, but it is mandatory that it is the doctor who provides it. He contends that the provisions of the Act would be unnecessary if a police officer could give evidence which the Act envisages coming from a medical practitioner. He further submits that the strictness of such a requirement makes good sense since it is consent at the time of the taking of the sample that is relevant and the medical practitioner is the best placed person to assess that.

[15] I do not accept these submissions. It is abundantly clear from the words of s 16(2) that it is permissive. That much is plain from the word 'may'. Its purpose is to provide a way which enables the prosecution to present evidence with minimal cost and inconvenience. However, in my judgment, it is not the only evidence which is admissible on the issues of consent or the qualifications of the medical practitioner. To take two examples that were canvassed in the course of submissions. If the accused person had been interviewed under caution in the police station and had admitted in the course of that interview that he had consented to the taking of the blood sample, it is absurd to suggest that that evidence would not be admissible to prove his consent in the absence of a certificate or other evidence from the medical practitioner. Moreover, if there

were a dispute about consent in the course of the evidence, and the police officer who was present was able to give evidence as to what had happened, supporting or contradicting the evidence of the doctor, there is absolutely no reason why the police officer should not give such evidence. Indeed, it seems to me that if there were such a colourful dispute it would be the duty of the defence advocate to cross-examine the police officer in relation to it, as it would be inevitable that he would have been present and in a position to provide evidence about the disputed matter.

**[16]** Accordingly, I conclude that there is nothing in this second ground of appeal.

**[17]** The third ground of appeal is to some extent a continuation of the second ground but is put in global terms, to the effect that there was no or insufficient evidence upon which the defendant could be convicted. Again, the points which Mr Lofthouse seeks to make relate to the issues of consent and the medical practitioner. I return again to the wording of the case stated, which reports that the magistrates found as facts from the evidence of PC Jackson: (i) that he had arranged 'for Dr Bell, police surgeon, to attend', and (ii) that he had observed Dr Bell obtain the defendant's consent to blood being taken and then Dr Bell actually taking the blood samples from the defendant.

**[18]** It is not suggested that that evidence was challenged in any way, or that any issue about those matters was raised with PC Jackson. It is also instructive to have regard to the context. This is not a case in which the driver was being required to provide a blood sample pursuant to s 7 of the Road Traffic Act 1988. It is a case in which the blood samples were being taken as a result of the defendant's election under s 8(2) of that Act, which provides:

> 'If the specimen with the lower proportion of alcohol contains no more than 50 microgrammes of alcohol in 100 millilitres of breath, the person who provided it may claim that it should be replaced by such specimen as may be required under section 7(4) of this Act and, if he then provides such a specimen, neither specimen of breath shall be used.'

I observe that that section is headed 'Choice of specimens of breath'.

**[19]** In my judgment, it is plain on the face of the case stated that there was evidence as to the taking of the samples by Dr Bell. There was evidence that the defendant consented to that course and there was evidence that Dr Bell was a medical practitioner; it is fanciful to suggest that he was not.

**[20]** Mr Lofthouse complains that the case stated is defective because it does not disclose whether the findings about consent and, to a lesser extent, the status of the medical practitioner were matters of direct evidence from PC Jackson or were inferences drawn from parts of his evidence. We agreed to look at the notes taken by the legal adviser to the justices, but we do not find that they take the matter any further. I propose to ignore them.

**[21]** I see no reason not to take the case stated at face value. The position adopted by Mr Lofthouse is that the case stated is defective because it does not properly separate the findings from the evidence upon which they were based, and it does not make clear that which was based on direct evidence and that which was based on inference. He refers to r 81 of the Magistrates' Court Rules 1981, SI 1981/552.

**[22]** I do not accept his arguments about that. The case stated is, in my judgment, unequivocal. These criticisms of its contents relating to the facts that

were found seem to me to be utterly unmeritorious and I reject them. It follows that I am not persuaded by this third ground of appeal.

**[23]** I therefore turn to the three questions that are posed in the case stated for the consideration of this court. Question 1: 'Whether the justices were entitled to re-open the case after finding that there was no case for the defendant to answer.' I answer that in the affirmative. Question 2:

> 'Whether, in the absence of a certificate from a medical practitioner certifying that a sample of blood had been taken from the defendant with his consent or oral evidence from the medical practitioner, the justices were entitled to rely upon other evidence to show that such a sample had been taken.'

Again, I answer that in the affirmative. Question 3: 'Whether there was evidence upon which the justices were entitled to convict the defendant.' Once again I answer that in the affirmative.

**[24]** Accordingly, I would dismiss the appeal.

**CRANE J.**

**[25]** I agree.

*Appeal dismissed.*

Alexander Horne Barrister.

# Relaxion Group plc v Rhys-Harper D'Souza v Lambeth London Borough Council Jones v 3M Healthcare Ltd and other appeals

[2003] UKHL 33

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOPE OF CRAIGHEAD, LORD HOBHOUSE OF WOODBOROUGH, LORD SCOTT OF FOSCOTE AND LORD RODGER OF EARLSFERRY

25–28 NOVEMBER 2002, 19 JUNE 2003

*Discrimination – Sex discrimination – Employment – Jurisdiction of employment tribunal – Whether employment tribunal having jurisdiction to hear complaint relating to benefit arising from employment relationship after termination of employment – Whether tribunal having jurisdiction to hear complaint of sex discrimination with regard to employer's alleged failure to carry out proper investigation of allegation of sexual harassment – Sex Discrimination Act 1975, s 6(2).*

*Discrimination – Racial discrimination – Employment – Whether employment tribunal having jurisdiction to hear complaint relating to benefit arising from employment relationship after termination of employment – Whether tribunal having jurisdiction to hear complaint of discrimination based on employer's failure to comply with reinstatement order – Race Relations Act 1976, s 4(2).*

*Discrimination – Disability discrimination – Employment – Whether employment tribunal having jurisdiction to hear complaint relating to benefit arising from employment relationship after termination of employment – Whether tribunal having jurisdiction to hear complaints relating to provision of references – Whether tribunal having jurisdiction to hear complaints relating to employer's failure to return employee's property – Disability Discrimination Act 1995, s 4(2).*

In three consolidated appeals, the principal question raised was whether discriminatory acts done by an employer after termination of an employee's contract of employment were outside the scope of s 6(2)[a] of the Sex Discrimination Act 1975, s 4(2)[b] of the Race Relations Act 1976, and s 4(2)[c] of the Disability Discrimination Act 1995. In the first appeal, which concerned the 1975 Act, the Court of Appeal held that the employment tribunal had had no jurisdiction to hear the employee's complaint of sex discrimination with regard to the alleged failure of her employer to carry out a proper investigation of her allegation of sexual harassment, as the discriminatory conduct was alleged to have occurred after her employment had ended. In the second appeal, which concerned the 1976 Act, the Court of Appeal held that the tribunal had had no jurisdiction to hear a complaint of discrimination based on the employer's failure to comply with a reinstatement order made after the employee had succeeded in his complaint of unfair dismissal, racial discrimination and

a Section 6(2) is set out at [23], below
b Section 4(2) is set out at [24], below
c Section 4(2) is set out at [25], below

victimisation. In the third appeal, which concerned the 1995 Act, the Court of Appeal held that the tribunal had had no jurisdiction to hear three complaints relating to the provision of references after employment had been terminated, or a complaint relating to the refusal by the employer to return property of the employee after his dismissal.

**Held** – The natural and proper interpretation of s 6(2) of the 1975 Act and the corresponding provisions in s 4(2) of the 1976 Act and s 4(2) of the 1995 Act in the present context was that once two persons entered into the relationship of employer and employee, the employee was intended to be protected against discrimination by the employer in respect of all the benefits arising from that relationship. The statutory provisions were concerned with the manner in which the employer conducted himself, vis-à-vis the employee, with regard to all the benefits arising from that relationship, whether as a matter of strict legal entitlement or not. That being the purpose, it would make no sense to draw an arbitrary line at the precise moment when the contract of employment ended, protecting the employee against discrimination in respect of all benefits up to that point, but in respect of none thereafter. To be an 'incident' of the employment relationship for that purpose the benefit in question had to arise between the employer or former employer as such and the employee or former employee as such. The first and third appeals would, accordingly, be allowed. However, the second appeal would be dismissed, since the benefit acquired by an employee from a reinstatement order did not arise from the employment relationship, but rather derived from an order of the tribunal (see [37]–[40], [44], [45], [47], [48], [51]–[53], [123], [125], [129], [162]–[165], [197], [205], [206], below).

*Adekeye v Post Office* [1997] IRLR 105 overruled.

**Notes**

For time limits for bringing a complaint of discrimination in the employment field, see 13 *Halsbury's Laws* (4th edn) (2000 reissue) para 376.

For the Sex Discrimination Act 1975, s 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 53.

For the Race Relations Act 1976, s 4, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 140.

For the Disability Discrimination Act 1995, s 4, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 295.

**Cases referred to in opinions**

*Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110, CA; *affg* sub nom *Post Office v Adekeye* [1995] IRLR 297, [1995] ICR 540, EAT.

*Anyanwu v South Bank Student Union (Commission for Racial Equality, interveners)* [2001] UKHL 14, [2001] 2 All ER 353, [2001] ICR 391, [2001] 1 WLR 638.

*Burton v British Railways Board* Case 19/81 [1982] 3 All ER 537, [1982] QB 1080, [1982] 3 WLR 387, [1982] ECR 555, ECJ.

*Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1999] ICR 100, [1998] ECR I-5199, ECJ.

*Coote v Granada Hospitality Ltd (No 2)* [1999] IRLR 452, [1999] ICR 942, EAT.

*D'Souza v Lambeth London BC* [2000] All ER (D) 878, EAT; *affd* [2001] EWCA Civ 794, [2001] All ER (D) 346 (May).

*De Souza v Automobile Association* [1986] IRLR 103, [1986] ICR 514, CA.

*Garland v British Rail Engineering Ltd* [1982] 2 All ER 402, [1983] 2 AC 751, [1982] 2 WLR 918, ECJ and HL.

*Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787, [2001] ICR 99, [2001] 1 WLR 225, CA.

*Jones v Tower Boot Co Ltd* [1997] 2 All ER 406, [1997] ICR 254, CA.

*Kirker v British Sugar plc, Jones v 3M Healthcare Ltd, Angel v New Possibilities NHS Trust, Bond v Hackney Citizens' Advice Bureau* [2002] ICR 341, EAT; *affd* [2002] EWCA Civ 304, (2002) 70 BMLR 1, [2002] ICR 1124.

*Leighton v Michael* [1996] IRLR 67, [1995] ICR 1091, EAT.

*Litster v Forth Dry Dock and Engineering Co Ltd* [1989] 1 All ER 1134, [1990] 1 AC 546, [1989] 2 WLR 634, HL.

*Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135, ECJ.

*Nagarajan v Agnew* [1994] IRLR 61, [1995] ICR 520, EAT.

*Nagarajan v London Regional Transport* [1999] 4 All ER 65, [2000] 1 AC 501, [1999] 3 WLR 425, HL.

*Rhys-Harper v Relaxion Group plc* [2001] EWCA Civ 634, [2001] IRLR 460, [2001] ICR 1176; *affg* [2000] IRLR 810, EAT.

*Sainsbury (J) Ltd v Savage* [1980] IRLR 109, [1981] ICR 1, CA.

*Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, [1994] 3 WLR 354, HL.

*Wagner Miret v Fondo de Garantía Salarial* Case C-334/92 [1993] ECR I-6911, ECJ.

*Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929, [1993] ICR 175, [1993] 1 WLR 49, HL.

**Cases referred to in list of authorities**

*Barclays Bank plc v Kapur* [1991] 1 All ER 646, [1991] 2 AC 355, [1991] 2 WLR 401, HL.

*Duke v GEC Reliance Systems Ltd* [1988] 1 All ER 626, [1988] AC 618, [1988] 2 WLR 359, HL.

*Falkirk Council v Whyte* [1997] IRLR 560, EAT.

*Hampson v Dept of Education and Science* [1990] 2 All ER 513, [1991] 1 AC 171, [1990] 3 WLR 42, HL.

*Khan v Chief Constable of West Yorkshire* [2001] UKHL 48, [2001] 4 All ER 834, [2001] ICR 1065, [2001] 1 WLR 1947.

*Savjani v IRC* [1981] 1 All ER 1121, [1981] QB 458, [1981] 2 WLR 636, CA.

**Appeal**

*Relaxion Group plc v Rhys-Harper*

Christine Lillian Rhys-Harper appealed with permission of the Appeal Committee of the House of Lords given on 7 February 2002 from the decision of the Court of Appeal (Pill, Mantell and Buxton LJJ) on 3 May 2001 ([2001] EWCA Civ 634, [2001] IRLR 460, [2001] ICR 1176) dismissing her appeal from the decision of the Employment Appeal Tribunal (Judge Collins CBE, CHolroyd, Sir Gavin Laird CBE) on 24 March 2000 allowing an appeal by the respondent, Relaxion Group plc from the decision of an employment tribunal sitting at Truro (Chairman AD Puttick, B Dunstan, J Cook) promulgated on 28 April 1999 that it had jurisdiction to hear the appellant's claims under the Sex Discrimination Act 1975 for acts allegedly done by the respondent after the termination of the

appellant's contract of employment. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

*D'Souza v Lambeth London BC*

Donald D'Souza appealed with permission of the Appeal Committee of the House of Lords given on 11 February 2002 from the decision of the Court of Appeal (Schiemann, Robert Walker LJJ and Lloyd J) on 25 May 2001([2001] EWCA Civ 794, [2001] All ER (D) 346 (May) dismissing his appeal from the decision of the Employment Appeal Tribunal (Morison J, TA Marsland, RN Straker) on 27 June 2000, dismissing his appeal from the decision of an industrial tribunal sitting at London South (Chairman DWH Brayden, C Curson, T MacLean) promulgated on 14 March 1996 that it had no jurisdiction to hear the appellant's claims under the Race Relations Act 1976 for acts allegedly done by the respondent, Lambeth London Borough Council after the termination of the appellant's contract of employment. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

*Jones v 3M Healthcare Ltd*

Gerald Philip Jones appealed with permission of the Appeal Committee of the House of Lords from the decision of the Court of Appeal (Pill, Mummery and Latham LJJ) on 27 February 2002 ([2002] EWCA Civ 304, (2002) 70 BMLR 1, [2002] ICR 1142) dismissing his appeal from the decision of the Employment Appeal Tribunal (Lindsay J, P Dawson, I Ezekiel) on 11 December 2001 ([2002] ICR 341) dismissing his appeal from the decision of an employment tribunal sitting at Leicester (Chairman D Price, J Harper, M Kamal) promulgated on 5 May 2000 that it had no jurisdiction to hear the appellant's claim for victimisation under the Disability Discrimination Act 1995 in relation to acts allegedly done by the respondent, 3M Healthcare Ltd, after the termination of the appellant's contract of employment. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

*Kirker v Ambitions Personnel and anor*

Nicholas Kirker appealed with permission of the Appeal Committee of the House of Lords from the decision of the Court of Appeal (Pill, Mummery and Latham LJJ) on 27 February 2002 ([2002] EWCA Civ 304, (2002) 70 BMLR 1, [2002] ICR 1142) dismissing his appeal from the decision of the Employment Appeal Tribunal (Lindsay J, P Dawson, I Ezekiel) on 11 December 2001 ([2002] ICR 341) dismissing his appeal from the decision of an employment tribunal sitting at Nottingham (Chairman JS Walker, AJ Hutchins, N Greatrex) promulgated on 28 July 2000 striking out the appellant's claim for victimisation under the Disability Discrimination Act 1995 against the second respondent, British Sugar plc in relation to the provision of an allegedly unsatisfactory reference provided by British Sugar to the first respondent, Ambitions Personnel after the termination of the appellant's contract of employment with British Sugar. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

*Angel v New Possibilities NHS Trust*

Diana Dinsmor Angel appealed with permission of the Appeal Committee of the House of Lords from the decision of the Court of Appeal (Pill, Mummery and Latham LJJ) on 27 February 2002 ([2002] EWCA Civ 304, (2002) 70 BMLR 1,

[2002] ICR 1142) dismissing her appeal from the decision of the Employment Appeal Tribunal (Lindsay J, P Dawson, I Ezekiel) on 11 December 2001 ([2002] ICR 341) dismissing her appeal from the decision of an employment tribunal sitting at Bury St Edmunds (Chairman BG Mitchell, G Adams, B Shelley) promulgated on 21 August 2000 that it had no jurisdiction to hear the appellant's claim for victimisation under the Disability Discrimination Act 1995 against the respondent, New Possibilities NHS Trust in relation to the provision of an allegedly unsatisfactory reference provided by the respondent after the termination of the appellant's contract of employment with them. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

*Bond v Hackney Citizens Advice Bureau*

Charmaine Venise Bond appealed with permission of the Appeal Committee of the House of Lords from the decision of the Court of Appeal (Pill, Mummery and Latham LJJ) on 27 February 2002 ([2002] EWCA Civ 304, (2002) 70 BMLR 1, [2002] ICR 1142) dismissing her appeal from the decision of the Employment Appeal Tribunal (Lindsay J, P Dawson, I Ezekiel) on 11 December 2001 ([2002] ICR 341) dismissing the decision of an employment tribunal sitting at London Central (Chairman MS Rabin, J Dickinson, K Thomas) promulgated on 25 October 2000 that it had no jurisdiction to hear the appellant's claim for victimisation under the Disability Discrimination Act 1995 against the respondent, Hackney Citizens Advice Bureau in relation to acts allegedly done by the respondent after the termination of the appellant's contract of employment with them. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

*Frederick Reynold QC* and *Helen Gower* (instructed by *Hancock Caffin*, Truro) for the employee in the first appeal.

*David Reade* (instructed by *Morrison & Foerster LLP*) for the employer in the first appeal.

*Karon Monaghan* (instructed by *Anthony Robinson*) for the employee in the second appeal.

*David Griffith-Jones QC* and *Keith Bryant* (instructed by *Gerard Curran*) for the employer in the second appeal.

*Robin Allen QC* and *Sandhya Drew* (instructed by *Pauline Hughes*, Manchester) for the employees in the third appeal.

*Adrian Lynch QC* and *Thomas Kibling* (instructed by *Eversheds*, Nottingham, and *Greenwoods*, Peterborough) for the employers in the third appeal.

Their Lordships took time for consideration.

19 June 2003. The following opinions were delivered.

**LORD NICHOLLS OF BIRKENHEAD.**

[1] My Lords, the principal question raised by these appeals is whether discriminatory acts done by an employer after termination of an employee's contract of employment are outside the scope of the anti-discrimination legislation. The first appeal raises this question in the context of the Sex Discrimination Act 1975, the second appeal in the context of the Race Relations Act 1976, and the third appeal in the context of the Disability Discrimination Act 1995. In each case the issue has been decided as a preliminary point, without a

full investigation of the facts. The facts relevant for the purpose of this preliminary point, as found or agreed for this purpose, can be summarised as follows.

THE SEX DISCRIMINATION CASE: MS RHYS-HARPER

**[2]** The discriminatory act alleged in the sex discrimination case is a little unusual. It relates to an employer's failure properly to investigate a sexual harassment complaint first made after the termination of the contract of employment. Christine Rhys-Harper was employed by Relaxion Group plc (Relaxion), now known as Leisure Connection plc, as a lifeguard and general assistant at the Helston Sports Centre. In October 1998 she was summarily dismissed on the grounds of misconduct, after a disciplinary hearing conducted by her manager, Mr Osborn. She had been rude to customers. Her contract of employment ended on 22 October.

**[3]** She then availed herself of her right to appeal against the decision to dismiss her. The appeal hearing took place on 9 November. It was conducted by the general manager, Mr Adamson. In the course of this hearing Ms Rhys-Harper complained that during her employment Mr Osborn had regularly subjected her to sexual harassment. On 30 November she was informed that her appeal had been dismissed. She was told also that the company had investigated the sexual harassment complaint, and had concluded there was insufficient evidence to establish a case against Mr Osborn.

**[4]** On 15 February 1999 Ms Rhys-Harper made an application to an employment tribunal in respect of unfair dismissal and sex discrimination. The discrimination alleged was sexual harassment during her employment and, additionally, failure to carry out a proper investigation of her sexual harassment complaint. In April 1999, after a preliminary hearing, the tribunal ruled that the complaint to the tribunal regarding the series of incidents of sexual harassment was made outside the prescribed period of three months. The claim should have been lodged by early January 1999. But Relaxion's decision, given on 30 November after investigation of Ms Rhys-Harper's complaint, could be in itself a continuing discrimination against her. She had not been seen during the investigation, nor had she been able to challenge the evidence of witnesses. So time ran from 30 November, and her sex discrimination application was in time.

**[5]** Relaxion appealed against this ruling in respect of the alleged post-termination discrimination. The Employment Appeal Tribunal (EAT), presided over by Judge Collins, allowed the appeal. The EAT rightly regarded itself as bound by the decision of the Court of Appeal in *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110. *Adekeye's* case was a decision in respect of the 1976 Act, but the relevant provisions in the 1975 Act are indistinguishable. The Court of Appeal, comprising Pill, Mantell and Buxton LJJ, dismissed Ms Rhys-Harper's appeal against that decision ([2001] EWCA Civ 634, [2001] IRLR 460, [2001] ICR 1176). Buxton LJ said (at [25]) that Peter Gibson LJ's conclusion in *Adekeye's* case was 'entirely persuasive'. Ms Rhys-Harper has now appealed to your Lordships' House.

THE RACIAL DISCRIMINATION CASE: MR D'SOUZA

**[6]** The complaint in the racial discrimination case also is a little unusual. The discrimination alleged is the employer's failure to comply with a reinstatement order made by an employment tribunal. Donald D'Souza was employed by the London Borough of Lambeth (Lambeth) as an information systems group

manager until his dismissal in January 1990. The employment tribunal upheld a complaint by Mr D'Souza that he had been unfairly dismissed, discriminated against on racial grounds and victimised within the meaning of the 1976 Act. The tribunal ordered Lambeth to reinstate Mr D'Souza by 16 January 1993. On 25 March 1993 Lambeth told Mr D'Souza it was not willing to do so.

[7] Two years later, on 11 July 1995, the employment tribunal held that it had not been practicable for Lambeth to reinstate Mr D'Souza. By a decision sent to the parties on 18 October 1995, an award of compensation was made in favour of Mr D'Souza, having regard to Lambeth's failure to reinstate Mr D'Souza. Meanwhile, in July 1995 Mr D'Souza had made two further applications to the employment tribunal, the subject of each being Lambeth's alleged racial discrimination and victimisation in deciding not to reinstate him. The employment tribunal held that, following the decision in *Adekeye's* case, it had no jurisdiction to hear these applications.

[8] The EAT, under the presidency of Morison J, dismissed an appeal by Mr D'Souza ([2000] All ER (D) 878). In so doing the EAT followed *Adekeye's* case, as it was obliged to do. But the EAT did not disguise its unease, saying: '... we are of the view that the *Adekeye* decision fails to give effect to the intention of Parliament to provide a comprehensive legislative code.' The Court of Appeal, comprising Schiemann, Robert Walker LJJ and Lloyd J, dismissed Mr D'Souza's further appeal ([2001] EWCA Civ 794, [2001] All ER (D) 346 (May)). Schiemann LJ said ([at 17]) that the court saw 'some force' in the submission that the decision in *Adekeye's* case could have gone the other way.

[9] Mr D'Souza has now appealed against this decision. His appeal is supported by the Commission for Racial Equality.

THE DISABILITY DISCRIMINATION CASES

[10] The third appeal comprises four disability cases. Each case involves victimisation. Each applicant claims he was discriminated against because he had previously made an application to an employment tribunal. In three of the four cases the alleged victimisation concerns the provision of a reference after the termination of the contract of employment.

[11] Mr Kirker's complaint is of this character. Nicholas Kirker was employed by British Sugar plc as a shift chemist until he was dismissed in March 1997. He has very poor eyesight and is registered as fully blind. He claimed he had been discriminated against as a disabled person and unfairly dismissed. Both claims succeeded in the employment tribunal and were upheld by the EAT ([2002] ICR 341).

[12] In August 1997 he applied for a job as a warehouse operative, through a company called Ambitions Personnel. He gave British Sugar as a referee. He was not appointed to the post he sought, although the position remained unfilled.

[13] Mr Kirker then made an application to an employment tribunal against Ambitions Personnel, alleging disability discrimination. He later joined British Sugar, alleging victimisation. He claimed that the reference supplied by British Sugar to Ambitions Personnel was unsatisfactory. British Sugar successfully applied to have the claim against it struck out, on the basis of the *Adekeye* decision. The tribunal was plainly unhappy at being obliged to follow and apply this decision, observing that 'a more purposive approach ... might now find more support in today's social and judicial climate'.

[14] Next, Mrs Angel. Diana Angel was employed by New Possibilities NHS Trust until July 1998, when she was dismissed from her nursing post because she

suffered from back and hip problems. She made a successful claim to an employment tribunal in respect of her dismissal. In January 2000 the NHS Trust supplied a reference for her to a prospective employer. This contained material she considered to be adverse because of her earlier proceedings. In March 2000 she presented a second application to an employment tribunal, complaining of victimisation. Following a preliminary hearing the tribunal ruled, in August 2000, that it had no jurisdiction to hear the complaint.

**[15]** The third in this trilogy of 'reference' cases is that of Mrs Bond. Charmaine Bond suffers from back injuries sustained in a road accident. She was employed by Hackney Citizens' Advice Bureau until she was made redundant in October 1999. She then made three successive applications to an employment tribunal: in November 1999, when she claimed she had been discriminated against on account of her disability; in January 2000, when she alleged breach of contract and unlawful deduction of wages; and in June 2000, when she presented the application now under consideration. In this application she claimed she had been victimised in that the bureau had refused to supply her with a reference and had given false information in reply to inquiries by two companies which had insured her property in respect of mortgage repayments. The alleged acts of victimisation all related to periods after her employment with the bureau had come to an end. In October 2000 the tribunal dismissed the claim of victimisation, because she was not a person whom the bureau was employing at the relevant date. The tribunal considered this outcome was 'unsatisfactory and wrong in principle'.

**[16]** The fourth disability discrimination case is that of Mr Jones. Gerald Jones was employed by 3M Healthcare Ltd (3M) as a computer network analyst until dismissed in November 1997. He brought proceedings, which were unsuccessful, for unfair dismissal and sex and disability discrimination. While employed Mr Jones had received business cards from other organisations. He had left these cards in his office when his employment ended. In September 1999 he asked 3M to return the cards, but the company declined to do so. Mr Jones then brought proceedings in the county court, and the cards were delivered to him pursuant to an order of the court made in February 2000. Thereafter, in March 2000, Mr Jones made an application to an employment tribunal, complaining that in respect of 3M's earlier refusal to return the cards he had been subjected to victimisation and discrimination on the grounds of sex and disability, the disability being severe clinical depression. The tribunal held it had no jurisdiction to hear the claims under the 1995 Act, because at the time he was not employed by 3M, but that it did have jurisdiction to hear the victimisation claim made under the 1975 Act. This conclusion, which draws a distinction between a claim for victimisation under the 1975 Act and a similar claim under the 1995 Act, derives from the impact of Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) (the Equal Treatment Directive). This directive is applicable to sex discrimination but not racial or disability discrimination.

**[17]** All four disability claimants appealed from the adverse decisions of the employment tribunals. Their appeals were heard together by the EAT under the presidency of Lindsay J. After reviewing the authorities the EAT dismissed the appeals. In doing so Lindsay J commented that this outcome was unsatisfactory, adding ([2002] ICR 341 at 358 (para 44)): '... if there is any escape other than by legislative amendment, it lies only, as it seems to us, in the House of Lords.'

[18] The four claimants then appealed to the Court of Appeal. The court, comprising Pill, Mummery and Latham LJJ, dismissed the appeals ([2002] EWCA Civ 304, (2002) 70 BMLR 1, [2002] ICR 1124). Mummery LJ said (at [12] and [21]) that the meaning of the legislation was plain. This further appeal to your Lordships' House is supported by the Disability Rights Commission.

THE STATUTORY PROVISIONS

[19] The basic structure of the 1975 Act and the 1976 Act is familiar enough. These are parallel Acts, using the same concepts. Much of the language is identical. Each statute defines discrimination, and prohibits discriminatory conduct over a wide range of activities in specified fields, of which the primary one is employment. Sanctions are provided for breaches of the prohibitions. Each Act established a commission: the Equal Opportunities Commission, in the case of the 1975 Act, and the Commission for Racial Equality, in the case of the 1976 Act. The duties of the Equal Opportunities Commission were to work towards the elimination of sex discrimination, to promote equality of opportunity between men and women, and to keep under review the working of the Act and the Equal Pay Act 1970. The Commission for Racial Equality was given comparable duties regarding racial discrimination. The Disability Rights Commission, established by the Disability Rights Commission Act 1999, exercises similar functions regarding disability discrimination.

[20] I can note first the relevant provisions of the 1975 Act. Nothing turns, for the purpose of the present appeals, on the precise wording of the definition of sex discrimination in ss 1 and 2. Suffice to say, under s 1(1)(a) a person discriminates directly against a woman, in any circumstances relevant for the purposes of any provision of the Act, if 'on the ground of her sex he treats her less favourably than he treats or would treat a man'. Under s 1(1)(b) discrimination also embraces 'indirect' discrimination. Stated very broadly, this consists of applying to a woman a requirement or condition which would equally be applied to a man but which can less readily be complied with by women. Section 2 applies the s 1 definition in the converse case of less favourable treatment of a man.

[21] Section 4 provides that discrimination also includes victimisation. Essentially this comprises treating a person less favourably in retaliation for her having exercised her rights under the 1975 Act or under the 1970 Act or having assisted others to do so. Section 4(1) provides:

> 'A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—(a) brought proceedings against the discriminator or any other person under this Act or the Equal Pay Act 1970, or (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act or the Equal Pay Act 1970, or (c) otherwise done anything under or by reference to this Act or the Equal Pay Act 1970 in relation to the discriminator or any other person, or (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act or give rise to a claim under the Equal Pay Act 1970, or by reason that the discriminator knows the

person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.' *a*

Subsection (1) does not apply to treatment of a person by reason of a false allegation not made in good faith.

**[22]** Against the background of this definition of discrimination, including as it does victimisation under s 4 as well as sex discrimination under ss 1 and 2, I turn to s 6. This concerns discrimination by employers. Section 6(1) renders unlawful certain types of conduct by a prospective employer: *b*

'It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman—(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or (b) in the terms on which he offers her that employment, or (c) by refusing or deliberately omitting to offer her that employment.' *c*

**[23]** Section 6(2) is the key section for present purposes. I have emphasised the crucial phrase: *d*

'It is unlawful for a person, in the case of a woman *employed by him* at an establishment in Great Britain, to discriminate against her—(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or (b) by dismissing her, or subjecting her to any other detriment.' *e*

**[24]** The structure and provisions of the 1976 Act are in substantially identical terms subject, of course, to discriminatory treatment being related to racial grounds and not, as in the 1975 Act, to the ground of sex. 'Racial grounds' means *f* grounds of colour, race, nationality or ethnic or national origins. The definitions of racial discrimination and victimisation in s 1(1) and s 2 of the 1976 Act correspond to the definitions of sex discrimination and victimisation in s 1(1) and s 4 of the 1975 Act. Similarly, the prohibition of discrimination against applicants and employees in s 4 of the 1976 Act corresponds in all respects now material to the like prohibition in s 6 of the 1975 Act. Section 4(2) provides: *g*

'It is unlawful for a person, in the case of a person *employed by him* at an establishment in Great Britain, to discriminate against that employee—(a) in the terms of employment which he affords him; or (b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or (c) by dismissing him, or subjecting him to any other detriment.' (My emphasis.) *h*

**[25]** The structure and scope of the relevant provisions in the 1995 Act differ in some respects from the corresponding provisions in the other two Acts. But *j* the crucial provisions concerning discrimination by employers, although couched in slightly different language, are in the relevant respects to the same effect. Section 1 of the Act defines a disabled person as a person who has a disability. A person has a disability 'if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out

normal day-to-day activities'. Section 4(1) prohibits discrimination against applicants for employment. Section 4(2) prohibits discrimination against employees:

> 'It is unlawful for an employer to discriminate against a disabled person *whom he employs*—(a) in the terms of employment which he affords him; (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit; (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or (d) by dismissing him, or subjecting him to any other detriment.' (My emphasis.)

This subsection reproduces, in a more modern format and with minor linguistic changes, the corresponding provision in s 4(2) of the 1976 Act. For present purposes the only difference of note is that s 4(2) of the 1995 Act prohibits discrimination by an employer against 'a disabled person whom he employs'. As already mentioned, the corresponding phrase in s 6(2) of the 1975 Act and s 4(2) of the 1976 Act is a person 'employed by him'.

**[26]** Discrimination is defined in the 1995 Act in terms which, particularly in one respect, give this expression a wider meaning than under the other two Acts. Under s 5(1) an employer discriminates against a disabled person if, for a reason which relates to the disabled person's disability, he treats him less favourably than he treats others to whom that reason does not apply, and he cannot show that the treatment is justified. As under the other two Acts, discrimination also includes discrimination by way of victimisation: see s 55. Additionally, however, under the 1995 Act discrimination includes failure to comply with a s 6 duty which the employer cannot show is justified. A s 6 duty is a duty imposed on an employer to make adjustments to his arrangements, or to the physical features of premises occupied by him, which place the disabled person at a substantial disadvantage in comparison with persons who are not disabled. For this purpose 'arrangements' means arrangements for determining to whom employment should be offered, and terms, conditions or arrangements on which employment, promotion, a transfer, training or other benefit is offered or afforded.

**[27]** Each of the three Acts contains enforcement provisions. Under s 63 of the 1975 Act a complaint that an unlawful act of discrimination has been committed in the employment field may be made to an employment tribunal. Similar provisions are to be found in s 54 of the 1976 Act, and s 8 of the 1995 Act.

**[28]** I should next note Directive 76/207, of 9 February 1976. This directive, known colloquially as the Equal Treatment Directive, is concerned only with sex discrimination. The purpose of the Equal Treatment Directive was to put into effect in member states the principle of equal treatment for men and women in respect of several matters, including access to employment and working conditions (see art 1). Article 5 provided that application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on the grounds of sex. Article 6 provided that member states should introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of art 5 to pursue their claims by judicial process. Article 7 provided that member states should take the necessary measure to protect employees against dismissal by their employers 'as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal

treatment'. In a word, victimisation. The 1975 Act gave effect to this directive in this country.

THE AUTHORITIES

**[29]** The question whether conduct of an employer after termination of the contract of employment can constitute unlawful discrimination appears to have arisen for decision for the first time in a case which came before the EAT in 1993: *Nagarajan v Agnew* [1994] IRLR 61, [1995] ICR 520. That was a claim under the 1976 Act. Knox J said that there has to be a 'subsisting employment relationship' at the time when the events contemplated in s 4(2) of the Act occur. The majority of the events listed in that subsection can occur only during employment, the whole provision is couched in the present tense, and had Parliament intended to include post-employment benefits, it would have made that intention explicit (see [1994] IRLR 61 at 65, [1995] ICR 520 at 530–531).

**[30]** Three years later the point came before the Court of Appeal, on another claim of racial discrimination: *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110. Omolara Adekeye was employed by the Post Office as a customer care officer until summarily dismissed for misconduct. She utilised the internal appeal procedures of the Post Office to appeal against her dismissal. Her appeal was unsuccessful. She then presented a complaint to an employment tribunal, asserting she had been the subject of unlawful racial discrimination in the conduct and outcome of her appeal. The Court of Appeal, comprising Hirst, Peter Gibson and Pill LJJ, followed the decision in *Nagarajan*'s case and held that the employment tribunal had no jurisdiction to entertain Ms Adekeye's complaint. Section 4(2) protects only those whose employment continues at the time of the act of discrimination (see [1997] IRLR 105 at 109, [1997] ICR 110 at 118). Peter Gibson and Pill LJJ considered it was 'unsatisfactory' that the Act does not extend to give a remedy to an ex-employee pursuing an appeal against dismissal.

**[31]** Meanwhile, the question of jurisdiction regarding post-termination conduct had arisen in the context of a victimisation claim. Belinda Coote presented a complaint against her former employer, Granada Hospitality Ltd (Granada). She had been employed as a bowling centre manager until dismissed. She brought a claim for sex discrimination against Granada, asserting she had been dismissed because of pregnancy. That claim was settled. Subsequently she presented another complaint, asserting that Granada's refusal to provide a reference to an employment agency was in retaliation for the claim she had previously brought against Granada. The EAT referred a question to the European Court of Justice.

**[32]** The European Court held that the 'principle of effective judicial control' laid down in art 6 would be deprived of an essential part of its effectiveness if the protection afforded did not cover retaliatory steps. Fear of such retaliation, if no legal redress were available, might deter employees from pursuing sex discrimination claims. That would be liable seriously to jeopardise the aim of the Equal Treatment Directive. The court rejected the United Kingdom government's argument that retaliatory steps were outside the scope of the directive if taken after the employment relationship had ended (see *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1999] ICR 100, [1998] ECR I-5199).

**[33]** The EAT then resumed its hearing of Ms Coote's appeal (see *Coote v Granada Hospitality Ltd (No 2)* [1999] IRLR 452, [1999] ICR 942). In the light of the judgment of the European Court the EAT, presided over by Morison J, declined

to follow *Adekeye's* case. The phrase 'in the case of a woman employed by him' in s 6(2) of the 1975 Act was capable of embracing the case of a woman 'who has been employed by him'. Thus it was possible to construe s 6(2) in a way which would conform with the Equal Treatment Directive as authoritatively interpreted by the European Court. Section 6(2) should be so interpreted. Accordingly, the employment tribunal had jurisdiction to entertain Ms Coote's claim even though the act of victimisation of which she complained had occurred after her dismissal.

THE INTERPRETATION OF THE LEGISLATION: 'EMPLOYED BY HIM' AND 'WHOM HE EMPLOYS'

[34] Two points relevant to the interpretation of the legislation are tolerably clear. First, the decisions in *Adekeye's* case and *Coote's* case are inconsistent. *Coote's* case was a case of victimisation, *Adekeye's* case seemingly was not. But, for the purpose now in hand, it is not possible to differentiate between victimisation and other forms of discrimination. Section 6(2) of the 1975 Act, containing the phrase 'employed by him', is a single provision governing all forms of discrimination prohibited by that subsection. The proper interpretation of s 6(2), whatever it may be, applies equally to all forms of discrimination prohibited by that subsection, sex discrimination as defined in ss 1 and 2 as well as victimisation as defined in s 4. The position is the same under s 4(2) of the 1976 Act and s 4(2) of the 1995 Act.

[35] Next, although this may be more controversial, s 6(2) of the 1975 Act, s 4(2) of the 1976 Act and s 4(2) of the 1995 Act all bear the same meaning on the point now in issue. (In saying this I am leaving aside for the moment any special implications the Equal Treatment Directive may have on the interpretation of the 1975 Act.) The only distinction between the language of these three Acts is the distinction already mentioned: the 1975 Act and the 1976 Act use the phrase 'employed by him', and the 1995 Act uses the expression 'whom he employs'. I consider this is a distinction without a difference. In the context of s 6(2) of the 1975 Act and s 4(2) of the 1976 Act, the phrase 'employed by him', although ambiguous, is more naturally to be read as having the meaning adopted when the phrase was reproduced in s 4(2) of the 1995 Act: a person 'whom he employs'.

[36] Translated into practical terms, where does this lead? The context in which these expressions are used includes benefits arising from a contract of employment. A contract of employment creates an employment relationship between two persons, an employer and an employee. It is a matter of ordinary experience that incidents of the employment relationship thus created often continue beyond the termination of the contract of employment which gave rise to the relationship. When a contract of employment ends the employee ceases to be obliged to work for the employer, and the employer ceases to be obliged to employ the employee. But the ending of these obligations does not normally signify a complete end to all aspects of the relationship between employer and employee. Frequently contractual obligations, express or implied, accrue or continue after the period of employment has come to an end. An employee may be subject to obligations of confidentiality or restrictions on where he may work or for whom he may work. An employer may be subject to obligations regarding pension rights or bonus payments. These obligations are matters of contractual right. Frequently also, an employee continues to enjoy, although not as a matter of contractual entitlement, other benefits arising in respect of his employment. One important example, of everyday occurrence, is the opportunity to obtain a

reference to assist the employee in obtaining a new job. Another example is the employee's opportunity to have recourse to internal appeal or grievance procedures in respect of his dismissal. Sometimes this is a matter of contractual right, sometimes not.

[37] To my mind the natural and proper interpretation of s 6(2) of the 1975 Act and the corresponding provisions in the other two Acts in this context is that once two persons enter into the relationship of employer and employee, the employee is intended to be protected against discrimination by the employer in respect of all the benefits arising from that relationship. The statutory provisions are concerned with the manner in which the employer conducts himself, vis-à-vis the employee, with regard to all the benefits arising from his employment, whether as a matter of strict legal entitlement or not. This being the purpose, it would make no sense to draw an arbitrary line at the precise moment when the contract of employment ends, protecting the employee against discrimination in respect of all benefits up to that point but in respect of none thereafter.

[38] If such a hard and fast line were drawn at this point it would mean that the employee who asks for a reference before he retires from his employment is protected but the employee who asks for a reference the day after he left is not. It would mean that the employee who is dismissed with notice and whose appeal is heard before his notice expires is protected against discrimination in his recourse to the employer's appeal procedure, but the employee who is dismissed summarily and without notice is not. It would mean that retaliatory action taken by an employer before the contract of employment ends is within the scope of the legislation, but retaliatory action taken later, for instance, regarding bonus payments, is not.

[39] This cannot have been the intention of Parliament. Dismissal is one of the matters in respect of which discrimination is expressly prohibited by the statutes. Parliament cannot have intended that this prohibition should include an appeal decision regarding dismissal if the appeal is heard before the dismissal takes effect but not if it is heard later. That would be palpably absurd. Dismissal cannot have been intended to have such an artificially limited meaning. Nor can it have been intended that reprisals may be exacted, so long as they are postponed until after the employee has been dismissed. Nor can a sensible distinction be drawn between giving a reference the day before employment ends and giving a reference the day after.

[40] I recognise that a line has to be drawn somewhere between what is prohibited and what is not. I recognise also the pioneering character of the anti-discrimination legislation. Parliament may well have chosen to advance cautiously, one step at a time, while experience accumulates on the practical working of the legislation and guidance is forthcoming from the expert commissions entrusted with the task of keeping the law under review. But these considerations do not point to the conclusion that, when enacting this new form of legislation, Parliament intended to ban discrimination in respect of some of the benefits in respect of an employee's employment but not others, with the distinction between the two categories being self-evidently capricious.

[41] Nor am I impressed with the argument that prohibiting post-termination acts of discrimination would expose employers to 'long tail' liability. Fears have been expressed about the potentially burdensome nature of this liability regarding, in particular, the provision of references. Liability in respect of post-termination acts of discrimination would, it is said, enable a discontented

former employee to harass his former employer, perhaps years later, when he is provided with an unfavourable reference or a reference is refused altogether.

[42] There are several strands interwoven in this expression of concern. They must be separated and considered one by one. First, whenever an employer gives a reference for a person currently employed by him he is subject to common law duties of care as well as statutory non-discrimination obligations. I can see no reason why in this regard the position should be different, or regarded as more onerous, if a reference is provided for a former employee as distinct from a current employee. If an employer provides a reference for a former employee he must do so as fairly as he would for a current employee. Second, regarding refusal to provide a reference, the question of discrimination can only arise if the employer's normal practice is to provide references for former employees on request. If that is the employer's practice, there is surely nothing burdensome in requiring him not to discriminate in the way he implements this practice. He must not treat one former employee less favourably than another on grounds of sex or race or disability or by way of victimisation. If, however, it is not the employer's practice to give references for former employees, for example, after the lapse of a certain time, then refusal of a reference after that time cannot give rise to a well-founded discrimination claim. In such a case there would be no question of the employer subjecting the former employee to a detriment. Third, the prospect of former employers being harassed with unfounded, vexatious claims cannot be a good reason for refusing to entertain well-founded claims. The appropriate response to this understandable concern of employers is for employment tribunals to be alert to strike out manifestly ill-founded claims as vexatious.

[43] For these reasons I respectfully disagree with the decision in *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110. I understand the reasoning which attracted the Court of Appeal. But I consider this reasoning attaches insufficient importance to the capricious results which follow from a too literal interpretation of the statutory language. The *Adekeye* interpretation is insufficiently purposive. It pays insufficient heed to the context.

[44] The preferable approach is to recognise that in each of the relevant statutory provisions the employment relationship is the feature which triggers the employer's obligation not to discriminate in the stated respects. This is the connection between two persons which Parliament has identified as requisite for these purposes. Once triggered, the obligation not to discriminate applies to all the incidents of the employment relationship, whenever precisely they arise. For the reasons already given, this obligation cannot sensibly be regarded as confined to the precise duration of the period of employment if there are incidents of the employment which fall to be dealt with after the employment has ended. Some benefits accrue during the period of employment, some afterwards. For the purposes of discrimination, there is no rational ground for distinguishing the one from the other. They all arise equally from the employee's employment.

[45] To be an 'incident' of the employment relationship for this purpose the benefit in question must arise between employer or former employer as such and employee or former employee as such. A reference is a prime example. Further, save perhaps in exceptional circumstances which it is difficult to envisage, failure to provide a non-contractual benefit will not constitute a 'detriment', or discrimination in an opportunity to receive a 'benefit', within the meaning of the anti-discrimination legislation unless the non-contractual benefit in question is

one which normally is provided, or would be provided, to others in comparable circumstances. This is so with regard to current employees. It is equally so with former employees. But I stress this is not to say that an employer's practice regarding current employees is to be treated as equally applicable to former employees. This is emphatically not so. The two situations are not comparable. What is comparable is the way the employer treats the claimant former employee and the normal way he treats or would treat other former employees in similar circumstances.

**[46]** I add, as a footnote, that the question whether the s 6 duty imposed by the 1995 Act continues after the termination of the contract of employment is a separate question which does not call for decision on these appeals. I prefer to leave that question open.

THE APPEALS

**[47]** I would therefore allow the appeal concerning the four disability discrimination cases. The employment tribunal has jurisdiction to consider each of these four victimisation claims.

**[48]** I would also allow Ms Rhys-Harper's appeal in the sex discrimination case. Whether Ms Rhys-Harper's claim has any reasonable prospect of success is not a relevant consideration on the issue of jurisdiction which alone is the issue under consideration by the House. I should add, in the context of this claim under the 1975 Act, that I have reached the conclusion expressed above on the proper interpretation of all three Acts without regard to the impact of the Equal Treatment Directive or the decision of the European Court in *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1999] ICR 100, [1998] ECR I-5199. Having regard to the conclusion I have reached, it is not necessary to consider the issues arising out of the Equal Treatment Directive.

**[49]** In the racial discrimination case Lambeth has another string to its bow in seeking to resist Mr D'Souza's claim on jurisdictional grounds. It will be recalled that the basis of Mr D'Souza's claim is that the council discriminated against him by refusing to reinstate him as ordered by the employment tribunal. This raises the question whether such a refusal is conduct falling within s 4 of the 1976 Act.

**[50]** I can deal with this issue quite shortly. The effect of the relevant legislation can be summarised as follows. An order for reinstatement made by an employment tribunal is an order that the employer shall treat the employee in all respects as if he had not been dismissed. It is one of the orders an employment tribunal may make, in the exercise of its discretion, if it upholds an employee's complaint that he was unfairly dismissed. If an employer fails to reinstate an employee as ordered the tribunal is required to make an award of compensation for wrongful dismissal, with an additional award where the employer fails to satisfy the tribunal that it was not practicable to comply with the order: see ss 68, 69 and 71 of the Employment Protection (Consolidation) Act 1978, now ss 112–114 and 117 of the Employment Rights Act 1996.

**[51]** In my view the benefit acquired by an employee from a reinstatement order cannot be regarded as a benefit within the meaning of s 4(2) of the 1976 Act. It does not arise from the employment relationship. It derives from an order of the tribunal, made in the exercise of its discretion, after the employee has been unfairly dismissed. Such an order is a discretionary statutory remedy for unfair dismissal, attracting its own sanctions in the event of non-compliance. Nor, for the like reason, can the employer's failure to comply with the order be regarded as a detriment within s 4(2).

[52] Nor does the case fall within s 4(1). Lambeth's conduct is not readily characterised as 'deliberately omitting to offer' Mr D'Souza employment within the meaning of s 4(1)(c). The nature of Lambeth's act was different. Lambeth was not in the normal position of a prospective employer. What Lambeth did was to fail to comply with a tribunal order which required the council to restore an employee to the employment from which he had been dismissed. That characterisation, coupled with the feature that the statute itself provides remedies for non-compliance with a reinstatement order, points strongly away from this circumstance being within s 4(1)(c) of the 1976 Act. I would so hold.

[53] Since, then, the discriminatory conduct alleged by Mr D'Souza does not fall within the ambit of s 4 of the 1976 Act, the employment tribunal has no jurisdiction to entertain his complaint. For this reason I would dismiss Mr D'Souza's appeal.

**LORD HOPE OF CRAIGHEAD.**

[54] My Lords, these three appeals raise an important point about the present state of the law which prohibits discrimination in the field of employment. Common to all three is an issue of statutory construction. In three separate enactments Parliament has made it unlawful for employers to discriminate on the grounds of sex, race and disability. It is not in doubt that statutory protection against discrimination and victimisation has been given to prospective and existing employees. The area of doubt to which these appeals have been directed relates to the position of ex-employees. The question is whether the statutory protection extends to persons who are no longer employed by the employer and, if so, in what circumstances.

[55] There are two other questions each of which affects one appeal only which also need to be answered. In order to set the scene I must first set out the facts which have provided the background to your Lordships' examination of all these issues.

THE FACTS

(1) *Relaxion Group plc v Rhys-Harper*

[56] The appellant, Christine Lillian Rhys-Harper, was employed by the respondent in November 1997 as a lifeguard and general assistant at the Helston Sports Centre. On 3 October 1998 an incident occurred there as a result of which a complaint was made to her employers that the appellant had been rude to customers. She was suspended from her duties, and on 12 October 1998 the manager of the centre, Mr Osborn, conducted a disciplinary hearing which resulted in a decision that she should be dismissed on the ground of misconduct. Her dismissal was confirmed by Mr Osborn by a letter dated 15 October 1998, in which he told her that she would be receiving one week's pay in lieu of notice. She exercised her right of appeal under the respondent's disciplinary procedure.

[57] The appeal hearing was conducted by the respondent's general manager, Mr Adamson. It took place on 9 November 1998. In the course of the hearing the appellant alleged that throughout her employment she had been regularly subjected to sexual harassment by Mr Osborn. Following the appeal hearing the appellant received two letters from Mr Adamson. In the first, which was undated, he told her that, having investigated the events, the company had found that there were sufficient grounds to dismiss her and that the decision to do so was to stand. In the second, which was dated 30 November 1998, he told her that

the company had carried out a full and thorough investigation into her allegation of sexual harassment against Mr Osborn at the appeal hearing and that the company's finding was that there was insufficient evidence to establish a case against him.

**[58]** On 18 February 1999 the appellant presented an application to the employment tribunal for unfair dismissal and sex discrimination. In her claim of sex discrimination she complained of sexual harassment and that the allegation relating to this matter which she had made at the appeal hearing had not been properly investigated. The tribunal referred the matter to a preliminary hearing to determine whether these claims had been lodged within the prescribed three-month time limit. A majority of the tribunal, the chairman dissenting, held that she had been dismissed on 30 November 1998, that the decision following the investigation into the allegation of sexual harassment could amount to continuing discrimination and that the claims of unfair dismissal and sex discrimination had been brought in time.

**[59]** The respondent appealed to the Employment Appeal Tribunal (EAT), which held that the appellant's employment terminated on 22 October 1998 at the end of her period of one week's notice and that her claim for unfair dismissal was out of time. It also held that it had no jurisdiction to consider her allegation of sex discrimination in regard to the alleged failure by the respondent to carry out a proper investigation of her allegation of sexual harassment as the discriminatory conduct was alleged to have occurred after her employment had ended. The appellant appealed on the question of jurisdiction only, but her appeal on this point was dismissed by the Court of Appeal (Pill, Mantell and Buxton LJJ) ([2001] EWCA Civ 634, [2001] IRLR 460, [2001] ICR 1176).

**[60]** The relevant provisions of the Sex Discrimination Act 1975 (s 1 of which as originally enacted has been substituted by reg 3 of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, SI 2001/2660 are as follows:

'PART I

*DISCRIMINATION TO WHICH ACT APPLIES ...*

**1.** *Direct and indirect discrimination against women.*—(1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if—(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or ...

'PART II

*DISCRIMINATION IN THE EMPLOYMENT FIELD ...*

**6.** *Discrimination against applicants and employees.*—(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman—(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or (b) in the terms on which he offers her that employment, or (c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her—(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately

omitting to afford her access to them, or (b) by dismissing her, or subjecting her to any other detriment.'

(2) *D'Souza v Lambeth London BC*

**[61]** The appellant, Donald D'Souza, was employed by the respondents (Lambeth) until his dismissal in January 1990. His complaint is of racial discrimination and victimisation under s 4(2), or alternatively under s 4(1), of the Race Relations Act 1976.

**[62]** On 11 April 1990, following his dismissal, the appellant commenced proceedings against the respondents in which he alleged unfair dismissal, race discrimination and victimisation. On 16 November 1992 the employment tribunal held that he had been unfairly dismissed within the meaning of s 57 of the Employment Protection (Consolidation) Act 1978 and that he had been unlawfully discriminated against on racial grounds and victimised within the meaning of the 1976 Act. The tribunal ordered the respondents to reinstate him by 16 January 1993. On 25 March 1993 the respondents informed the appellant that they were not willing to do so. The appellant made a further application for reinstatement on 31 July 1995, in response to which the respondent claimed that the relationship between them had broken down and that the post which he had previously occupied was no longer available. On 14 August 1995 the tribunal determined that it had not been reasonably practicable for the respondents to reinstate him, and it declined to make an award of compensation for the failure to reinstate under s 71(2)(b) of the 1978 Act. But on 18 October 1995 the tribunal made an award of compensation for the unfair dismissal, having regard to the fact that he was not reinstated.

**[63]** In the meantime on 1 July 1995 the appellant commenced separate proceedings in which he claimed that the original decision not to reinstate him was caused by discrimination and victimisation. It is these proceedings with which this appeal is concerned.

**[64]** On 14 March 1996 the tribunal determined that it had no jurisdiction to hear these complaints, as a person who was seeking to be restored to his former employment was not within the categories of persons who are protected against racial discrimination and victimisation under the 1976 Act. That decision was affirmed by the EAT, and an appeal against its decision was dismissed by the Court of Appeal (Schiemann, Robert Walker LJJ and Lloyd J) on 25 May 2001 ([2001] EWCA Civ 794, [2001] All ER (D) 346 (May)).

**[65]** The relevant provisions of the 1976 Act are as follows:

'PART I

*DISCRIMINATION TO WHICH ACT APPLIES ...*

**1.** *Racial discrimination.*—(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if—(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or ...

**2.** *Discrimination by way of victimisation.*—(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—(a) brought proceedings against the

discriminator or any other person under this Act; or ... (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act ...

PART II

*DISCRIMINATION IN THE EMPLOYMENT FIELD ...*

**4.** *Applicants and employees.*—(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against another—(a) in the arrangements he makes for the purpose of determining who should be offered that employment; or (b) in the terms on which he offers him that employment; or (c) by refusing or deliberately omitting to offer him that employment.

(2) It is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee—(a) in the terms of employment which he affords him; or (b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or (c) by dismissing him, or subjecting him to any other detriment.'

(3) *Jones v 3M Healthcare Ltd and other appeals*

**[66]** This is a group of four appeals all of which raise the same question about the right to compensation for post-employment victimisation under s 4(2) of the Disability Discrimination Act 1995. In summary the facts in each of these cases is as follows.

Nicholas Kirker

**[67]** The appellant has very poor eyesight, which has made him eligible for full registration as a blind person. He was employed by British Sugar plc at Newark as a shift chemist but was dismissed for redundancy on 17 March 1997. He claimed that he had been discriminated against as a disabled person. His claim was successful in the employment tribunal and upheld by the EAT ([1998] IRLR 624). On 13 August 1999 he applied for a position as a warehouse operative with Ambitions Personnel and named British Sugar as a referee. The manager at its Newark facility completed and returned the reference questionnaire which Ambitions Personnel had sent to him, but it was apparently not received and the appellant's application was rejected for lack of a reference. When this was brought to his attention the manager sent another copy of it to Ambitions Personnel as the position was still vacant, but the appellant was not appointed to fill the position. On 10 November 1999 he presented an application to the employment tribunal alleging disability discrimination against Ambitions Personnel. On 7 February 2000 he applied successfully for British Sugar to be joined as second respondent on the ground that it had victimised him by failing to respond to the application for a reference.

Gerald Philip Jones

**[68]** The appellant suffers from severe clinical depression. He was dismissed by 3M Healthcare in November 1997. He brought proceedings against them for unfair dismissal and disability discrimination, but they were dismissed on 26 August 1998. On 12 September 1999 he asked 3M Healthcare to return his

business cards which he had left in the office when he was dismissed. They refused to return the cards as they considered that they belonged to them. On 14 February 2000 the appellant obtained an order for their return from the county court. On 8 March 2000 he presented an application to the employment tribunal complaining that his former employers had subjected him to discrimination and victimisation by refusing to return his business cards.

Diana Angel

[69] The appellant was suffering from back and hip problems when she was dismissed from the post which she had held since July 1993 as a nurse by New Possibilities NHS Trust in July 1998. She claimed that she had been discriminated against on the ground of her disability, and her claim was successful. She then sought employment with Ling Trust. On 12 January 2000 New Possibilities NHS Trust provided a reference to Ling Trust, who decided not to offer her employment. On 16 March 2000 she presented an application to the employment tribunal in which she complained that she had been discriminated against and victimised by New Possibilities NHS Trust by supplying her with an adverse reference.

Charmaine Bond

[70] The appellant suffers from back injuries which she sustained in a road accident. She was employed by Hackney Citizens' Advice Bureau until she was made redundant in October 1994. On 8 November 1999 she presented an application to the employment tribunal in which she claimed that she had been victimised because of her disability. On 6 June 2000 she presented a further application alleging that her former employer had victimised her by refusing to supply her with a reference and giving false information in reply to inquiries by two companies which had insured her property in respect of mortgage repayments.

[71] The employment tribunal held that it had no jurisdiction to consider the appellants' claims of victimisation under the 1995 Act, on the ground that s 4(2) of the Act applied to employees during the course of their employment only and did not extend to persons who were no longer employed on the date when the alleged act of victimisation took place. These decisions were upheld by the EAT ([2002] ICR 341). The appellants appealed, but their appeals were dismissed by the Court of Appeal (Pill, Mummery and Latham LJJ) ([2002] EWCA Civ 304, (2002) 70 BMLR 1, [2002] ICR 1124).

[72] The relevant provisions of the 1995 Act are as follows:

'PART I

*DISABILITY*

**1.** ... (1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

(2) In this Act "disabled person" means a person who has a disability ...

PART II

*EMPLOYMENT ...*

**4.** ... (2) It is unlawful for an employer to discriminate against a disabled person whom he employs—(a) in the terms of employment which he affords him; (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit; (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or (d) by dismissing him, or subjecting him to any other detriment ...

PART VI

*SUPPLEMENTAL ...*

**55.** ... (1) For the purposes of Part II or Part III, a person ("A") discriminates against another person ("B") if—(a) he treats B less favourably than he treats or would treat other persons whose circumstances are the same as B's; and (b) he does so for a reason mentioned in subsection (2).

(2) The reasons are that—(a) B has—(i) brought proceedings against A or any other person under this Act; or ... (iv) alleged that A or any other person has (whether or not the allegation so states) contravened this Act; or (b) A believes or suspects that B has done or intends to do any of those things.'

THE PRINCIPAL ISSUE

[73] Section 62(1) of the 1975 Act provides that a contravention of the Act shall incur as such no sanction, whether civil or criminal, except to the extent (if any) expressly provided by that Act. Section 63(1) of that Act provides that a complaint by any person that another person has committed an act of discrimination against the complainant which is unlawful by virtue of Pt II of the Act may be presented to an employment tribunal, and s 65 sets out the remedies that may be given by the tribunal if it finds that a complaint presented under s 63 is well founded. Provisions to the same effect are to be found in ss 53, 54 and 56 of the 1976 Act and in s 8 of the 1995 Act. The effect of these provisions is that complaints of discrimination on grounds of sex, race and disability in the employment field must be presented to an employment tribunal. The question of law which is common to all these cases is whether the employment tribunal has jurisdiction to consider a complaint of discrimination which relates to only acts which are alleged to have taken place after the complainant's employment has come to an end.

[74] The answer to this question depends on the meaning which is to be given in its context to the phrase 'employed by him' in s 6(2) of the 1975 Act and s 4(2) of the 1976 Act and to the phrase 'whom he employs' in s 4(2) of the 1995 Act. As Lord Bingham of Cornhill observed in *Anyanwu v South Bank Student Union (Commission for Racial Equality, interveners)* [2001] UKHL 14 at [2], [2001] 2 All ER 353 at [2], [2001] ICR 391, this is a trio of Acts which contain similar provisions, although they are directed to different forms of discrimination. It is plain that, when Parliament used the same phrase 'employed by him' in s 4(2) of the 1976 Act as it used in s 6(2) of the 1975 Act, it must have intended that it should be given the same meaning in each of these two Acts. The wording of the equivalent phrase in s 4(2) of the 1995 Act is slightly different, and there are other differences in the layout and wording of that Act in comparison with the Acts which deal

with discrimination on the grounds of sex and race. So it will be necessary to consider the meaning which is to be given to the phrase in the 1995 Act separately.

[75] At the end of the hearing of the appeal in Mrs Rhys-Harper's case a further issue was raised by Mr Reynold QC on her behalf. Her complaint had been presented hitherto as a complaint about discrimination after the employment relationship had ended. But in his closing speech Mr Reynold submitted that, as her allegation of sexual harassment was made in the course of her appeal against dismissal, her complaint had a direct bearing on the part played by Mr Adamson who investigated and rejected that complaint and was the decision-taker in her appeal against her dismissal. He accepted that the nexus between her complaint of sexual discrimination investigation in his handling of that allegation and his decision in the appeal against dismissal had not been made clear previously. The point which he sought now to put in issue was that, on a correct analysis of the facts, this was a case of continuing discrimination by victimisation which could be related to the employer's act in dismissing her.

[76] In Mrs Rhys-Harper's case it will also be necessary to take account of the fact that the 1975 Act gave effect in domestic law to Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) (the Equal Treatment Directive). This is a feature which is absent from the other two cases, as the legislation which dealt with discrimination on grounds of race and disability had no equivalent base under the EC Treaty when it was enacted. Council Directive (EEC) 2000/43 (OJ 2000 L180 p 22) (the Race Directive) was adopted under art 13 of the EC Treaty by the United Kingdom and other member states in 2000, but it does not have to be implemented until 19 July 2003. The Community has not yet turned its attention to discrimination in the employment field on the ground of disability.

[77] A further question of law is raised by the case of D'Souza, as he has an alternative argument that the decision of his former employer not to reinstate him when ordered to do so by the employment tribunal was a breach of s 4(1) of the 1976 Act. The question is whether, when it refused to do so, his employer was 'refusing or deliberately omitting to offer him' that employment within the meaning of s 4(1)(c) of that Act.

A BRIEF HISTORY OF THE LEGISLATION

[78] It is a remarkable fact that, although discrimination on whatever grounds is widely regarded as morally unacceptable, the common law was unable to provide a sound basis for removing it from situations where those who were vulnerable to discrimination were at risk and ensuring that all people were treated equally. Experience has taught us that this is a matter which can only be dealt with by legislation, and that it requires careful regulation by Parliament. The Community has adopted the same approach in its promotion of the principle of equal treatment as part of its social action programme. The fact is that the principle of equal treatment is easy to state but difficult to apply in practice. In the result the legislation which is under scrutiny in these appeals is designed to be specific and particular rather than universal in its application, and it is still being developed incrementally. It must, of course, be construed purposively, as Waite LJ said in *Jones v Tower Boot Co Ltd* [1997] 2 All ER 406 at 413, [1997] ICR 254 at 261–262. But the scope to be given to the legislation is essentially a matter for Parliament. The question which lies at the heart of these appeals is what its intention was when it enacted the provisions in each of these three Acts which deal with discrimination by employers against applicants and employees.

[79] The 1975 Act was designed to give effect to the principles contained in the White Paper *Equality for Women* (Cmnd 5724) of September 1974. The White Paper stated that the government's ultimate aim was to harmonise the powers and provisions for sex and race discrimination so as to secure genuine equality of opportunity in both fields. It made unlawful discrimination across a wide range of activities in the employment and social fields on the ground of sex and marital status. It drew on experience of the workings of the Race Relations Act 1968 and the Equal Pay Act 1970. In the field of employment it prohibited discrimination in the offering of and other acts preparatory to entering into a contract of employment. It also extended its provisions against discrimination once the contract was entered into to non-contractual aspects of the employment relationship to ensure equality of treatment in the provision of benefits and the avoidance of detriment. The contractual aspects were dealt with by an amendment to s 1(1) of the 1970 Act which substituted for the equal pay clause which was deemed to be included in every contract of employment by that subsection a more broadly framed equality clause. No indication was given in the White Paper of an intention to extend the prohibition to non-contractual acts or omissions by employers once the employment relationship had come to an end, and there is no provision in the Act which expressly addresses this matter. Some indication of the common understanding of the scope of the Act when it was enacted is given by the comment in a general note by the annotator in *Current Law Statutes Annotated* (1975) vol 2, p 65 that s 6 'provides the general prohibition of discrimination by an employer between prospective and *existing* employees'. (My emphasis.)

[80] The 1975 Act received the Royal Assent on 12 November 1975. The Equal Treatment Directive 'on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions' was published in the Official Journal on 14 February 1976. The preamble to the directive referred to the Council's resolution of 21 January 1971 concerning a social action programme for the purpose of achieving equality between men and women as regards access to employment and vocational training and promotion 'and as regards working conditions, including pay'. It also referred to Council Directive (EEC) 75/117 (on the approximation of the laws of Member States relating to the application of the principle of equal pay for men and women) (OJ 1975 L45 p 19) and stated that Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and 'in respect of other working conditions' appeared to be necessary. No amendment to the 1975 Act to give effect to this directive in domestic law was thought to be necessary.

[81] The 1976 Act was the third enactment dealing with race relations. The first, in 1965, dealt with incitement to racial hatred and made discrimination on racial grounds unlawful in places of public resort. The second, in 1968, widened the prohibition of discrimination to other areas including employment, but it was soon appreciated that further legislation was needed. The 1976 Act too, like the 1975 Act, was preceded in September 1975 by a White Paper: *Racial Discrimination* (Cmnd 6234). This White Paper gives no indication of an intention to extend the scope of the prohibition of discrimination to acts or omissions by employers after the employment relationship has come to an end. The language and structure of this Act was closely modelled on the 1975 Act. Much of the

wording of Pt II in both Acts about discrimination in the employment field, including the sections which deal with discrimination against applicants and employees, is identical.

**[82]** Provision was made by both of these Acts for keeping the working of the legislation under review. Section 53 of the 1975 Act provided for the establishment of the Equal Opportunities Commission, among whose duties was to be to keep under review the working of that Act and the 1970 Act and, when they were so required by the Secretary of State or otherwise think it necessary, to draw up and submit to the Secretary of State proposals for amending them: see s 53(1)(c). Section 43 of the 1976 Act provided for the establishment of the Commission for Racial Equality with the same duty to keep the working of that Act under review: see s 43(1)(c). This legislation has now been in force, and kept under review, for more than a quarter of a century. No amendments have been introduced with a view to making it clear that the prohibition in the employment field extends to acts or omissions by employers after the employment relationship has come to an end.

**[83]** The question whether the legislation as originally enacted had that effect, or whether employment must continue to subsist for a person to be 'a person employed by him' does not appear to have been raised until the point was argued for the first time before the EAT in *Nagarajan v Agnew* [1994] IRLR 61, [1995] ICR 520. In the meantime in *De Souza v Automobile Association* [1986] IRLR 103 at 107, [1986] ICR 514 at 522 May LJ felt able to say that the word 'detriment' in s 4(2)(c) of the 1976 Act referred to the circumstances in which the person 'had *thereafter* to work'. (My emphasis.) In *Garland v British Rail Engineering Ltd* [1982] 2 All ER 402, [1983] 2 AC 751 a female employee complained that she was being discriminated against by her employers who operated a scheme which gave concessionary travel facilities to employees and their families. This facility was available to employees after their retirement, but only male employees had the benefit of it after retirement for their families. An issue was raised as to the meaning to be given to the words 'provision in relation to death or retirement' in s 6(4) of the 1975 Act in the light of art 119 of the EEC Treaty (now art 141 EC). It was held, following a reference to the European Court of Justice, that the scheme was not covered by the exception in s 6(4) because these words should not be construed so widely as to include a privilege which had existed during employment and was allowed by the employer to continue after retirement. The result was that the scheme was subject to the prohibition on discrimination imposed by s 6(2)(a) of the 1975 Act. An important feature of that case, however, was that the employees were entitled to the benefit of the scheme both before and after their retirement. The issue whether s 6(2) was apt to cover things done or omitted to be done by the employer which could be attributed only to a period after the end of the employment relationship was not raised in that case.

**[84]** In *Nagarajan v Agnew* [1994] IRLR 61, [1995] ICR 520, in which an ex-employee alleged that he had been victimised by a bad reference from his former manager, the EAT held that the natural meaning of the phrase 'a person employed by him' in s 4(2) of the 1976 Act was that the employment must continue to subsist for the prohibition to apply. Knox J said ([1994] IRLR 61 at 65, [1995] ICR 520 at 531) that the whole provision was couched in the present tense and that, if it had been intended to include benefits, facilities or services or detriments post-employment, Parliament would certainly have made it explicit that that extended meaning was the correct one and it had not done so. In *Post*

*Office v Adekeye* [1995] IRLR 297, [1995] ICR 540 the EAT held, for the same reasons, that the tribunal had not jurisdiction to hear a complaint about racial discrimination at an internal appeal hearing by a person who was pursing an appeal against her dismissal. But Smith J said ([1995] IRLR 297 at 300, [1995] ICR 540 at 548) that it was unsatisfactory that the Act did not give a remedy to an ex-employee in such circumstances. The decision by the EAT in that case was given on 15 February 1995.

**[85]** It was against this background that the Disability Discrimination Act 1995 was enacted. It received the Royal Assent on 8 November 1995. Once again the legislation was preceded by a White Paper *Ending discrimination against disabled people* (Cm 2729) (January 1995). It was stated (para 3.1) that ensuring full and fair access to employment opportunities was a key element in the government's policy of enabling disabled people to be fully active and independent members of society. It was stated (para 3.4) that a new right of non-discrimination in employment was to apply 'in all areas of employment, including recruitment, dismissal, training, career progression, terms of employment and general treatment at work'. No indication was given in the White Paper that it was the intention to extend this right to ex-employees to give them a right of non-discrimination by their former employers after the employment relationship had come to an end. Much of the structure and language of Pt II of the Act which deals with discrimination by employers follows closely the pattern which is to be found in Pt II of the 1975 Act and the 1976 Act, although there are some important differences. In his general note to this Part of the Act the annotator in *Current Law Statutes* (1995) vol 4, p 50–12 states that the right not to be discriminated against 'covers employees and applicants for employment'. In his note to s 55 (p 50–84), which deals with victimisation, he refers to the report of the decision of the EAT in *Nagarajan v Agnew* [1994] IRLR 61, [1995] ICR 520 and states that by analogy with that case it seemed likely that the protection against victimisation would be limited to events occurring during the course of employment. This a reminder, if any reminder were needed, that attention had already been drawn to this problem prior to the enactment of the 1995 Act.

**[86]** Parts VI and VII of the 1995 Act contain a number of provisions which are designed to assist in the working out of the Act in practice. Section 50 provides for the establishment of the National Disability Council among whose duties was to advise the Secretary of State on matters relating to the operation of the Act or of provisions made under it: see s 50(2)(c). Section 53 provides that the Secretary of State may issue codes of practice containing such practical guidance as he considers appropriate with a view to eliminating discrimination in the field of employment against disabled persons and persons who have had a disability and encouraging good practice in relation to such persons. This provision was implemented by the issuing of the Disability Discrimination Act 1995 code of practice. Paragraph 2.8 answers the question 'Who counts as an employee under the Act?' It states that 'employee' means anyone whose contract is within the definition of employment in s 68 of the Act, which defines employment as a employment under a contract of service or of apprenticeship or a contract personally to do any work, 'whether or not, for example, he works full-time'. The guidance which the code gives with regard to employment relates entirely to prospective and existing employees. There is no indication that the Secretary of State thought that the Act was designed also to deal with the position of

ex-employees after the employment relationship had come to an end, and no guidance whatever is offered on this issue.

**[87]** The conclusion which I would draw from this history is that up to this point the issue as to whether the prohibition against discrimination should be, or had been, extended to ex-employees had not been specifically addressed either by the government or by the legislature. None of the advisory bodies established under these Acts have asked to intervene in these appeals. Nor was your Lordships' attention drawn to any published statements by any of them indicating their views, either one way or the other, on the questions which the appeals have raised. The practical problems to which the competing interpretations of the relevant sections may give rise in the field of employment as a whole have not been explored.

**[88]** In an area which is as sensitive and as wide-ranging in its effects as this one, the absence of information of that kind is a significant omission. It inhibits the use of the purposive approach in this case, as we have no clear guide to the scope which was intended to be given to the enactments other than the words which they themselves have used to describe it. The extent to which, if at all, the legislation was intended to apply after the ending of the employment relationship was, of course, a matter for the legislature. In this situation I believe that, subject to the guidance of the European Court of Justice as to the scope to be given to the 1975 Act in the light of the Equal Treatment Directive, your Lordships must approach these questions by examining the language which Parliament used in order to discover what its intention was when the statutes were enacted. It is to this task that I now turn.

THE LANGUAGE OF THE LEGISLATION: INTRODUCTION

**[89]** The critical words in s 6(2) of the 1975 Act and s 4(2) of the 1976 Act are 'employed by him'. In s 4(2) of the 1995 Act they are 'whom he employs'. The question is whether these words extend to cases where the employment relationship had come to an end at the time of the alleged act of discrimination.

**[90]** In *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110 this question reached the Court of Appeal for the first time. This was an appeal from the decision of the EAT in *Post Office v Adekeye* [1995] IRLR 297, [1995] ICR 540. The Court of Appeal held that, in the absence of any express extension of the term 'employee' to include a person whose employment had ceased, the words 'a person employed by him' in s 4(2) of the 1976 Act when given their ordinary and natural meaning in their context excluded a person whose employment had ceased at the time of the act of discrimination. Peter Gibson LJ, with whose judgment Pill and Hirst LJJ agreed, said ([1997] IRLR 105 at 109, [1997] ICR 110 at 118):

> 'I accept the submission of Mr Greening for the Post Office that giving the words "in the case of a person employed by him" their ordinary and natural meaning in their context, those words mean, and can only mean, "in the case of a person who is employed by him". I note that that person is referred to in the next line as "that employee" which is again suggestive of a present and not a past employee ... Further, as Smith J pointed out ([1995] IRLR 297 at 299, [1995] ICR 540 at 544–545) the definition of "employee" in s. 153 Employment Protection (Consolidation) Act 1978 (which re-enacted the definition in s. 167(1) Industrial Relations Act 1971) was expressly extended to include a person whose employment had ceased. It is significant that there

> is no equivalent extension in the 1976 Act. I therefore conclude that the EAT was right to hold that s. 4(2) protects only those whose employment continues at the time of the act of discrimination.'

**[91]** The Court of Appeal in each of the three cases which are now before your Lordships appears to have had no difficulty in following and applying the decision in *Adekeye's* case. In *Rhys-Harper v Relaxion Group plc* [2001] EWCA Civ 634 at [25], [2001] IRLR 460 at [25], [2001] ICR 1176, Buxton LJ said that he found entirely persuasive the conclusion of Peter Gibson LJ that, when one read the words in s 4(2) of the 1976 Act which are the equivalent of s 6(2) of the 1975 Act, it was inescapable that what was addressed was events occurring during the actual course of employment. After quoting the words of s 6(2)(a) he said (at [26]):

> 'The concept of a person affording "access" to benefits to a woman "employed" by him only makes sense when directed to conduct taking place during the employment relationship. If what was addressed here was conduct towards *former* employees, not only would that be spelled out in terms, but also language a good deal different from that of providing access to facilities would be used.'

He said that he agreed with Peter Gibson LJ's conclusion that strong indications of post-contract activity within the events listed in that subsection, going beyond mere possibilities, would be needed in order to compel a reading of 'a person employed by him' in the unnatural sense of a person previously employed. In *D'Souza v Lambeth London BC* [2001] EWCA Civ 794 at [4], [2001] All ER (D) 346 (May) at [4] Schiemann LJ said that the Court of Appeal at the time regarded the decision in *Adekeye's* case as unsatisfactory but inescapable in the light of the wording of s 4 of the 1976 Act. He also said that it was fair to point out that, despite that expression of dissatisfaction, Parliament in passing the Race Relations (Amendment) Act 2000, had not seen fit to alter s 4 of the earlier Act in any relevant respect. In *Kirker v British Sugar plc, Jones v 3M Healthcare Ltd, Angel v New Possibilities NHS Trust, Bond v Hackney Citizens' Advice Bureau* [2002] EWCA Civ 304 at [23], (2002) 70 BMLR 1 at [23], [2002] ICR 1124 Mummery LJ observed the result of his reading of s 4(2) of the 1995 Act was consistent with the decisions in *Adekeye's* case, *Rhys-Harper's* case and *D'Souza's* case. But, as he said (at [25]), the wording of s 4(2) of the 1995 Act is different from that in the two other discrimination Acts, so it would have been possible for a different view to be taken as its meaning in their case without affecting the construction of the 1995 Act.

**[92]** In *Kirker v British Sugar plc* Mummery LJ said (at [14]) that on their plain and ordinary meaning the words of s 4(2) of the 1995 Act expressly conferred protection from discrimination by an employer on only two classes of disabled person: first, job applicants, and, secondly, persons 'whom he employs'. He referred to the fact that the words 'whom he employs' is couched in the present tense, which naturally referred to a contractual employment relationship existing at the date of the commission of any of the particular kinds of act referred to in the subsection all of which were plainly referable to events occurring in the course of an existing employment relationship. It was contended in that case that this result was unsatisfactory, arbitrary and contrary to the statutory purpose of the enactment. He responded to this argument (at [21]) in this way:

> 'In my judgment, the meaning of the language of section 4(2) is so plain that, as a matter of construction, the court would not be justified in departing from its natural meaning in order to avoid the predicted consequences. I would add that some surprising consequences might be thought to flow from the construction of section 4(2) proposed by the applicants. For example, a disabled employee, who was fairly dismissed for misconduct after a month of employment, would be entitled for the rest of his life to make claims of discrimination and victimisation against his former employer who would be potentially liable, even for subconscious acts of discrimination and victimisation (see *Nagarajan v London Regional Transport* [1999] 4 All ER 65, [2000] 1 AC 501) in respect of post-termination acts committed many years later, such as the provision or non-provision of a reference.'

**[93]** In contrast to the position which has been adopted by the Court of Appeal, Morison J has made his disgreement with the decision in *Adekeye*'s case clear on at least two occasions. In *Coote v Granada Hospitality Ltd (No 2)* [1999] IRLR 452, [1999] ICR 942, a case under the 1975 Act which was decided following a reference to the European Court of Justice, he said ([1999] IRLR 452 at 454, [1999] ICR 942 at 949) that it seemed to the tribunal that the present tense would have been quite apt had the section been intended to apply to former employees since what is made unlawful is a present act of discrimination. He summed the position up ([1999] IRLR 452 at 455, [1999] ICR 942 at 950):

> 'We have not been persuaded that it could be said that the Court of Appeal's decision was so mistaken (per incuriam) that it need not be followed. We quite see the force of the criticisms made of it. Indeed, we would go further and respectfully say that we disagree with it. But the doctrine of precedent requires us to follow it and had it been applicable to this case we would have done so.'

In *D'Souza v Lambeth London BC* [2000] All ER (D) 878 he said:

> 'It seems to us that we are bound by the decision in *Adekeye*'s case which must be faithfully followed, although we do so without relish. We can see a strong argument for adopting a purposive approach to s 4 and make it elastic enough to cover acts of discrimination against former employers. The employment relationship, in the most general sense, outlives the contractual relationship: there are references, pension matters, sports clubs and other post-employment events which links an ex-employee with his former employer. It would be intolerable if an employer could blacken the former employee in the market place because he had successfully sued his former employer in a tribunal. If people are frightened by what happens to them if they make a complaint, the evil of discrimination will be more likely to live on. Not all perks and privileges for retired staff could be considered contractual and it is difficult to understand why, if they are dealt with in a discriminatory way, they should not be covered by the Act, since there may be no other available remedy.'

**[94]** Against this background which indicates that there are powerful views on either side of the argument, I now turn to the language of the statutes themselves. I shall take them in their historical order, although it will not be necessary to say much about the 1976 Act as the wording which it uses is so close to that of the 1975 Act.

THE LANGUAGE OF THE LEGISLATION: THE WORDS THEMSELVES

**[95]** What is the meaning which is to be given in its context to the phrase 'employed by him' in s 6(2) of the 1975 Act and s 4(2) of the 1976 Act and to the phrase 'whom he employs' in the 1995 Act? I propose to examine this question by stages. I shall start with the wording of s 6(2) of the 1975 Act itself. Then I shall look at other provisions in order to determine how the critical phrase falls to be read in its context. Then I shall look at s 4(2) of the 1976 Act in its context. I shall deal finally with the slightly different wording of s 4(2) of the 1995 Act in its context.

(a) *Section 6(2) of the 1975 Act: 'employed by him'*

**[96]** The word 'employed' can serve either as an adjective or as a participle. If it is to serve as an adjective it will be attached to a noun. Here there is no noun, so at least one can say that it is being used in the subsection as a participle. But if it is to serve as a participle, the question whether it is being used as a past participle or as a present participle will depend on the tense of the verb with which it is associated. Here there is no verb. That is not to say that a verb cannot be read into the subsection. But this requires an understanding of the intention of Parliament, and the participle itself gives no indication as to the tense. So the phrase 'employed by him' without more is ambiguous.

**[97]** As soon as one beings to examine the context, however, the ambiguity beings to recede. The phrase 'in the case of a woman employed by him at an establishment in Great Britain', taken together with the words 'in the way he affords her access to opportunities for promotion, transfer or training' the first part of para (a) indicates beyond doubt that existing employees fall within the phrase 'employed by him'. But it also suggests that it is only existing employees who do so. This impression is reinforced by the words 'by dismissing her' in para (b). If Parliament had intended it to deal with ex-employees as well, one would have expected it to have said so. The reference to 'any other benefits, facilities or services' in para (a) and 'subjecting her to any other detriment' in para (b) are not so plainly related to things done to existing employees. They could include acts of discrimination after the employment has come to an end, and it is by no means impossible for the subsection as a whole to be read in this way. But it is not obvious that this is what Parliament intended. Elsewhere in s 6, sub-s (7) states that sub-s (2) does not apply to benefits, facilities or services of any description if the employer 'is' concerned with the provision of these things to the public, or to a section of the public comprising the woman in question. It then sets out three exceptions to this provision—(a) the provision differs in a material respect from the provision of these things by the employer to 'his employees', (b) the provision of these things to the woman 'is regulated' by her contract of employment and (c) they relate to training. This provision appears to have been designed on the assumption that the situation with which sub-s (2) is dealing is that which applies where the contract of employment is still on foot, not after it has come to an end.

**[98]** Two other provisions in the first group of sections in Pt II of the 1975 Act which deal with employers indicate that Parliament did not address itself to the position of their ex-employees. Section 9 makes it unlawful for a person to discriminate against a woman who 'is a contract worker'. Among the things he may not do is discriminate against her in the provision of 'any benefits, facilities or services' or by subjecting her to 'any other detriment'—phrases that are repeated from s 6(2). An exception is made for benefits, facilities or services if the

person 'is' concerned with the provision of these things to the public, as in s 6(7). Section 10 deals with the meaning of employment at an establishment in Great Britain in terms which make use throughout of the present tense. The second group of sections in Pt II deals with discrimination by other bodies. Section 11 deals with partnerships. It makes it unlawful for a firm to discriminate against a woman who is seeking a position as partner and against a woman 'who already holds that position'. But it makes no mention of women who are no longer partners but who may—for example—be seeking a reference. Section 12, which deals with membership of trade unions, follows the same pattern. It protects a woman who is applying for membership and a woman who 'is' a member of the organisation. But it makes no mention of a woman who is no longer a member.

**[99]** I would hold that, taken overall and when given their ordinary meaning in their context, these provisions indicate that the phrase 'employed by him' in s 6(2) of the 1975 Act includes a woman who is employed by the alleged discriminator but that it does not include a woman who is no longer employed by him.

(b) *Section 4(2) of the 1976 Act: 'employed by him'*

**[100]** I can see no grounds for giving a different meaning to the phrase in this context from that which I would give to it in s 6(2) of the 1975 Act. The wording of s 4(2) of the 1976 Act is precisely the same except that it refers to a person where s 6(2) in the 1975 Act refers to a woman. The wording of s 4(4) of the 1976 Act matches that of s 6(7) of the 1975 Act, and ss 7, 8, 10 and 11 of the 1976 Act deal with contract workers, the meaning of employment at an establishment in Great Britain, partnerships and membership of trade unions in the same way as these matters are dealt with in the corresponding sections of the 1975 Act.

**[101]** So I would hold that the phrase 'employed by him' in s 4(2) of the 1976 Act includes a person who is employed by the alleged discriminator, but that it does not include a person who is no longer employed by him.

(c) *Section 4(2) of the 1995 Act: 'whom he employs'*

**[102]** The first thing that strikes one about the language of this subsection is that it does not use the participle 'employed'. It uses instead the verb 'employs'. As my noble and learned friend Lord Rodger of Earlsferry observed in the course of the argument, this was an odd choice of language if the draftsman's instructions were to cover the position of persons who were no longer employed by the alleged discriminator. And it was odd too, if those were his instructions, that this was not picked up during the passage of the Bill through Parliament. So in this case one starts from the position that the ordinary and natural meaning of the phrase is that it includes a person who is employed by the alleged discriminator, but that it does not include a person who is no longer employed by him. The question is whether there is anything in the context which requires that the phrase be read differently so that it includes a person who is no longer employed by the alleged discriminator.

**[103]** I can find nothing in s 4(2) itself which points to a different conclusion. Section 4(3) of the 1995 Act, like its counterparts in ss 6(7) and 4(4) of the 1975 and 1976 Acts, is cast in the present tense. So too are ss 12 and 13 of the 1995 Act which deal with discrimination against contract workers and by trade organisations. There are a number of other more subtle indications that the focus of this Act was on applicants for employment and those in employment, not on those whose employment has come to an end: see, for example, the wording of

the exemption for small businesses in s 7. I can find no support anywhere else in the Act for the argument that s 4(2) extends to persons who are no longer in the employment of the alleged discriminator.

COMMUNITY LAW

**[104]** In Mrs Rhys-Harper's case it is necessary, as I said earlier (see [76], above), to take account of the fact that the 1975 Act gave effect in domestic law to the Equal Treatment Directive. The conclusion which one draws from this exercise may have implications for all the other cases too, as I shall explain later. The directive does not, of course, have direct effect on the relationship between a woman and her employer. The third paragraph of art 249 of the EC Treaty (formerly art 189 EEC) provides that a directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed but that it shall leave to the national authorities the choice of form and method. So a directive works its way into our domestic system by means of the legislation which is designed to give effect to it. It is then for the courts to interpret that legislation, as far as possible, in a way that gives effect to this country's obligations under the treaty.

**[105]** In *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] 1 All ER 1134 at 1140, [1990] 1 AC 546 at 559 Lord Oliver of Aylmerton said that the approach to the construction of primary and subordinate legislation enacted to give effect to the United Kingdom's obligations under the EEC treaty was not in doubt:

> 'If the legislation can reasonably be construed so as to conform with those obligations, obligations which are to be ascertained not only from the wording of the relevant directive but from the interpretation placed on it by the Court of Justice of the European Communities, such a purposive construction will be applied even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use.'

In *Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929 at 939, [1993] ICR 175 at 186 Lord Keith of Kinkel said:

> '... it is for a United Kingdom court to construe domestic legislation in any field covered by a Community Directive so as to accord with the interpretation of the directive as laid down by the European Court, if that can be done without distorting the meaning of the domestic legislation ...'

He referred ([1992] 4 All ER 929 at 940, [1993] ICR 175 at 187) to the way in which the European Court in *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135 expressed the obligation which is binding on the courts in applying national law, whether the provisions in question were adopted before or after the directive:

> 'As the European Court said, a national court must construe a domestic law to accord with the terms of a directive in the same field only if it is possible to do so. That means that the domestic law must be open to an interpretation consistent with the directive whether or not it is also open to an interpretation inconsistent with it.'

The European Court took the opportunity in *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865 at 876, [1999] ICR 100 at 111–112, [1998] ECR I-5199 at 5219 (para 18) to restate this point:

> 'As follows from *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135 at 4159 (para 8) and *Wagner Miret v Fondo de Garantía Salarial* Case C-334/92 [1993] ECR I-6911 at 6932 (paras 20–21), in applying national law, in particular legislative provisions which, as in the present case, were specially introduced in order to implement the directive, the national court is required to interpret its national law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the third paragraph of art 189 of the Treaty.'

**[106]** The phrase 'employed by him' in s 6(2) of the 1975 Act is, as I have said, ambiguous. I think that it is *possible* to construe it as referring to a woman who is no longer employed by the alleged discriminator as well as to a person who is employed by him, although I do not think that that is what the phrase means when domestic rules of construction are applied to it and it is taken in its context. So the question which arises in Mrs Rhys-Harper's case is whether the Equal Treatment Directive, as interpreted by the European Court, requires us to adopt that possible construction.

**[107]** There is nothing in the wording of the directive which makes it plain to the domestic reader that its purpose was to extend the principle of equal treatment for men and women as regards access to employment to cases where the employment relationship has come to an end. It refers in its long title to 'the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions'. The preamble too refers to access to employment, training and promotion and to 'working conditions, including pay', as does art 1 which describes the purpose of the directive. One finds here the familiar categories of people seeking employment, training or promotion on the one hand and those who are in work on the other. Nothing is said about ex-employees.

**[108]** The articles which are most directly in point with regard to the question what scope is to be given to the expression 'working conditions' are these:

> *'Article 5*
>
> 1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex ...
>
> *Article 6*
>
> Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.

*Article 7*

Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

*Article 8*

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.'

But here too no mention is made of the situation where the employment relationship is at an end.

**[109]** What then is to be said about the purpose of the directive? Here one must turn for guidance to the decision of the European Court in *Coote's* case. In that case, after settling a sex discrimination claim against her employer, the applicant had left the employer's employment by mutual consent. She then asked the employer to supply a reference to the employment agency through which she was trying to find another job. This was refused. She then brought proceedings against the employer under s 4 of the 1975 Act, which deals with victimisation, in which she alleged that this response was a reprisal for her previous claim of sex discrimination.

**[110]** The European Court saw this as an issue of judicial protection within the meaning of art 6 of the directive. It explained its approach ([1998] All ER (EC) 865 at 876, [1999] ICR 100 at 112, [1998] ECR I-5199 at 5220 (para 19):

'In those circumstances, the questions put by the national court must be understood as seeking to ascertain, for the purpose of interpreting national provisions transposing the directive, whether the directive requires member states to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the end of the employment relationship, refuses to provide references as a reaction to proceedings brought to enforce compliance with the principle of equal treatment within the meaning of the directive.'

It went on to develop this point in the following paragraphs.

**[111]** The court noted ([1998] All ER (EC) 865 at 876–877, [1999] ICR 100 at 112, [1998] ECR I-5199 at 5220 (para 20)) that it followed from art 6 that the member states must ensure that the rights conferred by the directive could be effectively relied on before the national courts by the persons concerned. It observed ([1998] All ER (EC) 865 at 877, [1999] ICR 100 at 112, [1998] ECR I-5199 at 5220 (para 21)) that the requirement laid down by that article reflected a general principle of law which underlies the constitutional traditions common to the member states and which was also enshrined in art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). It emphasised ([1998] All ER (EC) 865 at 877, [1999] ICR 100 at 112, [1998] ECR I-5199 at 5221 (para 23)) that art 6 of the directive was an essential factor for attaining the fundamental objective of equal treatment for men and women which, as the court had repeatedly held, was one of the fundamental human rights whose observance it had a duty to ensure. It said ([1998] All ER (EC) 865 at 877, [1999] ICR 100 at 113,

[1998] ECR I-5199 at 5221 (para 24)) that the principle of effective judicial control which art 6 of the directive lays down would be deprived of an essential part of its effectiveness if it did not cover measures which the employer took as a reaction to legal proceedings brought by the employee with the aim of enforcing the principle of equal treatment. The conclusion which it expressed ([1998] All ER (EC) 865 at 877, [1999] ICR 100 at 113, [1998] ECR I-5199 at 5221 (para 25)) was that it was not possible to accept the argument that such measures did not fall within the scope of the directive if they are taken after the employment relationship has ended.

**[112]** It would have been possible for the court to find a more direct answer to the problem in art 5 of the directive regarding working conditions as indicated by Advocate General Mischo in his opinion ([1998] All ER (EC) 865 at 869, [1999] ICR 100 at 104, [1998] ECR I-5199 at 5204–5205 (paras 11–12)). He said that an employer's appraisal of the quality of the services rendered fell entirely within the scope of the relationship between employee and employer, and that the service rendered by the employer in providing the employee with what he described as 'the parting gift' of a reference could not be severed from the employment relationship. He also said that the conditions regarding dismissal were to be construed broadly, as was clear from *Burton v British Railways Board* Case 19/81 [1982] 3 All ER 537 at 549, [1982] QB 1080 at 1112, [1982] ECR 555 at 575 (para 9) where the court said that in the context of the directive the word 'dismissal' must be widely construed so as to include termination of the employment relationship between a worker and his employer, even as part of a voluntary redundancy scheme. But the court did not go down that road. The principle underlying its approach was the right of a person who claimed to have been discriminated against by her employer to obtain an effective remedy.

**[113]** The conclusion which I would draw from this case is that the interpretation placed on the directive by the European Court does not require your Lordships to read the words 'employed by him' in s 6(2) of the 1975 Act as including each and every case where the employment relationship has come to an end. If that reading of those words were to be adopted it would enable all ex-employees to claim that they were entitled to the benefit of that subsection. It would extend the principle of equal treatment to them as a class, without regard to the question which was of concern to the court which was that the rights conferred by the directive could be relied upon effectively in the courts. It would also raise problems which the court did not address about the scope of the employer's liability. If the protection were to be extended to ex-employees as a class without some words of qualification, employers would be exposed to a potential liability for unconscious and perhaps trivial acts of discrimination for the rest of the employee's life. There is no indication in the court's decision that it saw this as one of the purposes of the directive. The Advocate General's description of a reference as a 'parting gift' which could not be severed from the employment relationship suggests that he regarded the expression 'working conditions' in art 5 as referring to things that fell within the employment relationship.

**[114]** It is to be noted however that the expression which the European Court used in *Coote*'s case ([1998] All ER (EC) 865 at 876, [1999] ICR 100 at 112, [1998] ECR I-5199 at 5220 (para 19)) to describe the period which falls within the scope of the directive was 'the employment relationship'. Buxton LJ used the same phrase in *Rhys-Harper v Relaxion Group plc* [2001] IRLR 460 at [25] when he said

that he agreed with Peter Gibson LJ's conclusion in *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110 that strong indications of post-contract activity would be needed within the events listed in s 6(2)(a) in order to compel a reading of 'a person employed by him' in what he described as 'the unnatural sense' of a person previously employed. But, as my noble and learned friend Lord Scott of Foscote has pointed out, the relationship between the employer and the employee does not necessarily come to an end at the precise moment when their contract terminates. There may well be things that need to be done to bring their relationship to an end after the contract has terminated. There may also have been agreements entered into during the employment about benefits to be enjoyed afterwards, such as the continued use of sports facilities, which remain to be implemented or there may be evidence that it is the employer's practice to allow the continued use of such facilities. At that stage the employer will, of course, be dealing with someone who strictly speaking is a former employee. But the fact that this description applies will not of itself remove that person from the scope of the directive, so long as the transactions that remain to be completed are attributable to a continuation of their relationship as employer and employee.

**[115]** I think that the approach which is indicated by the decision in *Coote*'s case strikes a reasonable balance between the interests of the employee after the employment is ended and the risk to the employer of being exposed to claims indefinitely. I would extend the same meaning to the words 'employed by him' in s 6(2) of the 1975 Act and, as I see no grounds for giving a different meaning to the same words where they appear in section 4(2) of the 1976 Act, to those words in that context also. That being so, as there are no rational grounds for a different approach to be taken to the use of similar language in the context of discrimination against disability, I would extend the same meaning to the words 'whom he employs' in s 4(2) of the 1995 Act. Whether or not there is still an employment relationship will be for determination according to the facts of each case.

**[116]** I would therefore, with respect, differ from the decision of the Court of Appeal in *Adekeye's* case that the words 'a person employed by him' in s 4(2) of the 1975 Act did not apply to a person who was no longer an employee. That approach, which confines the scope of the protection strictly to the duration of the contract, seems to be out of keeping with the approach of the European Court in *Coote*'s case when it used the expression 'the employment relationship'. I too would hold that that case was wrongly decided.

CONCLUSIONS

(1) *Relaxion Group plc v Rhys-Harper*

**[117]** The issue in this case, as focused in the agreed statement of facts and issues, is whether, on a proper construction of s 6(2) of the 1975 Act, an employment tribunal has jurisdiction to entertain a claim of sex discrimination where the act or conduct complained of occurred after the employment relationship has ended. In his opening remarks Mr Reynold QC for the appellant said this was what her case was about. He said that her complaint was that she had been sexually discriminated against after her employment had come to an end because the respondent's general manager, Mr Adamson, failed to investigate properly a complaint which she made at the hearing of her appeal against her dismissal on 9 November 1998 that she had been harassed on the ground of her sex by Mr Osborn. Mr Reynold did not suggest that Mr Adamson's

investigation into this complaint had any bearing on his decision that there were sufficient grounds for the appellant's dismissal and that Mr Osborn's decision to dismiss her should stand.

[118] I would hold that s 6(2) of that Act does not apply to the appellant's complaint of discrimination as so presented. What is alleged is a single and self-contained act of discrimination, which is said to have occurred when the appellant was no longer employed by the respondent. As for the wider question whether it was attributable to a continuation of their employment relationship, I would hold that there is nothing in this way of presenting her case which links the alleged act of discrimination by Mr Adamson to the conditions of her employment. The appellant did not ask Mr Adamson to investigate her complaint, and there has been no suggestion that she had any right to do so. She was no longer employed in the respondent's premises, so she was not in a position to benefit in any way from any decisions that Mr Adamson might have taken as a result of that investigation. Nor is there anything in it that links Mr Adamson's alleged failure to investigate this complaint properly to the appeal and his decision to confirm her dismissal.

[119] But Mr Reynold sought to present her case in a different way when he was replying to Mr Reade for the respondent. He based this presentation of it on the fact that the appellant received two letters from Mr Adamson on the same day. One of these letters dealt with the outcome of the appellant's appeal against her dismissal by Mr Osborn. In the other Mr Adamson said that the allegation which the appellant made at the hearing of her appeal of sexual harassment by Mr Osborn had been investigated and that there was insufficient evidence to establish a case against him. Mr Reynold said that fact that these two letters arrived together showed that Mr Adamson's decision in the appeal was linked to his investigation into the appellant's allegation. The allegation had arisen in the course of her appeal against her dismissal. What the appellant was alleging therefore was bias on the part of Mr Adamson as the decision-taker in her appeal against her dismissal. Mr Reynold said that it was not realistic to divorce the appeal procedure from the ambit of the allegation of sexual harassment. The reality was that they were part and parcel of the same thing.

[120] This presentation of the appellant's case makes it necessary to examine the history of her allegations against Mr Osborn more closely. According to a transcript of the notes of evidence of the chairman of the employment tribunal, the appellant said in her evidence that she did not bring the issue of sexual discrimination up when she attended the disciplinary hearing on 12 October 1998 which was conducted by Mr Osborn. She said that this was because he was the perpetrator and because his girlfriend was there. But the fact is that, for whatever reason, she did not mention this issue at the hearing. Moreover, she made no mention of sexual discrimination in her letter of 19 October 1998 in which she appealed against Mr Osborn's decision to dismiss her on the ground of misconduct. It was not until she saw Mr Adamson at the appeal hearing on 9 November 1998 that she mentioned the issue for the first time. She mentioned it again when she was setting out the details of her complaint in her application to the employment tribunal. She said that she was putting forward a complaint of sexual harassment and constructive dismissal against Mr Osborn, and gave details of various problems of this nature which she had encountered with him during her employment. At the end of this document she said that she felt that she had been sacked for misconduct once she had reported the sexual harassment. But

the history which I have outlined shows that she did not make any such report until she mentioned the matter to Mr Adamson in the course of the hearing of her appeal against her dismissal.

**[121]** Although Mr Reynold did not put her case quite in these terms, it appears to me in the light of this further background that the case which he was seeking to put forward in his reply was that the appellant had been victimised within the meaning of s 4 of the 1975 Act by Mr Adamson in his conduct of the hearing of the appeal against her dismissal. Mr Reynold said that the appellant's case was that Mr Adamson's decision in the appeal was biased against her because of the complaint which she had made. An employment tribunal does not have jurisdiction under s 63 of the 1975 Act to investigate an allegation of bias on the part of the decision-taker in an appeal by an employee against her dismissal. But it does have jurisdiction under that section to deal with a complaint that she has been the victim of an act of discrimination by way of victimisation within the meaning of s 4 of the 1975 Act which is unlawful under Pt II of the Act.

**[122]** In my opinion there is no doubt that an employment tribunal has jurisdiction to entertain a complaint of discrimination by way of victimisation which relates to conduct by an employer in his determination of an appeal by a woman against her dismissal from his employment. Article 7 of the Equal Treatment Directive requires member states to take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking aimed at enforcing compliance with the principle of equal treatment. Section 6(2)(b) of the 1975 Act makes it unlawful for an employer to discriminate against a woman by dismissing her. Discrimination within the meaning of s 6(2) includes discrimination by way of victimisation as defined by s 4. Section 6(2)(b), when read together with s 4, provides the protection which art 7 requires. An act of dismissal by way of victimisation is made unlawful by s 6(2)(b). So there is no need here for the appellant to rely on the obligation to ensure effective judicial control for the protection of the rights provided by the Equal Treatment Directive arising from art 6 which the European Court of Justice described in *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1999] ICR 100, [1998] ECR I-5199. The issues of statutory interpretation on this presentation of her case appear to me to be quite straightforward. The appellant's difficulty lies in the fact that her complaint that she was victimised by Mr Adamson in the course of the proceedings regarding her dismissal was not presented in this way at any stage in these proceedings until it was mentioned by Mr Reynold in his closing address to your Lordships.

**[123]** With some hesitation I have come to the conclusion that the events which happened in her case, as now presented, were all attributable to the employment relationship. There are various ways in which the facts can be analysed. But however this is done it would, as Mr Reynold said, be unrealistic to ignore the fact that the victimisation of which she complains was part and parcel of the events that were attributable to her employer's act in dismissing her. The stage at which it could be said that the employment relationship had ended had not yet been reached. I would allow this appeal.

(2) *D'Souza v Lambeth London BC*

**[124]** Mr D'Souza's complaint is of racial discrimination and victimisation contrary to s 4(2), or alternatively s 4(1), of the 1976 Act. The act of which he

complains is the failure by his former employer to reinstate him when ordered to do so by the employment tribunal.

**[125]** I would hold that s 4(2) does not apply to his case, as it is plain that the act of which he complains occurred after the employment relationship had come to an end. I would hold that s 4(1) does not apply to his case either. His argument was that the decision by his former employer not to reinstate him when ordered to do so by the employment tribunal under what is now s 113(a) of the Employment Rights Act 1996 was a refusal or a deliberate omission to offer him that employment within the meaning of s 4(1)(c) of the 1976 Act. I would reject that argument. His former employer was not being required to offer him that employment. What it was ordered to do by the tribunal was simply to reinstate him on the terms which the order itself specified. Failure to comply with an order for reinstatement by the tribunal will result in an award of compensation under the statute. There is no other remedy. What the Act does is to lay down a statutory procedure by which the employee obtains the benefit of the original contract. I would dismiss this appeal.

(3) *Jones v 3M Healthcare Ltd*

**[126]** These are all cases where it is said that allegations were made under s 4(2) of the 1995 Act of discrimination and victimisation after the employment relationship had come to an end. I would hold that the phrase 'whom he employs', which qualifies the whole of that subsection, does not make it unlawful for an employer to discriminate against a disabled person who is no longer in his employment and with whom he no longer has an employment relationship. As to the facts, the question in each case is whether the interval in time was too long for it to be reasonable, in the light of all the surrounding circumstances, to conclude that there was still an employment relationship.

**[127]** A period of about one year and ten months had gone by before Mr Jones asked for the return of his business cards. The other cases all relate to requests for references. I consider that these cases all lie close to the limits of what comes within the boundaries of the employment relationship. A request which is made after a short interval may well be regarded as having been made while there was still an employment relationship. But it may well be thought to be unreasonable to expose employers to the risk of proceedings before an employment tribunal after a long interval. It is one thing to hold the door open, as it were, for this purpose for a few weeks or possibly for a few months. It is quite another for an employer to be compelled to provide references for an ex-employee, perhaps several times over, in response to repeated requests long after the employment has ended.

**[128]** The solution to this problem may well lie, as my noble and learned friend Lord Nicholls has pointed out, with employers in the first instance. If it is the employer's practice to give references to former employees after such a long interval, then the employer must be careful not to discriminate. If the employer's practice is to cease giving references after a given interval, then the refusal of a reference to a particular individual after that interval has passed will not, without more, be discriminatory. The 'chilling effect' of these propositions is regrettable but inescapable. It is by no means unknown for employers to seek safety by adopting practices in the giving of references which are as parsimonious as possible. For smaller employers, of course, the number of former employees asking for references may be too few to enable them to develop a practice which

will protect them against vexatious claims. In their case employment tribunals will need to be particularly vigilant.

**[129]** With some hesitation I have come to the view that, although these cases lie close to the borderline, it has not been shown on the facts which are available so far that the employment tribunals do not have jurisdiction to consider them. For this reason I would allow these appeals and remit the cases to the tribunals for further consideration.

**LORD HOBHOUSE OF WOODBOROUGH.**

**[130]** My Lords, these appeals concern the proper understanding of the provisions of three anti-discrimination Acts and their application to the six cases concerned. The courts below were bound by the Court of Appeal decision in *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110. It is necessary to decide whether that case was rightly decided. The appeals all came before the House as cases relating to the jurisdiction of employment tribunals.

**[131]** But, if one is to reject the bright line rule stated in *Adekeye*'s case and adopt a less absolute criterion, it becomes necessary, in considering the disposal of the individual appeals, to consider whether by that criterion the tribunal should have accepted jurisdiction. This involves ascertaining what claim or claims it was that the aggrieved party made in the tribunal proceedings and to what extent they were rendered inadmissible by failure to present the claim to the tribunal within the period of three months beginning when the act complained of was done: see, for example, s 76(1)(a) of the Sex Discrimination Act 1975. A feature of discrimination cases in the employment field is that the obvious way of formulating a claim may be ruled out because the complainant has (without sufficient excuse) allowed the three-month time limit to expire without bringing proceedings. The complainant then has, artificially, to find some act within the three-month period on which to build the claim. (This point is particularly relevant to the disposal of the Rhys-Harper appeal.)

**[132]** The scheme which I will follow in this opinion is, first, to make some general observations about anti-discrimination legislation, then to discuss the *Adekeye* point, then, the victimisation point and then, finally, to apply my conclusions to the individual cases.

ANTI-DISCRIMINATION LEGISLATION

**[133]** The 1975 Act broke new ground for English domestic law and adopted a fairly cautious approach. The criteria for discrimination and the scope of the Act's application were fairly narrowly drawn. It is not right to view it, which was the invitation of the appellants, as creating a comprehensive anti-discrimination scheme. The Race Relations Act of the following year was in the same mould but at the same time adopted a more generalised criterion of unlawful discrimination. The former Act had said: '[a] person discriminates against *a woman* ... if—(a) on the ground of *her* sex he treats her less favourably than he treats or would treat *a man* ...' The latter Act uses the phrases 'on racial grounds' and 'other persons' which do not depend upon the racial group to which the actual complainant personally belongs or the racial group to which the comparator belongs provided the relevant racial ground would not apply to him but is otherwise comparable. For example, the relevance of race may be to the fact that the complainant is married to a person of a different race or has adopted children of a particular race. The drafting of the 1995 Act also shows signs of a developing confidence of those responsible for anti-discrimination legislation and refers to the 'reason' for

treating someone less favourably. The same developments are to be observed in other provisions of the three Acts. In construing each of these Acts and assessing and understanding decisions made under one or other of them, it is necessary, if errors are not to be made, to have regard to the actual wording of the relevant Act as is illustrated by what I have said about the different criteria used in the 1975 and the 1976 Acts.

**[134]** Another self-evident point is that the drafting of each Act had to be adapted to the type of discrimination at which it is directed. Thus the Disability Discrimination Act 1995 inevitably has to relate to direct discrimination and include a defence of justification. It is coupled with qualified obligations to make special arrangements for those with disabilities, including, in limited circumstances, adapting buildings. Similarly, each Act makes specific but different provision for its scope of application and those it will affect. But each Act also has a similar structure and, as between the 1975 and 1976 Acts, some provisions are expressed in the same or very similar words. This is particularly so in relation to the 'employment field' provisions. I agree that these statutes should be read as contributions to a developing scheme of anti-discrimination law and such words should not without good reason be given a different reading as between one of the statutes and another. They are not statutes to be formally 'read with' each other but they are statutes which reflect a consistent (though developing) legislative policy. The wording of the 'employment field' provision in the 1975 and 1976 Acts is in a relevant respect slightly different from the 1995 Act which, instead of using the phrase 'employed by him', uses the phrase 'whom he employs'. None of the counsel in these appeals submitted that a distinction should be made between the Acts on this ground. I consider that they were right. I will accordingly use the 1975 Act as the reference point save where it is necessary to refer to the Acts separately.

**[135]** The structure of the relevant parts of each of the Acts is also similar. They start with a definition of the relevant test of discriminatory conduct: see Pt I in the 1975 Act. They continue by defining (with elaborations or qualifications) the 'fields' in which the Act is to apply: see Pts II and III of the 1975 Act. They then add provisions making some related acts unlawful and granting some general exceptions to the application of the 'fields': see Pts IV and V of the 1975 Act. The words directly involved in the *Adekeye* point are in the Part defining the 'employment field'. All these cases were said to arise in the employment field, which in all three Acts is the primary field of application. The victimisation point arises from provisions which in the 1975 and 1976 Acts appear in the Part defining discriminatory conduct but which, in the 1995 Act, are placed in the later Part which (inter alia) makes other related acts unlawful (see Pt VII). In all three Acts the actual wording of the victimisation provision is similar and is by way of extending the definition of 'discrimination'. In relation to sex discrimination, what is involved in victimisation has been the subject of a decision of the European Court of Justice in the case of *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1999] ICR 100, [1998] ECR I-5199 applied by Morison J in *Coote v Granada Hospitality Ltd (No 2)* [1999] IRLR 452, [1999] ICR 942, to which I will revert later.

*ADEKEYE'S CASE*

**[136]** *Adekeye's* case was an employment field case under the 1976 Act. It was therefore essential for the complainant to show that the employment tribunal had jurisdiction under Pt II of the 1975 Act. Her complaint was that she had been

summarily dismissed by her employers, the Post Office, on racial grounds and that, on the same grounds, she had again been discriminated against when she had appealed against her dismissal under the Post Office's internal appeal procedure and her appeal had been dismissed. Her complaint against her dismissal was out of time but her complaint relating to her appeal was not. The Court of Appeal referring to the wording of s 4(2) of the 1976 Act formulated the question to be answered as being: could a person who had been dismissed still be described as 'a person employed by' the person who had already dismissed him? They adopted a simple temporal test: did the relevant act come before or after the termination of the employment? The Court of Appeal, following an earlier decision by the Employment Appeal Tribunal (EAT) in *Nagarajan v Agnew* [1994] IRLR 61, [1995] ICR 520, concluded that being employed and being dismissed were mutually inconsistent states. The Court of Appeal accordingly held that the employment tribunal had no jurisdiction. It was this decision by which the courts below were bound and which caused them to decline to entertain the appellants' various applications.

**[137]** Was *Adekeye*'s case right? As a matter of the simple language of s 4(2) and its equivalent in the 1975 and 1995 Acts, there is much to be said for it and it provides a rule of simple application. But a different view is possible. The words are not used to refer to a status but to a connection. Under the Acts the discriminatory treatment does not have to be an infringement of the complainant's contractual rights. It can simply be less favourable treatment than that afforded to others in a like position. To introduce at this point into the structure of the Acts a criterion of strict contractual status would be anomalous having regard to their scheme as a whole. There is the further recommendation for the connection approach that it avoids some of the individual anomalies as illustrated by the facts of *Adekeye*'s case itself and referred to in the judgment in that case. Why distinguish between the discriminatory dismissal and the discriminatory conduct during the internal appeal against that dismissal? Indeed, the complainant may have a contractual right to invoke the appeal procedure and to a fair consideration of his or her appeal. The remedy for which the complainant may be asking in that appeal procedure is the revocation of the dismissal decision. To construe the Act so that the dismissal can be the subject of a discrimination complaint but the handling of the appeal cannot is irrational and unnecessary. The scheme of the Acts and the context in which the relevant words occur suggest that, rather than importing a crude temporal test, they describe the substantive scope within which the various duties not to discriminate under the Acts apply in the employment field.

**[138]** But that still leaves a problem. The purpose of the relevant Part of these Acts is to define the scope of their operation (and consequentially, in relation to the 'employment field', the jurisdiction of employment, formerly industrial, tribunals). One therefore needs, before one can properly discard the *Adekeye* interpretation, to see whether the alternative interpretation has a sufficient degree of clarity to be a fair reading of the words used and to perform the defining function of these words in the Acts. In the 1975 Act, the relevant words 'woman employed by him' only appear in s 2 of the Act. Subsection 2(1) does not use such words since it deals with those seeking employment; it uses the words 'in relation to employment by him'. In sub-s 2(2) where the words are used, no problem need arise under para (a) since the wording of that paragraph read as a whole clearly refers to things happening during the currency of the woman's

employment by the discriminator; (a) is self-limiting and therefore does not raise the question presently under consideration nor does it need a restricted meaning to be given to the introductory phrase. It is in para (b) that the question manifests itself. Paragraph (b) includes two elements: first, 'by dismissing her'; secondly, by 'subjecting her to any other detriment'. The first should be read as referring to the whole of the process of dismissal. So, if the internal procedures of the employer or the legitimate expectations of the employee (or indeed the avoidance of an 'unfair' dismissal) include a review of the dismissal decision, whether by appeal or otherwise, para (b) should be read as including that review within its scope and any discrimination on grounds of the sex of the employee will be contrary to the law. (I have used the word 'employee' in this sentence deliberately to demonstrate that it is a perfectly natural use of language to refer to the woman in this situation in that way.) Thus the content of the first part of para (b) suffices to guide the giving of a non-legalistic meaning to the earlier phrase 'employed by him'. In my judgment a similar approach should be adopted in relation to the second part of (b)—'or subjecting her to any other detriment', a phrase which can include the denial of a benefit and ties in with the phrase 'treats her less favourably' in s 1.

**[139]** The words 'subjecting her to any other detriment' are general and undefined but it can be seen that the problem of construction is to decide what breadth they should be given and whether, on the facts of any given case, the facts fall within them. Guidance upon the scope can again be derived from the content of the provision. What are the detriments which an employer may subject an employee to which can fairly be referred to as 'any other detriment' in the context of this subsection? The answer must lie in a test of proximity. Does the conduct complained about have a sufficiently close connection with her employment? Is it sufficiently similar to the other conduct mentioned in the subsection? Any criterion of proximity has as its antithesis the concept of remoteness. Remoteness can have, as an element, remoteness in time. The further removed the conduct is in time from the employment, the greater the likelihood that the conduct is too remote and that the employment has become merely a matter of history. This is not a resurrection of the *Adekeye* test; it involves no cut-off point but is simply a recognition that, as time passes, it may become more difficult to show that the conduct complained of had a sufficient connection with the employment and a sufficient similarity with the other conduct falling within sub-s (2). Thus it is relevant to ask whether the conduct complained of, if committed whilst she had still been currently employed by the person complained about, would have come within s 6(2)(a); but she will also have to show that other former employees would, in the same circumstances, not have been subjected to the detriment—would have enjoyed the benefit denied to her.

**[140]** I appreciate that such an approach will ultimately lead to fact-specific decisions in a number of cases but that is what is involved in the rejection of an arbitrary time-based criterion. It should not lead to any additional uncertainty for employers since the construction which I prefer is based upon a factual connection with the employment which it should be easier for the lay employer to understand and apply than an essentially legal criterion depending upon identifying the moment when 'dismissal' was complete. The nub is that the introductory words 'a woman employed by him' are to be read with the rest of sub-s (2) and relate to a substantive and proximate connection between the conduct complained of and her employment by the alleged discriminator.

**[141]** In assessing whether the requisite connection exists, a starting point is to ask whether the same conduct during the currency of the employment would be unlawful. Likewise it is relevant whether or not a legitimate expectation of the benefit, or the contractual right to it, has continued and whether other former employees do in the same circumstances enjoy the benefit or suffer the detriment. For example, if other employees are permitted to continue to enjoy the use of the employee's social club after they have retired, but the complainant is not, that will come within the expression 'any other detriment' and, if she has been discriminated against on grounds of her sex, she will be entitled to complain.

**[142]** More difficult is the giving of references since it may refer to many different situations—the refusal of any reference at all, the giving of a limited reference, the giving of an unfavourable reference—and to many different complaints—breach of contract, breach of a legitimate expectation, breach of a duty of care, defamation, discrimination. Also the complainant may well be able to argue that, if the same reference had been refused or given during the currency of her employment, she would have been discriminated against but it of course does not necessarily follow that later conduct would also amount to discrimination. Something more has to be alleged and proved, that she had at the least a legitimate expectation of being given a reference at a later stage and in her then circumstances and that other ex-employees would in the same circumstances have been given one. Likewise, if one has been given but she is complaining about what it does or does not say, she must allege and prove that others in the like circumstances would have received a favourable one. In *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, your Lordships' House considered the extent and content of the obligation to give a reference. Lord Woolf ([1994] 3 All ER 129 at 179, [1995] 2 AC 296 at 354) referred to the fact that the position might not be the same once the employee had left his employment and there had been a lapse of time. Discussing the contractual term which might be implied he used the phrase 'during the continuance of the engagement or within a reasonable time thereafter'. The obligation will not necessarily be open-ended and the later it is asked for the less detail and information it may contain. It must be an obligation which the employer recognises in respect of other ex-employees in the like circumstances, otherwise the complainant cannot say she has been subjected to a detriment or denied a benefit. If the conduct is to be the subject of a complaint under one or other of the anti-discrimination Acts, it must come within and satisfy the criteria of the relevant Act. This illustrates the link in practice between the questions of 'less favourable treatment', denying a 'benefit' and subjecting to a 'detriment'. I will have to revert to the question of references when I come to deal with the appeals in the cases which arose under the 1995 Act.

**[143]** What I have said in the preceding paragraphs also reflects the view of the European Court of Justice in their decision in the case of *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1999] ICR 100, [1998] ECR I-5199. The employee's complaint was that she had been discriminated against on the grounds of her sex in that after leaving her employment she had applied to her former employer for a reference and had been refused one. The background to the dispute was that she had earlier, whilst still actually employed by him, complained about other conduct of her employer and her discrimination claim on that occasion had been settled. The case therefore had a victimisation element. The industrial tribunal had rejected her (second) claim under the 1975

Act on the ground that at the time she was refused a reference she was no longer employed by him. However, since her case was also covered by the Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) (the Equal Treatment Directive), the EAT sought an opinion from the European Court of Justice whether that decision was consistent with the directive's requirement that member states provide effective remedies.

**[144]** The Advocate General ([1998] All ER (EC) 865 at 870, [1999] ICR 100 at 105, [1998] ECR I-5199 at 5205, 5206 emphatically rejected the *Adekeye* criterion:

> '14. It would be totally unjustifiable for the application of the prohibition of discrimination on grounds of sex to a decision on the provision or refusal of references to depend on the moment when that decision was taken ...
>
> 15. The court has, moreover, always held with regard to equal pay that the prohibition of discrimination by an employer between employees on grounds of sex does not cease to have effect on termination of the contract of employment ...
>
> 16. I therefore consider that an employer may not discriminate on grounds of sex when providing an employee with references, whatever the moment—whether during or after the period of the employment relationship—at which the decision is taken in that regard or at which those references are requested.'

**[145]** The European Court of Justice in its judgment, after noting the element of victimisation, summarised its ruling upon the question referred ([1998] All ER (EC) 865 at 878, [1999] ICR 100 at 113, [1998] ECR I-5199 at 5222 (para 28)):

> 'In those circumstances, the answer to the questions put by the national court must be that art 6 of the directive requires member states to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references ...'

It would be possible to read this judgment as limiting the ruling to cases of victimisation but in my view that would not do justice to the reasoning which is more comprehensive. Nor would it pay adequate regard to the clear views expressed by the Advocate General.

**[146]** On the return of the case to the EAT ([1999] IRLR 452, [1999] ICR 942) the EAT recognised ([1999] IRLR 452 at 454, [1999] ICR 942 at 947) that the main issue which they had to consider was—

> 'whether it is possible to construe the 1975 Act so as to enable a claimant to make a victimisation complaint in relation to events that occurred after the employment relationship had terminated.'

The judgment of the appeal tribunal given by Morison J, carefully reviewed the reasoning of the Court of Appeal in *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110 and concluded that it could no longer be followed. Victimisation cases may be a fortiori but within the scheme of these Acts all cases have to pass through the gateway of one of the 'fields' of application and therefore it is still, in an 'employment field' case, necessary to consider the 'employed by' question. I consider that Morison J was right and that *Adekeye*'s case is no longer good law.

VICTIMISATION

**[147]** What I have said in the preceding paragraphs is also largely dispositive of the treatment of victimisation cases. Victimisation is in principle a free-standing unlawful wrong. It is ancillary to the main provisions of the relevant Act. It is not dependant upon the primary criterion of discrimination—sex, race, disability. The criteria are different. For example, to use the wording of s 4 of the 1975 Act, the victimisation arises from the complainant having made a sex discrimination complaint against the discriminator or *any other person* or having assisted another to do so or having given evidence in support of that other. The section has even been amended to bring in other Acts and extends to suspected conduct of the victim either past or future. These criteria go far beyond anything specific to any employment relationship between the victim and the alleged discriminator and are in themselves gender (or race or disability) neutral. There is a saving in each of the Acts to exclude 'victims' who have made false allegations or acted in bad faith.

**[148]** However it is still necessary for the person making a victimisation complaint to show that the discriminator has treated the person victimised 'less favourably than in those circumstances he treats or would treat other persons'. This brings one back to the 'field' provisions and, in the 1975 Act, to s 2(2). The less favourable treatment has to come within one part or another of s 2 and, if it is upon s 2(2) that the complainant relies, the complainant must show the requisite connection between the less favourable treatment complained of and her employment, whether it be prospective, future, current or past, by the alleged discriminator. Again the decision of the European Court of Justice is compelling. The Acts must be construed so as not to amount to the denial of a remedy for victimisation and, in particular, not so as to apply an arbitrary temporal test. Once it can be shown that it is a detriment—a disadvantage—to which the employer does not subject others and it can fairly, in the context of s 2(2), be termed *any other* detriment, the victimised complainant will have proved what is required in this respect. It is certainly not disproved by the mere fact that the complainant is no longer employed by the discriminator.

**[149]** Victimisation is an a fortiori case which shows that the application of the *Adekeye* approach is unacceptable. But essentially the same construction of the provisions defining the 'employment field' is to be adopted in victimisation cases and in ordinary discrimination cases. The case must still come substantively within the provisions defining the 'field'.

THE JURISDICTION QUESTION

**[150]** In any 'employment field' case there is potentially a jurisdiction question for the employment tribunal. Section 63(1) of the 1975 Act (as amended) provides:

> 'A complaint by any person ("the complainant") that another person ("the respondent")—(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part II ... may be presented to an employment tribunal.'

There are provisions to the like effect in s 54(1) of the 1976 Act and s 8(1) of the 1995 Act. The tribunals are bodies with limited jurisdiction. Section 2 of the Employment Tribunals Act 1996 empowers them to exercise the jurisdiction given to them by (inter-alia) these Acts. It follows that if the complaint does not fall within the 'employment field' as defined in the relevant Act, the employment

tribunal does not have jurisdiction to entertain the complaint and must decline to do so, as did the tribunal in *Adekeye*'s case.

**[151]** To categorise any question as going to jurisdiction raises procedural problems for the tribunal. At what stage of the proceedings should the tribunal decide the question? Does the actual question go to jurisdiction? Under *Adekeye*'s case this did not raise any real difficulty for the tribunal. The complainant had to say when the act complained of had occurred. The time-based criteria (the time bar and the date of dismissal) could then be mechanically applied. But if, as is my opinion, that a substantive criterion has to be applied, more may need to be known and some investigation may have to take place. There seems to be no escape from the conclusion that the whole of the 'employment field' provision (in the 1975 Act, s 2) is relevant to jurisdiction. The complainant must prove—satisfy the tribunal—that his or her complaint comes within the relevant section. If the complainant fails to do so, then the claim must fail both substantively and as a matter of jurisdiction. This would then preclude any consideration whether or not there was any discrimination contrary to the primary provisions of the relevant Act or any victimisation.

**[152]** But this tidy dichotomy will rarely exist in practice. The question whether the complainant was subjected to some 'other detriment' overlaps with (but is not the same as) the question whether the claimant was treated 'less favourably'. The tribunal will often find itself in practice in the same position when deciding an issue concerning less favourable treatment as it now does when it has to decide a dispute which turns upon the provisions which define the 'employment field' and will find it advantageous to make use of the same procedures to simplify hearings and separate off those claims which can have no proper basis and those allegations which appear to have no substance in fact. As the cases demonstrate, the tribunal is competent to decide whether it has jurisdiction and any such decision can be the subject of an appeal to the appeal tribunal.

THE INDIVIDUAL CASES

**[153]** In all the cases under appeal the courts below had treated themselves as bound by *Adekeye*'s case. They accordingly decided them against the present appellants on jurisdictional grounds (and/or time bar) without considering or investigating the merits of the appellants' claims. I have given my opinion that *Adekeye*'s case is not good law; it follows that all the appeals should be allowed and remitted for further hearing unless there is some other factor which justifies not taking that course.

*Rhys-Harper*

**[154]** The whole of her complaint involved allegations of less favourable treatment which fell within the ambit of the 'employment field' as being either part of the dismissal process itself or part of the internal review of her dismissal. Her primary problem was that she had not made any claim in the employment tribunal until 18 February 1999. The cut-off date for her was therefore 19 November 1998. She had been dismissed at a disciplinary hearing held on 10 October. She had exercised her right of internal appeal and the hearing was on 9 November. Originally her complaints were confined solely to her being dismissed on the ground of what had occurred on 6 October (the date of the incident involving guests at the swimming pool for which she was being disciplined). However when giving evidence at the hearing of her internal

appeal, which was conducted by the respondents' general manager, Mr Adamson, she stated that she been subjected to sexual harassment at an earlier stage of her employment and referred also to other earlier acts of sexual discrimination at earlier dates which she had not complained about at the time. Mr Adamson asked her to give him a written statement concerning the earlier incidents so that he could investigate them himself. (The written statement has not been put in evidence in the present proceedings.) She later told the employment tribunal that 'it was investigated badly'.

**[155]** On 30 November Mr Adamson sent Miss Rhys-Harper two separate letters. One, headed 'Re Appeal Hearing' consisted of one sentence: 'Following your appeal against your dismissal, having investigated the events the company has found there was sufficient grounds to dismiss and therefore the decision stands.' The other headed: 'Re Allegation of sexual harassment against Ken Osborn.' In it Mr Adamson referred to the allegation of sexual harassment she had made against Mr Osborn, informed her that a full and thorough investigation had been made into the alleged incident (which she had said had occurred at an earlier date when she had gone into the mens' showers and no one else had been present), that staff had been interviewed, including Mr Osborn, that it was confirmed that she had reported the incident but had asked for the information to remain private, that other staff had been unable to substantiate or witness the alleged harassment and that accordingly the company had concluded that there was 'insufficient evidence to establish a case against Mr Osborn'. He ended his letter by stressing that the company did not condone harassment or victimisation and any member of staff found guilty of any form of harassment would be dealt with in accordance with company policy and disciplinary procedures, adding that if additional evidence should become available a further investigation would be held.

**[156]** In her application to the employment tribunal, she confined her complaint to sexual harassment and (it seems) constructive dismissal. Her particulars of her complaint only referred to alleged incidents of sexual harassment and bullying occurring over a period January 1998 to October 1998 and to the incident which occurred on 6 October 1998 and had led to her dismissal. She alleged that the investigation of the 6 October incident and her complaints about Mr Osborn had not been investigated properly by the company prior to dismissing her. The employment tribunal considered that time could be treated as running from 30 November and that her claims were accordingly in time. Before the tribunal she had appeared in person and the company had been unrepresented and had merely made a short written submission.

**[157]** Before the EAT ([2000] IRLR 810) both sides were represented, the company by an employee and Miss Rhys-Harper by counsel. Her counsel put her case solely on the basis of sexual discrimination submitting that 'the act complained of' was 'the act of failure to investigate properly and dismissing her complaint' (sic). But it was not part of her case that she had asked Mr Adamson for an investigation, nor has she alleged that in that investigation she was treated unfavourably on the grounds of her sex. The EAT were nevertheless prepared to treat this complaint as referring to a continuing breach still existing on 30 November but they rejected the claim on the basis of *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110. If the EAT was not correct in its conclusion about the time bar point, the claim would have failed anyway; the *Adekeye* point would be academic.

**[158]** Your Lordships consider that the case should be remitted to enable the further consideration of her claim unfettered by the decision in *Adekeye*'s case. For myself, I have considerable doubts whether this is an appropriate order to make. There seems to have been a mistaken assumption that under the 1975 Act there was an entitlement to make a free-standing complaint of sexual harassment and to overlook the necessity for establishing a breach within the criteria stated in s 1(1)(a) of the Act and satisfying the substantive requirements of s 6(2)(b) which I have endeavoured to explain. The fact that *Adekeye*'s case was wrong does not mean that s 6(2) is not still relevant to the admissibility of the claim now being put forward. Nor does it mean that the three-month time limit can be forgotten about or that it is unnecessary to do justice as between both parties and to consider whether she had ever made the complaint now relied on prior to its being introduced during the hearing. Since the decision of the House is that the case should be remitted, I trust to a freshly constituted tribunal which will reconsider the whole matter, I will say no more about these points as they will now have to be subject of a decision of an employment tribunal. If her present complaint was time-barred at the time she first made it, it remains time-barred now.

*D'Souza*

**[159]** This case too has complexities. In 1992, the appellant had made claims of unfair dismissal, race discrimination and victimisation which were upheld by the employment tribunal which ordered that he be reinstated. In March the following year Lambeth London Borough Council (Lambeth) informed him that he would not be reinstated. On 1 July 1995, the appellant made a complaint of further discrimination and victimisation in respect of the failure of Lambeth to reinstate him. On 10 July 1995, the tribunal found that it had not been reasonably practical to reinstate him and made an appropriate award of compensation taking into account the failure to reinstate him. The tribunal communicated its decisions to the parties on 10 and 14 August. Meanwhile, on 31 July, the appellant had lodged a further application to the tribunal effectively duplicating that of 1 July alleging that the refusal to reinstate was race discrimination and victimisation. It was this application which came before the tribunal on 23 February 1996 and was dismissed on the basis of *Adekeye*'s case.

**[160]** The problem for the appellant is that his essential complaint remains that he was not reinstated. It is this act which he alleges amounted to discrimination and victimisation. But he has already, pursuant to the earlier decision of the employment tribunal, been compensated by Lambeth for the failure to reinstate and there is nothing further which can form the basis of a claim for compensation. I therefore agree with your Lordships that the appeal in this case ought to be dismissed.

*The 1995 Act cases*

**[161]** These four cases also raise some problems. Two of them are concerned with the content of references: *Kirker v British Sugar plc* and *Angel v New Possibilities NHS Trust*. A third, *Bond v Hackney Citizens' Advice Bureau*, concerns an answer given to a mortgage insurance company. The fourth, *Jones v 3M Healthcare Ltd*, is different and relates to the refusal to return property. They all lie close to the limits of what comes within the boundaries of the 'employment field'. Three of them raise arguable cases of victimisation—Kirker's case, Jones' case and Angel's

case—and are thus capable of satisfying the discrimination requirement but still need to satisfy the 'employment field' requirement.

**[162]** Jones' case is perhaps the simplest case. Mr Jones complains of the refusal to allow him to have back business cards, his personal property, which were left behind at his workplace when he was dismissed. The connection with his employment is clear and not affected by the delay which occurred. I would therefore allow the appeal and order a remission.

**[163]** Kirker's case and Angel's case are, as I have said reference cases but of a particular kind. They relate to delayed applications for references which were not responded to as favourably as the appellant would have wished. Mr Kirker complains that his employers declined to answer the question whether they would have re-employed him. The person answering a reference is under a duty to the person making the inquiry to give an honest and truthful answer. If the truth is that the referee would not have re-employed the relevant person, the referee must say so even though it may be fatal to that person's job application to the person making the inquiry. The same considerations apply to the complaint of Mrs Angel. If the case of either of them is that the former employer should have given a reference which it did not believe to be factually correct and accurate, the complainant will have to be prepared to allege and prove that the former employer would have given other ex-employees references which it knew were inaccurate or incorrect. This is a difficult case for any complainant to make credibly and, if they cannot, they have no credible case that they have been treated less favourably. Since the answer to this question depends upon facts not in your Lordships' possession on the hearing of these appeals I would therefore allow the appeals and order remission as in the case of *Relaxion Group plc v Rhys-Harper*.

**[164]** Finally in the case of Mrs Bond. Her case has a longer history behind it. Her complaints centre on two points. One is that Hackney Citizens' Advice Bureau declined to supply her with references in accordance with a draft which she herself had prepared. The other is that they declined to state to her mortgage insurance company that she had been made compulsorily redundant. It was the bureau's understanding that she had agreed to voluntary redundancy. Following the same logic, I would allow her appeal and order a remission so that the whole matter can be considered afresh.

CONCLUSIONS

**[165]** For these reasons, which substantially accord with those of my noble and learned friend Lord Nicholls, I would allow the appeals in all the cases except D'Souza and make orders accordingly for remission to an employment tribunal: I would dismiss the appeal in D'Souza.

**LORD SCOTT OF FOSCOTE.**

**[166]** My Lords, each of these appeals raises the important question of principle whether discriminatory acts (or omissions) detrimental to an ex-employee but carried out by an ex-employer after the employment has come to an end can give rise to liability under the anti-discrimination legislation at present in force. Although the point of principle arises in each of the appeals, and needs to be considered as a point of principle, the point requires a context for its implications to be fully comprehended. The facts of each appeal have been fully set out in the opinions of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead. I gratefully adopt their exposition and

can confine myself to referring to the essential skeletal details of the respective cases.

*RELAXION GROUP PLC v RHYS-HARPER*

**[167]** The appellant's complaint to the employment tribunal began its life as one of sexual harassment and constructive dismissal. She had been accused of misconduct. A disciplinary hearing to inquire into the incident in question was conducted by a Mr Osborn. His decision was that she was to be dismissed and she was given one week's notice, expiring on 22 October 1998. The decision was formally communicated to her by letter of 15 October 1998. Under Relaxion's internal disciplinary procedures she had the right to appeal against the dismissal decision. She decided to exercise this right and appealed. Her appeal was heard by Mr Adamson, Relaxion's general manager. In the course of the appeal hearing, on 9 November 1998, the appellant complained that prior to the events that were the occasion of her dismissal she had been the victim of sexual harassment by Mr Osborn. It is, in my opinion, a fair inference that her complaint about sexual harassment by Mr Osborn was not a free-standing complaint separate from her appeal against dismissal but was put forward as a reason for impugning Mr Osborn's dismissal decision.

**[168]** On 30 November 1998 the appellant received two letters from Mr Adamson. One letter told her that her appeal against dismissal had failed. The other letter told her that her sexual harassment complaint against Mr Osborn had been the object of a 'full and thorough investigation' and that there was 'insufficient evidence to establish a case against Mr Osborn'.

**[169]** It is of relevance that the latter letter said that 'members of staff did confirm that you had reported an incident to them and that you had requested that the information remain private'. This comment is consistent with the appellant's evidence to the employment tribunal that she had not previously to 9 November 1998 made any formal complaint about the sexual harassment (see the note of evidence made by the chairman of the tribunal).

**[170]** The appellant's application to the employment tribunal was made on 18 February 1999. She complained of sexual harassment and unfair dismissal. A preliminary point was taken. The point was whether the application had been made within the prescribed three months. At a preliminary hearing to deal with the point the tribunal concluded (by a majority) that the appellant's employment had continued until 30 November 1998 and that, accordingly, her application was in time. In the course of their extended reasons the tribunal described the appellant's complaint as being 'for a series of incidents of sex discrimination which lasted until early October 1998' but took the view that Mr Adamson's 30 November 1998 decision 'could be in itself a continuing discrimination against her'.

**[171]** Relaxion's appeal to the Employment Appeal Tribunal (EAT) succeeded: ([2000] IRLR 810). The EAT held, correctly as is now agreed, that the appellant's employment had terminated on 22 October 1998 when the one week's notice had expired. That being so, her application to the employment tribunal, in so far as it related to unfair dismissal or to sexual harassment preceding her dismissal, was out of time. If her sexual discrimination claim was to be viable then, unless she were given an extension of time, she would need to rely on an act of discrimination occurring after 19 November 1998, ie after the termination of her employment on 22 October 1998.

**[172]** Accordingly, both in the EAT and in the Court of Appeal ([2001] EWCA Civ 634, [2001] IRLR 460, [2001] ICR 1176) the appellant's claim was presented as including a complaint about an act of discrimination consisting of failure by Mr Adamson to investigate properly her complaint of sexual harassment. The EAT (at 810 (para 4)) posed the question whether she had 'a freestanding claim ... in relation to matters occurring after 19 November 1998 even though she had then ceased to be an employee'. In the Court of Appeal Pill LJ described her complaint ([2001] IRLR 460 at [2]) as a 'complaint about sexual harassment'—which is what it had originally been—but Buxton LJ described it (at [39]) as 'solely a failure ... properly to investigate her complaint'—which is what it had had to become.

**[173]** The EAT held that since the alleged discriminatory conduct had taken place after the appellant's employment had come to an end, her complaint could not be brought within the 1975 Act. Her appeal on this point was dismissed by the Court of Appeal. The point is now before your Lordships.

**[174]** In summary, the alleged discriminatory conduct was committed by Relaxion, through Mr Adamson, after the appellant's employment had come to an end. The conduct in question was Mr Adamson's alleged failure to deal properly with the sexual harassment complaint made to him as part of the appellant's case that her dismissal by Mr Osborn ought not to be allowed to stand. In failing to deal properly with the complaint Mr Adamson, it is said, discriminated against her.

*D'SOUZA v LAMBETH LONDON BC*

**[175]** In this case the alleged discrimination consisted of Lambeth's failure to reinstate the appellant in the job from which he had been dismissed. He was dismissed in January 1990. Following his dismissal he made an application to the employment tribunal complaining of unfair dismissal, race discrimination and victimisation. His application was successful on all three grounds and on 16 November 1992 the tribunal made an order that Lambeth reinstate him by 16 January 1993. Lambeth did not reinstate him. In July 1995 the appellant instituted a fresh application against Lambeth complaining of racial discrimination and victimisation in respect of Lambeth's failure to reinstate him. Lambeth contended that the post the appellant had previously occupied no longer existed and that it was not practicable for them to reinstate him. The tribunal accepted these contentions and, by a decision of 18 October 1995, made an award of compensation in the appellant's favour in respect of his original complaint of unfair dismissal, having regard to the fact that he had not been reinstated. In effect this decision replaced the original order for reinstatement with an award of compensation.

**[176]** On 14 March 1996 the tribunal held it had no jurisdiction under the 1976 Act to hear the appellant's complaint of race discrimination in respect of Lambeth's refusal to reinstate him because the discriminatory conduct in question took place at a time when the appellant was no longer an employee of Lambeth. The EAT ([2000] All ER (D) 878) and the Court of Appeal ([2001] EWCA Civ 794, [2001] All ER (D) 346 (May)) agreed. The point is now before your Lordships.

**[177]** In *D'Souza*'s case the important context in which the point arises is not simply that the discriminatory conduct complained of was post-employment but is also that the complaint relates to the statutory remedies for unlawful discrimination. It was the Employment Protection (Consolidation) Act 1978, now replaced by the Employment Rights Act 1996, that provided reinstatement

as a possible remedy (see s 113 of the 1996 Act; it was the same Act that enabled the employer to seek a determination that reinstatement was not reasonably practicable (see s 116(5) and (6) and s 117(7) of the 1996 Act); it was the same Act which enabled an award of compensation to be made if an order for reinstatement was not complied with (see s 117(1) and (2) of the 1996 Act).

THE DISABILITY DISCRIMINATION APPEALS

**[178]** There are four cases, in each of which the appellant suffers from a disability and alleges that he has suffered discrimination from an ex-employer on account of the disability. In each, a claim was made under the Disability Discrimination Act 1995. *Kirker v British Sugar plc* concerns references. The appellant was dismissed by British Sugar in March 1997 and successfully claimed that his dismissal involved discrimination on account of his disability. In August 1999 he applied for a position with another company and named British Sugar as a previous employer who could give a reference about him. British Sugar were asked by the prospective employer to supply the reference. They say they did so, but that is in dispute. The appellant's job application failed and he commenced proceedings both against the prospective employer and against British Sugar. The claim against British Sugar alleges discrimination and victimisation in failing to supply the reference. The question arises whether, even if the appellant's claim is factually correct, the discrimination is covered by the 1995 Act. He was an ex-employee seeking a reference from an ex-employer.

**[179]** In *Jones v 3M Healthcare Ltd* the appellant was dismissed and brought unfair dismissal and disability discrimination proceedings against his ex-employers. The proceedings were unsuccessful. The appellant then asked his ex-employers to return to him some business cards which he had left in his erstwhile office and, on their failure to do so, successfully sued in the county court for the return of the cards. He then commenced proceedings under the 1995 Act alleging that his ex-employers' failure to return his cards was because he had instituted the discrimination proceedings and was accordingly victimisation. But at the time of the allegedly victimising conduct, the appellant was no longer an employee. Is the discrimination covered by the 1995 Act?

**[180]** *Angel v New Possibilities NHS Trust* is another reference case. The appellant was dismissed from her employment with the NHS Trust in July 1998. She claimed that she had been dismissed on account of her disability. Her claim was successful. She sought new employment. The NHS Trust provided a reference about her to the proposed new employers. But she was not offered the job. She then claimed that the NHS Trust had victimised her by giving an adverse reference about her.

**[181]** Finally, there is *Bond v Hackney Citizens' Advice Bureau*. The appellant had been employed by the Citizens' Advice Bureau but in 1994 had been made redundant. In November 1999 she made an application to an employment tribunal alleging that she had been discriminated against by the Citizens' Advice Bureau on account of her disability. And in June 2000 she made a further application alleging that the Citizens' Advice Bureau had victimised her by declining to give a reference about her and also by the manner in which they had responded to inquiries made about her in connection with her mortgage repayments. The conduct complained of took place after her employment by the Citizens' Advice Bureau had come to an end.

**[182]** In each of these appeals the employment tribunal took the view that the complaints were not covered by the 1995 Act for the reason that the

discriminatory conduct complained of had taken place after the employment had come to an end. The EAT and the Court of Appeal agreed. The point is now before your Lordships.

THE SCOPE OF THE ANTI-DISCRIMINATION LEGISLATION

**[183]** It is clear that each of the anti-discrimination statutes, that is to say, the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995, covers discrimination against applicants for jobs and discrimination against current employees. The issue is whether or to what extent the Acts cover discrimination against ex-employees. There are three particular types of case in which alleged discrimination against ex-employees has led to litigation and to consideration being given to the issue by the courts. They are, first, cases in which the alleged discrimination has taken place in the course of domestic appeal procedures; second, cases in which an ex-employee has sought a reference from his or her ex-employer; and, third, cases in which some benefit has been extended by the ex-employer to some but not all ex-employees. There may, of course, be cases which do not fall into any of these categories. *Jones v 3M Healthcare Ltd* and the ex-employer's retention of his business cards is one such case.

**[184]** The issue is essentially one of statutory construction. The language used in each of the three Acts suggests, if read literally, that ex-employees are not protected. The 1975 Act refers to 'a woman employed by' the discriminator (see s 6(2)). The 1976 Act refers to 'a person employed by' the discriminator (see s 4(2)). The 1995 Act refers to 'a disabled person whom [the discriminator] employs' (see s 4(2)). This language is indicative of a present relationship rather than a past one. My noble and learned friend Lord Hope of Craighead has, in [44]–[48] of his opinion, referred to a number of textual provisions in the 1975 and 1976 Acts that reinforce the indication of a present relationship. And, as he points out (at [49] and [50], above), the indication of a present relationship is further reinforced by the language used in the 1995 Act.

**[185]** The conclusion that ex-employees are not protected under these three Acts is consistent with domestic authority. In *Nagarajan v Agnew* [1994] IRLR 61, [1995] ICR 520 Knox J held that there had to be a 'subsisting employment relationship' for a claim under s 4(2) of the 1976 Act. The Court of Appeal in *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110 came to the same conclusion on the point. Peter Gibson LJ said ([1997] IRLR 105 at 109, [1997] ICR 110 at 118):

> '.... giving the words "in the case of a person employed by him" their ordinary and natural meaning in their context, those words mean, and can only mean, "in the case of a person who is employed by him".'

**[186]** This conclusion has not, however, met with uniform satisfaction. In *Adekeye*'s case itself Peter Gibson and Pill LJJ said that it was unsatisfactory that the 1976 Act did not give a remedy for discrimination in the handling of an appeal against dismissal by an ex-employee. Morison J in the EAT has twice expressed dissatisfaction with *Adekeye*'s case (see *Coote v Granada Hospitality Ltd (No 2)* [1999] IRLR 452 at 454–455, [1999] ICR 942 at 949–950 and *D'Souza v Lambeth London BC* [2000] All ER (D) 878).

**[187]** It has been urged upon your Lordships to adopt a purposive approach to construction of the relevant language in the three Acts. It must surely, it is said, have been the intention of the legislature to protect an ex-employee from discrimination, and a fortiori from victimisation for having previously

complained of discrimination, where the discriminatory acts complained of consist of the unfair handling of appeals against dismissal. In these cases the appellant will, if the appeal succeeds, be reinstated as an employee as though he or she had never been dismissed. How can Parliament have intended that an employer, in reaching a decision as to whether an employee's dismissal should stand or should be set aside, should be free from the restraints on discrimination imposed by the Act? It seems to me that once the question is asked there can be only one answer. Of course Parliament must have intended the Acts to apply to such cases.

**[188]** On the other hand, where references are concerned the answer to whether Parliament must have intended the Acts to apply seems to me by no means clear. A request for a reference is, in part, a request for an opinion about the individual in question and, in part, a request for a statement of known events concerning that individual. An employer has no general contractual obligation to give a reference about an employee or an ex-employee but, as Lord Slynn of Hadley said in *Spring v Guardian Assurance plc* [1994] 3 All ER 129 at 161, [1995] 2 AC 296 at 335:

> '... in many cases an employee will stand no chance of getting another job, let alone a better job, unless he is given a reference. There is at least a moral obligation on the employer to give it.'

Lord Woolf went further and expressed the view ([1994] 3 All ER 129 at 179, [1995] 2 AC 296 at 354), that in respect of some types of employment—

> 'it is necessary to imply a term into the contract that the employer would, during the continuance of the engagement or within a reasonable time thereafter, provide a reference at the request of a prospective employer which was based on facts revealed after making ... reasonably careful inquiries ...'

And Lord Goff of Chieveley commented ([1994] 3 All ER 129 at 146, [1995] 2 AC 296 at 319):

> 'The provision of ... references is a service regularly provided by employers to their employees; indeed, references are part of the currency of the modern employment market.'

**[189]** Their Lordships held in *Spring*'s case that an employer, or ex-employer, would owe a duty not only to the prospective new employer but also to the subject of the reference to take reasonable care that the reference was fair and accurate.

**[190]** Whether or not there is an implied contractual obligation on an employer, or ex-employer, to give a reference, as there may be in some cases, most employers would, I am sure, usually give a reference if asked to do so. But some might be reluctant to do so, particularly if a long period had elapsed since the object of the reference had been an employee. If the anti-discrimination Acts are held to extend generally to ex-employees as well as current employees, any refusal or failure to supply a reference when asked to do so, no matter what period of years might have elapsed, might attract a discrimination complaint.

**[191]** Employers would be in a particularly vulnerable position where the possibility of a victimisation complaint were present. Suppose an employee has made one, or more than one, unsuccessful discrimination complaints during the

currency of his employment with a particular employer. He then leaves his employment and later asks for a reference in connection with an application for a job with some other employer. Must the first employer inform the prospective employer of the history of discrimination complaints made by the ex-employee? If the first employer refrains from doing so, will he be in breach of his duty to the prospective employer? If he does inform the prospective employer of the fact that the discrimination complaints were made and of their outcome, would that be victimisation? Perhaps not, but to include in the reference the details of the unsuccessful discrimination complaints would surely be damaging to the ex-employee's job prospects. Could it not be represented as constituting less favourable treatment than would have been accorded to an ex-employee who had not made such complaints? Similar problems might, of course, arise in relation to requests for references made by current employees.

**[192]** The problems about references are demonstrated by some of the disability discrimination cases now before the House. In *Kirker v British Sugar plc* complaint is made of a failure by British Sugar to provide a reference. Was British Sugar under an obligation to provide a reference? Presumably not. It may be that a reference was in fact provided. But the appellant did not succeed in getting the job applied for. Was that because the reference was unfavourable? If it was unfavourable was that because the appellant had successfully claimed to have been dismissed on account of his disability?

**[193]** *Angel v New Possibilities NHS Trust* raises similar questions. Victimisation by the supply of an unfavourable reference is the kernel of the complaint. And in *Bond v Hackney Citizens' Advice Bureau*, too, victimisation by an ex-employer in failing to supply a reference is the kernel of the complaint.

**[194]** It is one thing to allow the Acts to apply to references requested about current employees during the currency of the employment. It is quite another thing to allow them to apply without limit of time to all ex-employees. It is clear enough that Parliament did not have these problems in mind. Otherwise some provision would surely have been included in the Acts clarifying the position. But that is not by itself a reason why the Acts, if their language allows it, should not be applied to these cases. The literal language of a statute ought not, however, to be extended so as to cover matters that Parliament did not have in mind unless it is clear from the statute properly construed that Parliament would have intended the extension.

**[195]** The same problems are associated with post-employment benefits. If ex-employees are led to expect post-employment benefits, such as membership of sports clubs, concessionary travel benefits or the like, it is easy to conclude that, even if their expectation is not strictly contractual, their deprivation of these benefits in circumstances involving discrimination on sex, race or disability grounds should be covered by the relevant Act. If, however, no such expectation has been engendered and an employer decides to offer some extra-contractual benefit to employees and to extend the benefit to some but not all ex-employees, can the excluded ex-employees make a discrimination complaint? A person can decide on which strangers he will bestow his generosity and from whom he will withhold it. Can he not exercise the same freedom to discriminate in relation to those who were in the past his employees but have become strangers? Why should the anti-discrimination Acts apply? The answer to these questions is not, in my opinion, apparent from the Acts themselves.

[196] So how is the line to be drawn. How is the principle to be formulated that would enable ex-employers and ex-employees to judge whether the imposition of a particular detriment, alleged to be discriminatory, was or was not covered by the Act? One answer would be to construe the Acts simply as covering all ex-employees. The participle 'employed' in the 1975 and 1976 Acts would be read as meaning 'has been or is employed', and the word 'employs' in the 1995 Act would be read as meaning 'employs or has employed'. An alternative answer would be to confine the relevant words to their strict literal meaning and exclude ex-employees from protection under the Acts in all circumstances. I would, for my part, reject both these extremes. I would reject the first because it requires a purposive construction that can only be justified by attributing to Parliament an evident intention that, to my mind, is not in the least evident. I would reject the second because it introduces an arbitrary rigidity into the implementation of the Act that is unrealistic and cannot have been intended.

[197] In my opinion, the answer to the conundrum can be found by concentrating on the relationship between the employer and employee that is brought into existence when the latter enters the service of the former. The relationship is, of course, based on contract, express or implied, but does not necessarily come to an end, ipso facto, when the employment comes to an end. The internal appeal procedures that most employers, and all good ones, institute are a good example. Employees are entitled to avail themselves of these procedures. An employee who is dismissed and challenges the dismissal does not because he has been dismissed lose his right to appeal. The relationship between employer and employee, or ex-employee as he may by reason of his dismissal have become, is still in existence. The employee's, or ex-employee's entitlement is not simply an entitlement to lodge an appeal. He or she is entitled also to a fair hearing that is not tainted by discrimination. An obligation to provide such a hearing lies on the employer, or ex-employer. The relationship that is brought into existence when an employee enters an employer's service is not, in my opinion, wholly terminated so long as the internal appeal procedure is on foot. And, in my opinion, the reference to a woman 'employed' in the 1975 Act, to a person 'employed' in the 1976 Act and to a person whom the alleged discriminator 'employs' in the 1995 Act can and should be given a purposive construction so as to cover dismissed employees during the currency of an internal appeal process.

[198] If the opinion I have expressed in the preceding paragraphs is right, *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110 was wrongly decided. The case was one in which the complainant was dismissed by the Post Office but utilised the Post Office's internal appeal procedures to appeal against the dismissal. Her appeal was dismissed. She then instituted proceedings under the 1976 Act contending that the failure of her appeal was on account of racial discrimination. The EAT held ([1995] IRLR 297, [1995] ICR 540) that her complaint was not justiciable because at the time her appeal against dismissal was dealt with she was no longer an employee of the Post Office. The Court of Appeal agreed.

[199] It is of interest that an argument to somewhat of the same effect as that which I have attempted in para 32 was addressed to the Court of Appeal in *Adekeye*'s case. The argument is recorded by Peter Gibson LJ ([1997] IRLR 105 at 109, [1997] ICR 110 at 118):

> '[Counsel for the appellant] argued that the internal appeal is an integral part of the dismissal process and that until the appeal was concluded adversely to the employee, that process continued; the rejection of the applicant's appeal was therefore to be treated as her dismissal at a time when she was employed.'

Peter Gibson LJ characterised this as 'an impossible argument'. He said:

> '... the appeal procedures [do] not turn what was worded as an unconditional dismissal into a conditional one. Further, to argue that the dismissal did not take effect until the conclusion of the appeal is contrary to the decision of this court in *J Sainsbury Ltd v Savage* ([1980] IRLR 109, [1981] ICR 1).'

I respectfully agree with Peter Gibson LJ's cited remarks about the unconditional nature of a dismissal and its immediate effect in terminating the employment but the thought behind counsel's argument was, in my opinion, valid. The issue was whether the relationship between employer and employee, or ex-employee, during the currency of the appeal procedures was a relationship to which s 4(2) of the 1976 Act applied. It does not follow that because the dismissal was immediate and unconditional the Act could not apply to the relationship that would necessarily continue until the conclusion of the appeal procedures. In my opinion, for the reasons given the Act would continue to apply.

**[200]** Where references or other post-employment benefits are concerned the question whether the anti-discrimination Acts apply should, in my opinion, similarly depend on whether the relationship between employer and employee brought into existence when the employee entered the employer's service is still in existence. For my part I find it difficult to construct circumstances, other than those arising out of internal appeal procedures, where the relationship would still continue notwithstanding the dismissal, or departure for other reasons, of the employee. Lord Woolf in *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296 suggested that employees in certain types of employment might have an implied contractual right to a reference, whether before or after their employment had come to an end. If there were such a case, the continuing responsibility of the ex-employer towards the ex-employee in regard to references might constitute a continuing relationship sufficient to justify the application of the anti-discrimination Acts. Another possible scenario is that of an employee who has been dismissed but is not allowed to return to his office to remove his belongings. Perhaps *Jones v 3M Healthcare Ltd* is such a case. In my opinion every employee who is dismissed is entitled to expect to be given a reasonable opportunity, under supervision if necessary, to remove his or her belongings from the premises where he or she was employed. The entitlement might be founded on implied contract or merely reasonable expectation but in either case I would regard the relationship between employer and employee as continuing for a reasonable period for that purpose. A discriminatory refusal to allow the ex-employee to remove his or her belongings would not, in my opinion, fall outside the Act.

**[201]** Special problems arise where the discrimination allegation is, or includes, an allegation of victimisation. Victimisation (see s 4 of the 1975 Act, s 2 of the 1976 Act, and s 55 of the 1995 Act) is not per se unlawful. It is a form of discrimination that becomes unlawful if it takes place in circumstances in which the Act declares it to be unlawful eg in relation to an employed person by

subjecting the person to any detriment (see s 6(2) of the 1975 Act). Victimisation does not, therefore, extend the scope of protection against discrimination. It simply requires a different comparison to be made than that which has to be made for other forms of discrimination. If, for example, a reference is refused to an ex-employee as an act of victimisation, the relevant Act is no more, and no less, applicable than it would have been if the discrimination had taken some other form. But where the victimisation claim is brought under the 1975 Act, the position is complicated by the need to take account of European Community law.

**[202]** The *Coote v Granada Hospitality Ltd* litigation arose out of the following circumstances. Miss Coote, an employee of Granada, brought sex discrimination proceedings against them. The proceedings were settled and Miss Coote left Granada's employment. She then sought but failed to find employment elsewhere. She brought proceedings against Granada alleging that her failure was because, by way of reprisal for her previous sex discrimination claims, Granada had refused to supply a reference about her. The EAT sought a ruling from the European Court of Justice as to whether Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) (the Equal Treatment Directive) required member states to introduce measures to enable victimised persons in Miss Coote's position to pursue a claim. The European Court held that it did. It said that the directive—

> 'requires member states to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the end of the employment relationship, refuses to provide references as a reaction to proceedings brought to enforce compliance with the principle of equal treatment within the meaning of the directive.' (See [1998] All ER (EC) 865 at 876, [1999] ICR 100 at 112, [1998] ECR I-5199 at 5220 (para 19).)

**[203]** This decision and the directive with which it was concerned apply to sex discrimination cases only. They do not apply to race discrimination or disability discrimination cases. Following the ruling by the European Court, the case returned to the EAT. The EAT held that, in the light of the European Court ruling, the words 'a woman employed by him' in s 6(2) of the 1975 Act should be construed, in conformity with the directive, as covering discrimination against former employees. Morison J declined to follow *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110. He held that the European Court ruling had relieved him of the need to do so. In my respectful opinion it had not. There is no difference between the words used in the 1975 Act and those used in the 1976 Act with which *Adekeye's* case was concerned. The Court of Appeal decision on the 1976 Act words was just as applicable to the words in the 1975 Act. Moreover, the directive did not have direct effect in the domestic law of this country. It required, if its terms differed from domestic law, to be implemented in domestic law by primary or subordinate legislation. I, of course, accept that domestic legislation intended to implement a directive should, if possible, be construed in a manner consistent with the directive. But the 1975 Act was not passed in order to implement the directive. It preceded the directive. It may be that the government believed that no implementation measure was necessary because the 1975 Act did all that was required to comply with the directive. But the Court of Appeal decision in *Adekeye's* case, coupled with the European Court decision

in *Coote*'s case, showed, in my opinion, that that was not so. I do not think it was open to Morison J to disapply *Adekeye*'s case.

**[204]** In my opinion, save for cases where the relationship between employer and employee is still continuing notwithstanding the termination of the employment, the conclusions of the Court of Appeal in *Adekeye*'s case were correct and should be followed. The 1976 directive has now been amended by a new directive Council Directive (EC) 2002/73 (OJ 2002 L269 p 15), which must be implemented at latest by 5 October 2005. If and to the extent that domestic law is inconsistent with these directives it is for government and Parliament to provide the remedy and not, in my opinion, for the courts to do so.

**[205]** I must now return to the individual appeals.

(1) *Relaxion Group plc v Rhys-Harper.* I would allow the appeal in this case. The appellant complains of sex discrimination in her ex-employer's handling of her appeal against dismissal. A complaint of that character is, in my opinion, covered by s 6(2) of the 1975 Act.

(2) *D'Souza v Lambeth London BC.* I would dismiss this appellant's appeal for the reasons given by my noble and learned friend, Lord Nicholls of Birkenhead. The statutory remedy of reinstatement is associated with the statutory alternative of compensation if reinstatement can be shown to be impracticable. It was so shown in proceedings to which the appellant was a party and by which he is bound. There is no room for a complementary claim that Lambeth's failure to reinstate him was discriminatory.

(3) In each of *Kirker v British Sugar plc, Angel v New Possibilities NHS Trust* and *Bond v Hackney Citizens' Advice Bureau* the alleged acts of discrimination occurred after the relationship between the appellant and his or her ex-employer had come to an end. None of the appellants was, at the time, 'a person whom [the alleged discriminator] employs' (see s 4(2) of the 1995 Act). I would dismiss these appeals.

(4) In *Jones v 3M Healthcare Ltd* the courts below dismissed the case on the ground that at the time the alleged act of discrimination took place the appellant was no longer a person whom 3M Healthcare Ltd 'employs'. In my opinion, the appellant was entitled to a reasonable opportunity to remove his belongings, including his business cards, from the premises where he was previously employed. The relationship between him and his ex-employer that had been brought into existence when he entered their employ continued for that purpose during that period. If he had sought to remove his cards during that period and had been prevented from doing so as an act of victimisation, the case would in my opinion have been covered by the 1975 Act. But he was dismissed in November 1997, his proceedings for unfair dismissal and disability discrimination were dismissed in August 1998 and he did not request the return of his cards until September 1999. A reasonable time for him to remove his belongings from his ex-employer's premises and to request their return had elapsed long before September 1999. By September 1999 the relationship between the appellant and 3M Healthcare Ltd had long since come to an end. His complaint is not in my opinion covered by the Act and I would dismiss his appeal.

**[206]** Save that I have formed the view that the applicability of the three Acts should be tied to the continuance of the relationship between employer and employee rather than to the duration of the actual employment, I am in respectful agreement with the views about these appeals and the issues they give

rise to that have been expressed by my noble and learned friend, Lord Hope of Craighead.

**LORD RODGER OF EARLSFERRY.**

[**207**] My Lords, on one level these appeals raise a short point of construction of the words 'a woman employed by him' in s 6(2) of the Sex Discrimination Act 1975, 'a person employed by him' in s 4(2) of the Race Relations Act 1976 and 'a ... person whom he employs' in s 4(2) of the Disability Discrimination Act 1995. In substance, however, the House has to decide whether, as the Court of Appeal have held, in terms of these anti-discrimination Acts it is quite lawful for employers to discriminate against their former employees in circumstances where it would be quite unlawful for them to discriminate against their current employees.

[**208**] I gratefully adopt the detailed accounts of the facts and issues given by my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead. As they show, allowing for the distinctive features of the 1995 Act, the objectives and, to a greater or lesser degree, the structure and terms of the three Acts are similar. Precisely because of that, it has come to be accepted that an interpretation of the wording of one Act will be a guide to the interpretation of the equivalent wording in another Act. Most notably, in *Anyanwu v South Bank Student Union (Commission for Racial Equality, interveners)* [2001] UKHL 14 at [2], [2001] 2 All ER 353 at [2], [2001] ICR 391, Lord Bingham of Cornhill said:

> 'Since the 1976 Act is one of a trio of Acts (with the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995) which contain similar statutory provisions although directed to different forms of discrimination, it is legitimate if necessary to consider those Acts in resolving any issue of interpretation which may arise on this Act.'

True to that spirit, in the hearings before the House counsel referred indiscriminately to authorities on the interpretation of the provisions in all three Acts. Nor did they suggest that any approach other than that indicated by Lord Bingham of Cornhill would be realistic or appropriate, even though, of course, the 1975 Act has to be interpreted in the light of Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) (the Equal Treatment Directive), whereas there is at present no equivalent European dimension lying behind the other Acts.

[**209**] Discrimination can take a variety of forms but all involve treating the person concerned less favourably than others. The law does not attempt to outlaw every form of undesirable discrimination. In Great Britain it concentrates on discrimination on the ground of sex, race and disability and then only in certain circumstances, including the employment field. In Northern Ireland the Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162 (NI 21) adds discrimination on grounds of religious belief and political opinion. Before sex and race discrimination were made unlawful, employers would sometimes try to preserve the all-male or all-white character of their workforce by simply refusing to take on women or ethnic minority job applicants. Similarly, employers might refuse to employ disabled people in order to avoid having to make even minor adjustments for them. The three anti-discrimination Acts make such tactics unlawful (see s 6(1)(c) of the 1975 Act and s 4(1)(c) of both the 1976 and 1995 Acts). Another form of discrimination was to offer to employ people but on less favourable terms. That is outlawed by para (b) of the same

subsections. Moreover, once the person is employed, the employer cannot discriminate by actually affording him less favourable terms of employment (see s 4(2)(a) of both the 1976 and 1995 Acts). In the case of sex discrimination the mechanism is different: s 1 of the Equal Pay Act 1970 implies an equality clause into all contracts of employment. Where these provisions are observed, they go a long way towards ensuring that everyone has access to employment and enjoys the same contractual rights. If the employer fails to comply with his obligations under the contract of employment, the employee concerned has the usual remedies for breach of the contract.

**[210]** Ensuring that all employees in similar positions have the same contractual rights is only a start. Employment is just as much about opportunities as about rights. Not for nothing was the body which was set up under the 1975 Act called the Equal Opportunities Commission. Employees do not have a contractual right to promotion, but they should have an opportunity to earn it. Similarly, certain types of training, with the prospect of a better job, may only be available to employees selected by the employer. The selection should be made fairly. The employer may run a social or recreational club which employees can apply to join. Again everyone should have an equal opportunity to join if they want to. If an employer were free to discriminate in these areas, which do not involve contractual rights as such, then those affected would be marginalised and unable to achieve their full potential. So one important purpose of the anti-discrimination Acts is to prevent employers from exercising their freedom of choice in such matters so as to discriminate against employees on the ground of their sex, race or disability. That is achieved by the provisions which lie at the heart of these appeals. In the case of the 1975 Act the relevant provision is s 6(2), but it is convenient to set out sub-s (1) also:

> '(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman—(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or (b) in the terms on which he offers her that employment, or (c) by refusing or deliberately omitting to offer her that employment.
>
> (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her—(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or (b) by dismissing her, or subjecting her to any other detriment.'

As sub-s (2) shows, the anti-discrimination Acts are not really concerned with employees' rights under their contracts of employment. So, for instance, where a contract of employment is tainted by illegality, an employee may none the less complain that her employer discriminated against her on the ground of her sex by dismissing her, since both the Equal Treatment Directive and the 1975 Act are designed to provide effective relief in respect of discriminatory conduct 'rather than relief which reflects any contractual entitlement which may or may not exist': see *Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787 at 806, [2001] ICR 99 at 119 (para 67) per Mance LJ. As Peter Gibson LJ put it ([2000] 4 All ER 787 at 799, [2001] ICR 99 at 113 (para 46)):

'It is the sex discrimination that is the core of the complaint, the fact of employment and the dismissal being the particular factual circumstances which Parliament has prescribed for the sex discrimination complaint to be capable of being made.'

Mummery J had made the same point when, in giving the judgment of the Employment Appeal Tribunal (EAT) in *Leighton v Michael* [1996] IRLR 67 at 69, [1995] ICR 1091 at 1098, he said that the claim of sex discrimination 'does not involve enforcing, relying on or founding a claim on the contract of employment'. Employees invoke the Acts not to enforce their contractual rights but to enforce their statutory rights not to suffer discrimination 'in the employment field', inter alia in respect of the opportunities to which the employer affords access.

**[211]** Therefore, although being employed is one of the keys which unlocks access to the rights and remedies conferred by the anti-discrimination Acts, to a considerable extent those Acts are actually concerned with discrimination in relation to the various kinds of opportunities that employees may enjoy in addition to any contractual rights. Of course, not even all contractual rights end on the termination of employment: an employee may still have both rights and obligations under the contract. Most obviously, an employee may have a right under his contract to be paid a pension or to continue to enjoy free medical insurance, while he may also be bound by a restrictive covenant in the contract. Not only an employee's rights and obligations under the contract of employment can continue after the employment itself comes to an end: an employer may continue to afford his former employees opportunities to enjoy some of the additional non-contractual benefits, such as access to sports or other recreational and social facilities. Since the anti-discrimination Acts are not tied to contractual rights and obligations, there is in principle no reason why the Acts should cease to have effect in respect of these continuing opportunities. I therefore have difficulty in seeing why Parliament, however cautious its approach, would ever have intended that it should be lawful for an employer to discriminate against a former employee in these respects. The idea, for instance, that Parliament intended that, after the 1976 Act was in force, an employer should still be able to bar a black former employee from entering the employer's social club while allowing white former employees to continue to enjoy the facility strikes me as untenable.

**[212]** The same applies to the provision of references. In some cases the employee may have a contractual right, whether express or implied, to be supplied with a reference. But even where that is not so, since an employee or former employee will often stand little chance of getting a new job without a reference, an employer will recognise at least a moral duty to provide one (see *Spring v Guardian Assurance plc* [1994] 3 All ER 129 at 161, [1995] 2 AC 296 at 335 per Lord Slynn of Hadley). And in providing the reference he owes a duty of care to his employee or former employee. Again, I have the greatest difficulty in believing that Parliament could have intended that it should be unlawful for an employer to discriminate in giving or withholding references for existing employees but perfectly lawful for him to do so in the case of ex-employees. Parliament often has to draw lines—and indeed does so explicitly in various ways in the anti-discrimination Acts, eg by limiting their application in the case of domestic employment. It is not hard to see the reason for that. It is very much harder to see why Parliament would have chosen to draw an arbitrary line

through the continuing effects of the employment relationship rather than leave the ban on discrimination to expire as and when those effects themselves were spent. In particular, I am not impressed by the spectre of the supposed difficulties for employers if proceedings could be brought for discrimination in failing to provide a reference or in providing an unsatisfactory reference some time after the employee had left his employment. If such proceedings were brought, there is little reason to suppose that the difficulties for the employer would be significantly greater than those entailed in defending a negligence claim in relation to a request for a reference made at about the same time. And, of course, in any such proceedings the applicant will have to show that the former employer treated him or her less favourably than other former employees in similar circumstances.

**[213]** As an argument against holding that the Acts make it unlawful to discriminate against former employees, it is pointed out—correctly—that the pre-legislative materials make no mention of discrimination against them. Moreover, it is said, if the draftsman of s 6 of the 1975 Act, for instance, had intended to cover former employees, he might have been expected to do so specifically in a separate sub-s (3), to mirror sub-s (1) dealing with job applicants. These arguments, which are interlinked, really amount to saying that the lack of any positive sign that Parliament considered the position of former employees shows that it did not in fact intend to make discrimination unlawful in the case of former employees. So in *Rhys-Harper v Relaxion Group plc* [2001] EWCA Civ 634, [2001] IRLR 460, [2001] ICR 1176 the Court of Appeal were correct to interpret sub-s (2) as they did.

**[214]** At first sight the argument may appear quite persuasive, on mature reflection less so. For the reasons I have given, I do not find the lack of discussion of the particular position of former employees significant. What would have been significant, not to say remarkable, would have been any hint that the government of the day, or Parliament itself, ever contemplated that it was to remain lawful for employers to discriminate against former employees on, say, racial grounds. So far as the drafting of the sections is concerned, if discrimination against job applicants was to be outlawed, a separate provision was obviously necessary since on no view can they fall within sub-s (2). That subsection is drafted to deal with the very different situation of people who have gone a step further and have actually been employed. Former employees are different from job applicants in this respect. Some of the kinds of discrimination listed in sub-s (2)—eg failing to offer opportunities for promotion or dismissing someone—are such that only a current employee can be subjected to them. Others could apply to both current and former employees. It is not suggested that there is some other class of conduct by employers that would have to be made unlawful solely in the case of former employees. Therefore, the provision as drafted, making it unlawful for employers to discriminate against employees in various ways, could in principle operate perfectly satisfactorily in respect of former employees without there being any need either to discuss their position separately or to make separate provision for them in a further subsection. Everything thus depends on whether the wording of the provision in sub-s (2) is capable of covering both current and former employees—which is simply the point at issue.

**[215]** The words in s 6(2) of the 1975 Act which are said to confine the provision to current employees are 'a woman employed by him at an

establishment in Great Britain'. They comprise the noun phrase 'a woman' and the non-finite clause 'employed by him at an establishment in Great Britain' which modifies the noun phrase. In that clause 'employed' is a passive participle and, as such, it is inherently ambiguous. Discounting any other possibility, the words may be the equivalent of 'a woman who is employed by him at an establishment in Great Britain' or 'a woman who is or was employed by him at an establishment in Great Britain'. One cannot tell how the participle is to be interpreted from looking at these words alone: it must be interpreted in the context of the provision as a whole. Often the wider context in which the participle is used will point definitely one way or the other. So, for instance, if I say 'John is very worried about productivity in his firm and is inviting everyone employed by him to a meeting to discuss improvements', the obvious meaning is that the invitation is addressed to current employees. On the other hand, sometimes the context may not fully resolve the matter. If I say 'John, who has been in business for 20 years, is inviting everyone employed by him to a party to celebrate', someone listening to me might not be sure what to expect but he would not be unduly surprised to find former as well as current employees at the party. Similarly, in my view, the context of the words within the legislative sentence in s 6(2) leaves the matter open: looked at merely in that context, the passive participle could be interpreted in either way. Although most of the opportunities listed in para (a) may be relevant only to current employees, the examples that I have already given are enough to show that the paragraph could sensibly apply to the situation of former employees, while in para (b) the notion of 'subjecting someone to a detriment' is so broad that, indisputably, it could apply to refusing a reference to a former employee, for instance. Unlike s 6(2), s 4(2) of the 1976 Act uses the word 'employee' but, as Pill LJ noted in *Rhys-Harper v Relaxion Group plc* [2001] IRLR 460 at [13], the presence or absence of that term cannot be critical to the interpretation of these provisions. In what is largely a matter of impression, I am respectfully unable to share the view of Peter Gibson LJ in *Adekeye v Post Office* [1997] IRLR 105 at 109, [1997] ICR 110 at 118 that in s 4(2) of the 1976 Act the crucial words can only mean 'in the case of a person who is employed by him'. Since that is not the only possible meaning in either the 1975 or 1976 Act, the wider considerations discussed above persuade me that the provisions should be interpreted as making it unlawful to discriminate against former employees as well as current employees if there is a substantive connection between the discriminatory conduct and the employment relationship. In other words the former employer must discriminate qua former employer. I find nothing in the other provisions on employment in the statutes to invalidate that interpretation. Despite the difference in language, there is no indication that Parliament intended the 1995 Act to be different in this respect. Therefore, given the similarity of the general aims of the anti-discrimination Acts, I would interpret the words 'a ... person whom he employs' in s 4(2) in the same way. The House is not called on in these appeals to decide whether the duty in s 6 of that Act also applies in the case of former employees.

**[216]** I should add that, even if I had not been disposed to construe s 4(2) of the 1976 Act in this way, I should in any event have concluded that the decision in *Adekeye*'s case was wrong on the basis of the narrower line of reasoning adopted by my noble and learned friend, Lord Scott of Foscote. Unfortunately, in an organisation where racial discrimination is practised an employee is just as liable

to encounter it in the internal appeal as in the original dismissal. Reluctantly, the Court of Appeal felt obliged to hold, however, that, while it would have been unlawful for the Post Office to discriminate against Ms Adekeye when dismissing her, it would have been perfectly lawful for them to do so when determining her internal appeal from that self-same dismissal. The result is so startling as in itself to cast doubt on the construction. And indeed, even on a fairly strict construction, it would not have been difficult to regard the applicant as 'a person employed by' the Post Office in terms of s 4(2). After all, at the time of the internal appeal the employment relationship was not severed irrevocably: if the appeal had succeeded, the applicant would have been reinstated as an employee. Only a rather literal, as opposed to a purposive, reading of the words 'a person employed by him' would lead to the conclusion that someone in that twilight zone was no longer 'employed' and had lost her rights under s 4(2). For the reasons I have given, however, I prefer to approach the matter on the footing that, even if Ms Adekeye was indeed to be regarded as a former employee at the time of her internal appeal, she was still within the scope of s 4(2).

**[217]** Compelling support for the interpretation of s 6(2) of the 1975 Act which I prefer is to be found in the Community law background. The 1975 Act, which was passed while the Equal Treatment Directive was in preparation, was not subsequently amended when the directive came into force. In that situation, of course, as was explained by the European Court of Justice in *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135 at 4159 (para 8), when interpreting the 1975 Act, any tribunal or court in this country—

> 'is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.'

In *Coote v Granada Hospitality Ltd (No 2)* [1999] IRLR 452, [1999] ICR 942 the applicant first brought a claim against her employers alleging that they had discriminated against her on the ground of her sex by dismissing her because she was pregnant. That claim was settled but she later brought further proceedings complaining that she was unable to obtain new employment because, in retaliation for her previous proceedings against them, her employers had consistently failed to provide references when asked to do so. More particularly, her complaint was that, in terms of ss 4(1) and 6(2)(b) of the 1975 Act, it had been unlawful for her employers to discriminate against her by subjecting her to the detriment of failing to provide her with references when they would have provided them to persons who had not previously complained of sex discrimination. For present purposes what matters is that, in order to succeed, the applicant, who was no longer employed by the employers at the time of the alleged discrimination, had none the less to be regarded as 'a woman employed by' Granada Hospitality for the purposes of s 6(2). Consideration of this point in turn raised an issue as to the effect of the Equal Treatment Directive which the EAT referred to the European Court of Justice in November 1996, just a week after the Court of Appeal had given judgment in *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110.

**[218]** Article 5(1) of the Equal Treatment Directive provides:

> 'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men

and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

Articles 6 and 7 are in these terms:

'*Article 6*

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.

*Article 7*

Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.'

Despite the specific reference to retaliation by way of dismissal in art 7, in *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865 at 877–878, [1999] ICR 100 at 113, [1998] ECR I-5199 at 5222 (paras 27 and 28), the European Court of Justice held that, having regard to the objective of the directive and the fundamental nature of the right to effective judicial protection—

'art 6 of the directive requires member states to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of the directive.'

The EAT then had to apply the guidance given by the European Court of Justice to the interpretation of s 6(2) of the 1975 Act. They were faced with an argument by the employers that the proper construction of that provision had in effect been settled by the decision of the Court of Appeal in *Adekeye's* case on the interpretation of s 4(2) of the 1976 Act. The EAT rejected that argument, in the end because they considered that they had to apply the decision of the European Court. Having examined the language of s 6(2), and in order to achieve the result pursued by art 6 of the directive as interpreted by the European Court, the EAT found it possible to hold, and did indeed hold, that the words 'a woman employed by him' were apt to cover a former employee, such as the applicant, complaining of victimisation: see *Coote v Granada Hospitality Ltd (No 2)* [1999] IRLR 452, [1999] ICR 942. The employers did not appeal.

**[219]** In *Rhys-Harper v Relaxion Group plc* [2001] IRLR 460 at [23]–[26], Buxton LJ sharply criticised the decision of the EAT in *Coote's* case on the ground that it had not been open to them to do other than apply *Adekeye's* case. Unlike Lord Scott of Foscote, I am very doubtful whether that criticism was justified, given the duty imposed on the EAT by art 249 (ex 189) of the EC Treaty and by the *Marleasing* line of authority. The European Court of Justice had indeed restated that duty in *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865 at 876, [1999] ICR 100 at 111–112, [1998] ECR I-5199 at 5219 (para 18). It is unnecessary, however, to go into the question on this occasion since any

supposed constraint imposed by *Adekeye*'s case falls away once that decision is itself seen to have been incorrect. As I have noted already, in the context of s 6(2) the words 'a woman employed by him' are ambiguous. In that situation I consider that in *Coote*'s case Morison J was correct to hold that the EAT could, and therefore should, interpret them in such a way that s 6(2) would apply to a former employee who complained of victimisation. I note that—before Buxton LJ's comments—in *Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787 at 803, [2001] ICR 99 at 116 (para 59), Mance LJ, with whom Moore-Bick J agreed, cited the decision of the EAT in *Coote*'s case as an illustration of the kind of approach to interpretation that the decision in the *Marleasing* case required of a court.

**[220]** As Lord Nicholls of Birkenhead has pointed out, the interpretation of the critical words in s 6(2) which is required by the ruling of the European Court in *Coote*'s case cannot be confined to cases of victimisation. The words of the subsection cannot mean one thing in victimisation cases and something else in other cases. What constitutes discrimination for purposes of s 6(2) is to be found in Pt I of the Act, including both ss 1 and 4. So, if it is unlawful for an employer to 'discriminate' against a former employee in terms of s 6(2) by victimising her under s 4(1), it must equally be unlawful for the employer to 'discriminate' against a former employee in terms of s 6(2) by treating her less favourably on the ground of her sex under s 1(1). This confirms the conclusion, reached on an examination of the domestic law, that s 6(2) applies generally so as to make it unlawful to discriminate against former as well as current employees. The equivalent words in the other Acts fall to be interpreted in the same way.

**[221]** For these reasons, and for those given by Lord Nicholls of Birkenhead, I respectfully agree with his interpretation of the relevant provisions in the three Acts. I also agree both with the way he would apply that interpretation in the individual appeals and with what he says about the separate issue in *D'Souza v Lambeth London BC*. I would accordingly refuse that appeal but allow the others.

*Rhys-Harper, Jones, Kirker, Angel and Bond appeals allowed. D'Souza appeal dismissed.*

Kate O'Hanlon Barrister.

# Sheridan v Stanley Cole (Wainfleet) Ltd

[2003] EWCA Civ 1046

COURT OF APPEAL, CIVIL DIVISION
WARD, BUXTON AND MANCE LJJ
15 MAY, 25 JULY 2003

*Human rights – Right to a fair hearing – Decision of tribunal – Employment tribunal's decision referring to authorities which parties had had no opportunity to address – Proper approach for determining whether hearing rendered unfair in such circumstances – Human Rights Act 1998, Sch 1, Pt I, art 6.*

An employment tribunal upheld a complaint by the respondent employee of unfair constructive dismissal. The employer applied to the tribunal for a review of the decision. At the hearing, the employer was not legally represented. Neither party referred to any authorities and the tribunal did not refer them to any. In giving its decision, however, the tribunal referred to two authorities, and proceeded to dismiss the application. On its appeal to the Employment Appeal Tribunal (EAT), the employer relied on the tribunal's failure to draw the authorities to the attention of the parties. The EAT dismissed the appeal, holding that, even if the parties had been alerted to the authorities, there was no reasonable prospect that a tribunal, properly directed, would have taken a different view. The employer appealed to the Court of Appeal, contending that the authorities referred to by the tribunal were relevant, significant and material to its decision; that the hearing had been rendered unfair by the tribunal's failure to ensure that the parties had an opportunity to consider and make representations on the authorities; that there was no need to show that there had been a material injustice; and that in the circumstances there had been a breach of the employer's right to a fair hearing under art 6[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). In dealing with that submission, the court considered the approach to be adopted in such a case.

**Held** – Where it was alleged that proceedings had been unfair because a tribunal had referred in its decision to an authority which the parties had not had the opportunity to address, that authority had to be shown to have been central to the decision and not peripheral to it. It had to have played an influential part in shaping the judgment. The authority had to have altered or affected the way the issues had been addressed to a significant extent, so that it could truly be said by a fair-minded observer that the case had been decided in a way which could not have been anticipated by a party fixed with such knowledge of the law and procedure as it would be reasonable to attribute to him in all the circumstances. That was not, however, intended to be an all-encompassing test. It was impossible to lay down a rigid rule as to where the boundaries of procedural irregularity lay, or when the principles of natural

a Article 6, so far as material, provides: '1. In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ...'

justice were to apply, or what made a hearing unfair. Everything depended upon the subject matter and circumstances of each case. The proper approach was not limited to establishing the centrality of the authority to the decision in question. A hearing would not have been unfair if it had caused no substantial prejudice to the party claiming to be aggrieved. It therefore also had to be shown that a material injustice had resulted. In the instant case, one of the authorities referred to by the tribunal had not been central to its decision. The other authority should have been brought to the employer's attention, but no reasonable tribunal, directing itself properly, would in the circumstances have accepted the submission that the employer would have made had it been aware of the authority. The unfortunate manner in which the judgment had been delivered did not, therefore, amount to a serious irregularity or a denial of the employer's right to a fair hearing. Accordingly, the appeal would be dismissed (see [31]–[34], [37]–[39], [42], [44], [49]–[51], below).

*Albion Hotel (Freshwater) Ltd v Maia E Silva* [2002] IRLR 200 considered.

**Notes**

For natural justice and fairness and for the convention right to a fair trial, see respectively 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 95 and 8(2) *Halsbury's Laws* (4th edn reissue) para 134.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

**Cases referred to in judgments**

*Albion Hotel (Freshwater) Ltd v Maia E Silva* [2002] IRLR 200, EAT.

*Flint v Eastern Electricity Board* [1975] IRLR 277, [1975] ICR 395.

*General Council of British Shipping v Deria* [1985] ICR 198, EAT.

*Lindsay v Ironsides Ray & Vials* [1994] IRLR 318, EAT.

*Nelson v Carillion Services Ltd* [2002] All ER (D) 216 (Jun), EAT; *affd* [2003] EWCA Civ 544, [2003] IRLR 428.

*Nielsen v Denmark* (1989) 11 EHRR 175, [1988] ECHR 10929/84, ECt HR.

**Appeal**

The appellant, Stanley Cole (Wainfleet) Ltd, appealed with permission of the Employment Appeal Tribunal (Mr Recorder Langstaff QC, A Gallico and SM Springer MBE) from its decision promulgated on 25 October 2002 ([2003] IRLR 52) dismissing the company's appeal from the decision of an employment tribunal sitting at Boston on 1 November 2001 dismissing the company's application for a review of the tribunal's decision on 15 June 2001 upholding a complaint by the respondent, Mrs Sheridan, that she had been unfairly constructively dismissed by the company. The facts are set out in the judgment of Ward LJ.

The company appeared through one of its directors, Dr Malcolm Cohen.

*Damian McCarthy* (instructed by *Roiter Zucker*) for Mrs Sheridan.

*Cur adv vult*

25 July 2003. The following judgments were delivered.

**WARD LJ.**

THE ISSUE

[1] This appeal raises the short but interesting point identified by Mr Recorder Langstaff QC, the chairman of the Employment Appeal Tribunal (EAT), when giving permission to appeal:

> 'The Court of Appeal may wish to consider the scope of the test to be applied to determine whether failure by a court or tribunal to alert advocates to a material, significant and relevant authority is such that an appeal on that ground should succeed.'

THE BACKGROUND

[2] Mrs Sheridan, the respondent to this appeal, was employed by the appellant, Stanley Cole (Wainfleet) Ltd, a manufacturing company, from 14 August 1995 until she resigned, that resignation being treated as taking effect on 28 July 2000. She made a complaint to the employment tribunal sitting at Nottingham alleging that she had been unfairly constructively dismissed.

[3] The tribunal found that on Friday, 14 April 2000, she was one of four working in the customer services department. She was approached by Mr Holyer, a recently promoted quality manager, about an order for one of her usual customers. There was a heated discussion. Mr Holyer raised his voice but was not abusive. None the less Mrs Sheridan felt threatened, and felt so physically ill that she left the office. After an absence of about an hour-and-a-half, part of which spread over her lunch break, she returned and spoke to her superior, a Mr Leigh. She was upset, in tears and emotional and Mr Leigh advised her to go home. She saw her doctor during the weekend and was certified unfit to work for two weeks due to stress. She remained away from work providing medical certificates to similar effect for the remainder of her employment.

[4] On 27 April she was seen at home by the personnel manager and gave her account of the events of 14 April. On 17 May Mr Leigh conducted a disciplinary inquiry and found that she had unreasonably left work without permission 'thereby committing an act of gross misconduct which could result in summary dismissal'. She was given a final written warning for misconduct.

[5] She appealed to the managing director, Mr Cole, and attended a meeting before him on 16 June. He wrote to Mrs Sheridan on 21 June upholding the final warning. She resigned a month later on 21 July stating in her letter dated that day:

> 'Thank you for your letter of 21st June 2000 following our meeting on 16th June 2000. You will appreciate that I am profoundly disappointed and upset at the decision you reached. I cannot believe that after five years of loyal and devoted hard work to the firm you were prepared to back up the decision made on the 17th May to give me a final warning for a single incident which was in any case not my fault. I cannot understand how a single occasion on which I was away from the office "without permission" can be construed as Gross Misconduct ... As a result of all the stress and worry I have as you will know been unable to work. My doctor describes

my condition as stress, anxiety and depression of which I am still being treated. I had hoped to return to work with the stain on my record removed. Since you are not prepared to do so I am sorry to say that I consider myself to have been constructively dismissed. I shall be taking advice as to any action that I may take for this constructive unfair dismissal.'

The company treated the letter as giving one week's notice of termination and so her employment ended on 28 July 2000. She duly lodged her complaint with the employment tribunal.

THE EMPLOYMENT TRIBUNAL HEARING

[6] The hearing took place over two days. In its written decision promulgated on 15 June 2001 the tribunal directed itself on the law as follows:

'In order to establish constructive dismissal an employee must firstly show that she terminated the contract, that is common ground, see the letter of resignation 21 July ... Secondly, it was in response to the employer's breach of contract, thirdly that the breach of contract constituted a significant breach going to the root of the contract and fourthly *that the employee acted promptly in terminating the contract.*' (My emphasis.)

[7] It is not necessary for the purposes of this appeal to decide on the correctness of that direction, especially on the need for or perhaps relevance of acting promptly, or perhaps, more accurately, failing to act promptly.

[8] On the facts, the tribunal concluded that the incident with Mr Holyer was relatively minor. They held:

'In our view it falls clearly outside the band of reasonable responses having regard also to Mrs Sheridan's record and length of service. The imposition of such a disproportionate penalty is in our view a breach either of an implied term of trust and confidence or an implied term that the disciplinary procedure will be used fairly and without oppression. It is also in our view a significant breach going to the root of the contract therefore entitling Mrs Sheridan to resign.'

[9] The tribunal did however add:

'We have been somewhat more exercised by the delay between the notification of the confirmation of the final written warning and the letter of resignation. Such a delay would normally not be acceptable but in this case we find that by reason of Mrs Sheridan's illness which is supported by medical certificates and her evidence that she took time to take advice in those particular circumstances we find that her resignation was carried out in time.'

[10] The tribunal was satisfied that she was justified in treating her employment at an end by reason of the employer's breach and that the dismissal in all the circumstances was unfair. Having found in her favour a remedy hearing was fixed for 13 July 2001. Simply for the sake of revealing the outcome of this case, I note that the tribunal eventually awarded her £3,500 and that comparatively modest sum is the amount at stake in this appeal.

THE REVIEW

[11] Mrs Sheridan, with the help of the Citizens' Advice Bureau, prepared a schedule of loss for the remedy hearing. This disclosed that she had commenced employment with Butlins and worked for them for 14 weeks from 2 August to 7 November 2000. This information set the company on a train of inquiry. On looking through the 80-page bundle of documents which had been before the tribunal, Dr Cohen, a director of the company, paid closer attention to documents 70 and 71. The first was a letter from Butlins dated 24 July 2000, a date after Mrs Sheridan's letter of resignation. Butlins wrote:

> 'The above named person [Mrs Sheridan] has applied for employment with our company. The engagement is subject to receipt of satisfactory references and we would, therefore, ask you to complete the attached form and return it to us ...'

That form (as completed by the company) was document 71, and gave a favourable reference. It recorded that Mrs Sheridan had been employed from 14 September 1995 to '28.7.00'. In answer to the question how her employment ended the company stated through 'resignation'.

[12] In response to further inquiries from the company Butlins supplied the following information:

> 'Mrs Sheridan submitted her application (for employment) with a covering letter on 25th June 2000. We do not have a record of the date she attended an interview, although there are notes on her file to suggest that the interview was held on 16th July 2000. The offer of employment was dated 19th July 2000. Mrs Sheridan was employed from 2nd August to 7th November 2000.'

[13] That led to the company applying on 25 June 2001 for a review of its decision on grounds falling within r 13 of the employment tribunal's rules of procedure as set out in Sch 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171 which provide:

> '(1) ... a tribunal shall have power ... to review any decision on the grounds that ... (d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at the time of the hearing; or (e) the interests of justice require such a review.'

[14] The new evidence which the company sought to introduce was the fact of Mrs Sheridan's employment with Butlins and the information contained in Butlins' letter of 4 July. The company submitted in its written application:

> 'This evidence is relevant to two central issues in this case as well as raising an important question as to [Mrs Sheridan's] credibility. The two central issues are as follows: (a) whether [Mrs Sheridan's] delay in resigning her employment with the [company] constituted a waiver of any repudiatory breach of contract; (b) what was the real reason for [Mrs Sheridan's] resignation?'

[15] The company submitted:

> '6. The [company] is not legally represented in these proceedings. The employment tribunal are meant to provide a relatively informal forum in

which employment disputes can be resolved and where legal representation is not necessary. There were a large number of documents in this case. Pages 70–71 of the bundle did not seem to the [company] to be very important and we never focussed on the date on p 70. Had we noticed this date, then we would have followed through as we subsequently did.

7. It is not reasonable to expect a non-legally represented litigant to act as a forensic expert. The reality is that the evidence was not available at the close of the hearing and the [company] did exercise reasonable diligence in preparing its case. In these circumstances the criteria [are] satisfied.

The interests of justice

8. The rules allow the tribunal a broad discretion to allow a review in circumstances where the interests of justice would be served by doing so. The [company] submits that this is such a case. Even if the tribunal decides to adopt a restrictive approach to the issues of new evidence, it would not be in the interests of justice to deprive the [company] of the opportunity to argue the merits of the review.

9. The review involves reasonably narrow issues …'

**[16]** In its decision dated 1 November 2001 the tribunal held as follows:

'3. The first issue we have to determine is whether that evidence is new. In our view it is not. Although both documents to which we have referred post-date the hearing dates of March and May 2001 the evidence i e the fact that Mrs Sheridan was seeking work was available at the date of the hearing. We say that because it is common ground that documents 70 and 71 in the original bundle were available at the hearing though never referred to. Document 70 is a request by Butlins for a reference and document 71 is a standard form of reply by Stanley Cole duly signed by Mr Leigh in response to that request.

4. Even if we are wrong on that point, in our view the evidence itself was clearly foreseeable given the existence of documents 70 and 71 of the original bundle in that it is clear that Mrs Sheridan was seeking employment at some point around the date the receipt of document 70 which was 28 July 2000. Therefore, in our view, the evidence should have been known of and was reasonably foreseeable at the date of our hearing. We, therefore, conclude that the application based on ground (d) must fail.'

**[17]** Dealing with the interests of justice, the tribunal held:

'5. … Dr Cohen's application is based on the same facts namely that Mrs Sheridan was seeking employment. Neither party has, in fact, referred us to authority in this context. We feel that we must be guided by the case of *General Council of British Shipping v Deria* [1985] ICR 198. I will quote the headnote: "*Held*, allowing the appeal, that where a review of an industrial tribunal decision was precluded under rule [13(1)(d)] on the ground that the new evidence had been available, a review based on the new evidence should only be granted under rule [13(1)(e)] where there was some circumstance or mitigating factor which related to the failure to bring the

matter within rule [13(1)(d)], and not to the nature of the dispute at large, making it such that the interests of justice required a review ..."

6. What then is the circumstance or mitigating factor which would require us to grant a review under para (e)? We turn to Dr Cohen's submissions and, in fact, to paras 6 and 7 of those submissions. I hope that in paraphrasing them I have done them justice but it seems to us that Dr Cohen is saying that because he is not legally qualified the tribunal should not expect a non-legally represented litigant to act as a forensic expert. However, again unfortunately for Dr Cohen, there is again authority on the point in question and we refer to the case of *Lindsay v Ironsides Ray & Vials* [1994] IRLR 318. In that case the EAT held that an industrial tribunal had erred in law in holding that it had jurisdiction to grant a review of its decision because the employee's case had not been properly argued at the preliminary hearing as a result of her representative's shortcomings. The EAT went on to conclude that it would not be in the interests of justice for there to be a review on such grounds. They held that even though the interests of justice ground of review is in very wide terms it is a power which must be cautiously exercised. Further they hold that failings of a representative will not generally constitute a ground for review because that would risk encouraging a disappointed applicant to seek to re-argue his case by blaming his representative for the failure of his claim. Again we feel that we are bound by the guidance of the EAT in that case. It must, therefore, follow in our view that since as Dr Cohen has conceded it was his own shortcoming that led to the existence of Mrs Sheridan's application for employment not being pursued we have no alternative but to refuse the application for review on this ground.'

[18] The company is aggrieved at the way in which that review hearing was conducted. Dr Cohen, who appeared before the tribunal on the company's behalf as he appears before us, set out in an affidavit what happened:

'3. The hearing on 26 October commenced at Boston at approximately 10.50 am. I represented the appellant and Mrs Victoria Miller of the Citizens' Advice Bureau represented the respondent.

4. The tribunal decided that it would first hear submissions from the parties as to whether or not they should allow the review to be considered on its merits. All of the witnesses were present. Witness statements had been exchanged that morning and both parties were ready to proceed to a hearing on the merits of the review.

5. The submissions of the parties were brief and did not involve references to case law. The tribunal did not raise any issues or cases with us and never invited any comments or submissions on any case law. The tribunal retired to consider its decision at around 11.15 am.

6. The tribunal returned at around 11.45 am and the chairman dictated the decision and extended reasons into a tape recorder in the presence of the parties. He had photocopies of two cases with him, certain passages were highlighted and he read extracts of these during the course of his decision. Although I cannot be absolutely certain, I believe that the chairman had both of these photocopies in front of him from the beginning

of the hearing. These cases were *General Council of British Shipping v Deria* [1985] ICR 198 and *Lindsay v Ironsides Ray & Vials* [1994] IRLR 318.

7. I was extremely surprised when the chairman referred to these cases. He had given us no intimation that he was intending to rely on them and gave me no opportunity to comment or make any submissions on them. In any event, I had never seen or heard of these cases and it was only after the hearing that I obtained copies and could form an opinion.

8. If I had been given an opportunity to comment, I would have sought to persuade the tribunal that the facts of this case were substantially different from those in *Lindsay*'s case and that the guidance given by the EAT in that case did not compel the tribunal to refuse the review on ground 13(1)(e) as particularised in the ground of appeal.

9. I therefore believe that the [company] was seriously and unfairly prejudiced by the failure of the tribunal to afford me an opportunity to comment on the cases referred to in the tribunal's decision.'

**[19]** The tribunal has accepted that paras 1–6 inclusive of that affidavit are accurate but the chairman has written:

'Dr Cohen omits to mention that the tribunal did outline the tasks of the tribunal as to both grounds of the review, and as to the application under r 13(1)(e), said that such an application would not normally succeed if based on the same facts as the application under r 13(1)(d).'

**[20]** Dr Cohen does not recollect that and, I hope without doing injustice to the tribunal, I approach this matter accepting for this purpose that no help was given to Dr Cohen as to the way in which tribunals have applied r 13(1)(e).

THE APPEALS TO THE EMPLOYMENT APPEAL TRIBUNAL

**[21]** The company appealed both the decision promulgated on 15 June 2001 and the decision of 1 November 2001. The first appeal, described as the 'merits appeal', raised issues as to the correct approach to determining a claim of constructive dismissal and as to whether the imposition of a final written warning may be capable of amounting to repudiatory conduct on the part of the employer. The second appeal raised issues of the correct approach by an employment tribunal to authorities and the test which it is appropriate to apply to an authority which the tribunal wishes to rely on in reaching its decision but which it has not invited the parties to address. There was, however, no appeal against the adverse findings made against the company on the r 13(1)(d) ground.

**[22]** In a decision promulgated on 25 October 2002 ([2003] IRLR 52) the EAT, presided over by Mr Recorder Langstaff QC, dismissed the merits appeal and there is rightly no further appeal to us.

**[23]** The second appeal, the 'review appeal', was also dismissed. The tribunal concluded (at 59 (para 120)):

'... as a matter of legal principle, we should not accede to an appeal simply upon the basis that an authority, however material, significant and relevant, has not been drawn to the attention of parties as undoubtedly it should be.'

**[24]** In their view (at 59 (para 117))—

> 'the question must be whether or not there is any reasonably arguable case that if the parties had been alerted to the authority relied upon by the tribunal, they would, or might, have made submissions which would, or might, have produced a different result, or ... might have examined the evidence in a different and more extensive way.'

[25] Having approached the matter in that way, they rejected the appeal saying (at 60 (paras 143, 147)):

> 'We do not think that there was any reasonable prospect at all of persuading a tribunal, properly directed, to take any different view in respect of the application under 13(1)(e) than that which it did. There was here nothing which was capable, as we see it, of amounting to a mitigating factor or circumstance such as referred to in the *Deria* case ... no material injustice was caused to the appellant or, put colloquially, there is no reasonable argument that the decision would have been any different.'

THE COMPANY'S CASE

[26] To précis Dr Cohen's submissions: (i) The decision of the employment tribunal in refusing to remit was unjust because of the serious procedural irregularity and was a breach of his right to a fair hearing enshrined in art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). (ii) His primary case is that since the authorities followed by the tribunal 'could be viewed as somewhat esoteric', but were none the less central in the sense of their being 'relevant, significant and material' to the decision, the failure to ensure that the parties had an opportunity to consider and make representations upon them rendered the hearing unfair. (iii) That test of centrality derived from the judgment of Judge Serota QC in *Albion Hotel (Freshwater) Ltd v Maia E Silva* [2002] IRLR 200. That test was not qualified by the need to show a 'material injustice' as Judge Peter Clark held in *Nelson v Carillion Services Ltd* [2002] All ER (D) 216 (Jun), a decision of the Employment Appeal Tribunal promulgated on 26 June 2002. (iv) It is, therefore, wrong to consider whether his knowledge of the principles in *Deria*'s case and *Lindsay*'s case would have made a difference to the original decision. Furthermore, if this question does arise, it is only the original tribunal that is able to determine whether or not it would have made a difference to it. (v) If the appellate tribunal or appellate court is able to deal with that question, then it should hold that there was a good mitigating circumstance, namely the failure on the part of Mrs Sheridan to comply with the tribunal's directions. Had she filed a witness statement and served a schedule of her loss as she should have done before the first hearing, he would have been able to raise in time the matters upon which he now wishes to rely. (vi) Although the fact that he is not legally qualified is not a mitigating circumstance of itself, it is relevant to considering the reasonableness of the explanation he proffers for not adducing the evidence at the first hearing. (vii) If material injustice is a necessary ingredient, the appellant has suffered it.

MRS SHERIDAN'S CASE

[27] Mr Damian McCarthy, who now appears on Mrs Sheridan's behalf, submits that the appellant has to establish a material injustice. It is, therefore,

necessary for the appellate tribunal or court to consider what difference it would have made had he been aware of the authorities concerned. Lack of professional qualification or experience can never be a mitigating circumstance. The receipt of additional indications of Mrs Sheridan's employment would not mitigate the fact that the point could reasonably have been taken on the material that was available at the time.

CONCLUSIONS

**[28]** Not to be afforded a fair hearing would be an obviously serious procedural irregularity sufficient to allow the appeal. The real question is, however, whether what happened was seriously irregular and unfair.

**[29]** It is not contended, and rightly so, that there is a serious irregularity simply because a judge (and for present purposes that includes the tribunal) cites in his or her judgment decided cases which had not been referred to in the course of the hearing. Judicial research would be stultified if that were so and if the parties had to be given the opportunity to address each and every case eventually set out in the judgment.

**[30]** The test applied by Judge Serota in the *Albion Hotel* case was (at 203):

> '34 ... In our opinion the right to a fair hearing requires notice of all material matters of fact and law to be given to the parties, if the employment tribunal wishes to make determinations on points not argued by the parties. The consideration of the three authorities to which we have referred by the employment tribunal in the present case was material to their decision. Even though no complaint was made as to the principle to be deduced from these authorities, the application of that principle to the facts was highly material to the decision. The parties were not able to make submissions as to the relevant acts that were material ...
>
> 35 In our opinion, where an employment tribunal considers that an authority is relevant, significant and material to its decision but has not been referred to by the parties, it should refer that authority to the parties and invite their submissions before concluding its decision. This is more than mere good practice. Failure to do so *may* amount to a breach of natural justice and of the right to a fair hearing.' (My emphasis.)

**[31]** Dr Cohen sums up that test of relevance, significance and materiality as meaning that the authority must be central to the decision. In my judgment I can accept those epithets in so far as they convey the meaning that the authority must be shown to be central to the decision and not peripheral to it. It must play an influential part in shaping the judgment. If it is of little or no importance and serves only to underline, amplify or give greater emphasis to a point that was explicitly or implicitly addressed in the course of the hearing, then no complaint can be made. If the point of the authority was so clear that a party could not make any useful comment in explanation, then it matters not that the authority was not mentioned.

**[32]** Thus, it seems to me, the authority must alter or affect the way the issues have been addressed to a significant extent so that it truly can be said by a fair-minded observer that the case was decided in a way which could not have been anticipated by a party fixed with such knowledge of the law and procedure as it would be reasonable to attribute to him in all the circumstances.

**[33]** There is, however, an important caveat. This is not intended to be an all-encompassing test. It is, in my judgment, impossible to lay down a rigid rule as to where the boundaries of procedural irregularity lie, or when the principles of natural justice are to apply, or what makes a hearing unfair. Everything depends on the subject matter and the facts and circumstances of each case.

**[34]** I cannot accept Dr Cohen's submission that the proper approach is limited to establishing the centrality of the decided authority to the decision in question. That is the first stage of the inquiry. As Judge Serota said, failure to give a party the chance to address the authority *may*, not *must*, amount to a breach of natural justice. The hearing will not have been unfair if it has caused no substantial prejudice to the party claiming to be aggrieved. It must, therefore, also be shown, as Judge Peter Clark held in *Nelson v Carillion Services Ltd* [2002] All ER (D) 216 (Jun), that a material injustice has resulted. In his view 'Judge Serota was not stating a new proposition of law' in setting out the tribunal's opinion in his judgment in *Albion Hotel (Freshwater) Ltd v Maia E Silva* [2002] IRLR 200 at 203 (para 35) which I have cited above. In *Nelson*'s case, it was clear from their reasoning that the tribunal considered that the authority of which the appellant was unaware was relevant because they cited it in their reasons. He held: 'The real question, it seems to us, is whether that case significantly added to the learning which had been cited by the parties.' He held that it was not and: 'In these circumstances we are not persuaded that the tribunal's own recourse to that authority in fact caused any material injustice to the appellant.'

**[35]** Applying that approach, I ask first whether *General Council of British Shipping v Deria* [1985] ICR 198 was 'central' to the tribunal's decision. In *Deria*'s case Bristow J followed the judgment of Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277, [1975] ICR 395 where the question was whether, and if so in what circumstances, where what is now r 13(1)(d) precluded a review on the ground that new evidence was available, a review based on the availability of fresh evidence might be open under r 13(1)(e). It is important to note that the success of the application for a review depended upon that new evidence being admitted. So it does in the case before us. It was in those circumstances that the application of r 13(1)(e) had to be considered 'keeping an eye' on the terms of r 13(1)(d). Phillips J held ([1975] IRLR 277 at 281, [1975] ICR 395 at 404 (para 28):

> 'But I do think that it is necessary, in a case which otherwise falls within paragraph (d) ... to find some other circumstance, some mitigating factor, to make it such that the interests of justice require such a review.'

**[36]** I can accept that at first blush the ground provided under (e) is a broad, free-standing ground not linked to the separate ground under (d) and that it is reasonable so to understand it. It may not be immediately apparent, as Bristow J held in *Deria*'s case (at 202) that—

> 'in logic and in law this [that which is in the interests of justice] has to be geared to the rule [13(1)(e)] provisions and not to the nature of the dispute at large.'

**[37]** In my judgment this is a refinement and gloss upon the ordinary wide meaning of the words in (e) of such a kind that the tribunal ought to have directed Dr Cohen's attention to it. There is force in his submission that the

omission was all the more surprising in view of the fact that, on the facts we are assuming to be accurate, the tribunal had the report before them with the relevant passages already underlined. Dr Cohen's submissions had been broadly based when a narrower focus was required in view of the fact that his case was essentially dependent upon the new facts being admitted in evidence.

[38] The vital question, in my judgment, is whether it would have made any difference to the outcome if Dr Cohen had been armed with this authority. That is a question for this court to answer. It is not a matter we must refer back to the original tribunal.

[39] Not having appealed against the decision refusing to remit on the grounds set out in r 13(1)(d), Dr Cohen has to accept the findings made in that regard namely that it was clearly foreseeable given the existence of documents 70 and 71 that Mrs Sheridan was seeking employment at some point around the date of the receipt of the request for a reference on 28 July 2000. He had, therefore, to establish some exceptional circumstance or some mitigating factor 'to temper in [his] favour ... the rigour of the terms of rule [13(1)(d)]' (see *Deria*'s case at 202). Had he known that is how the court would approach r 13(1)(e) he would have sought to mitigate his failure to spot the point hidden in the 80-page bundle of documents by drawing attention to Mrs Sheridan's own failings to comply with the tribunal's directions. Particular emphasis is laid in this connection upon Mrs Sheridan's failure to serve her schedule of loss until after the hearing before the employment tribunal. As the company's skeleton argument puts it:

> '... the [company] failed to appreciate the importance of the documents in the bundle on the issue of liability because it never saw [Mrs Sheridan's] schedule of loss until after the main hearing.'

But all that the schedule disclosed was that Mrs Sheridan had received reduced salary from the company up to 28 July 2000, and earnings from Butlins for the 14 weeks from 2 August to 9 November 2000. Accordingly, in my judgment, no reasonable tribunal directing itself properly would in these circumstances have accepted Dr Cohen's submission. The EAT dismissed it saying ([2003] IRLR 52 at 60 (para 141)):

> '... it [Dr Cohen's submission] is asserting that there would have been notice if certain steps had been taken. But that assertion is irrelevant in the light of a finding by the employment tribunal that there already was such notice, which should have caused a reasonable advocate, enquirer or representative to find and produce the new evidence. The fact that there might have been further indications to the same effect cannot take away from, or mitigate the failure to take notice in the first case.'

[40] If the facts could have been discovered with reasonable diligence, remission will be refused. If the evidence could have been obtained, it should have been obtained and it is no sufficient excuse to mitigate that consequence to assert that the facts would have been more easily revealed if Mrs Sheridan had complied with her obligations. The hearing proceeded despite Mrs Sheridan's failure and it is too late to use that failure to excuse his own shortcomings.

[41] Dr Cohen is driven, therefore, to add his lack of forensic skill to the mitigation he seeks to advance. That leads me to deal with *Lindsay v Ironsides Ray & Vials* [1994] IRLR 318.

[42] I am not persuaded that *Lindsay*'s case was central to the decision. Drawing attention to it during the course of the argument would not have altered or affected the way in which this part of the case was being presented. It served to show that the argument being advanced by Dr Cohen was wrong. If he had been told that his forensic shortcomings were no excuse, nothing he could have said would have made any difference to that point and his position could never have been improved. A generous latitude of indulgence may be afforded litigants in person as part of the court's or tribunal's endeavour to maintain a level playing field for all litigants, but as Mummery J held in *Lindsay*'s case (at 322 (para 24)): 'Failings of a party's representatives, professional or otherwise, will not generally constitute a ground for review.'

[43] The interests of justice do not demand that any shortcomings in a litigant in person's presentation of his or her case should be overcome by affording the litigant the indulgence of the chance to do better second time round. I am satisfied that there was no serious procedural irregularity in referring to *Lindsay*'s case without it having been disclosed to him and the hearing was not rendered unfair by the omission to refer to it during the course of the hearing.

[44] I pay tribute to Dr Cohen's presentation of his case. He presented his arguments skilfully and concisely backed by immaculately prepared documents. I regret that he labours under this sense of injustice. I am, none the less, satisfied that the unfortunate manner in which judgment was delivered does not amount to a serious irregularity or a denial of his right to a fair hearing. In my judgment this appeal should be dismissed.

**BUXTON LJ.**

[45] I respectfully agree with Ward LJ's analysis of the question set out in [1], above, that was posed to this court by the Employment Appeal Tribunal (EAT). As the appeal progressed, however, I came increasingly to doubt whether that question was necessary for decision in order to dispose of the appeal.

[46] The employment tribunal, in its extended reasons of 1 November 2001, made a finding, not challenged before us, that the schedule of loss and the letter from Butlins were not 'new' evidence. That, as I understand it to be agreed, disposed of any ground of review under r 13(1)(d) of the employment tribunal's rules of procedure as set out in Sch 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171. Further, granted that finding, and leaving entirely out of account any general principle to be deduced from *General Council of British Shipping v Deria* [1985] ICR 198, it is difficult or impossible to see what other ground there could be for reopening the original hearing under r 13(1)(e). The only possible ground was that which is quoted by Ward LJ at [15], above, Dr Cohen's handicap in not being a professional advocate. It scarcely needed authority, in the shape of *Lindsay v Ironsides Ray & Vials* [1994] IRLR 318 or otherwise, to reject that contention. True it is, as Dr Cohen reminded us, that tribunals permit, even perhaps encourage, lay representation; but that gives no more licence than

where professional advocates are engaged to attempt to re-argue the case if on reflection the representative thinks that it could have been better put.

**[47]** That is particularly so where, as here, no specific error can be attributed to the nature of the advocacy. I appreciate that Dr Cohen says before us that, armed with the new evidence, he would have rigorously cross-examined Mrs Sheridan as to her credibility; but that overlooks the tribunal's finding that the 'new' evidence did not add to what was already before the tribunal and available to the cross-examiner, professional advocate or not.

**[48]** The latter difficulty also affects Dr Cohen's argument before us that the 'mitigating circumstance' that caused the interests of justice to require a review was, not merely his general inability as an advocate to identify the significance of the material that was available at the trial, but also and in particular Mrs Sheridan's failure in the late service of the schedule of loss. Had she kept the rules, Dr Cohen would have had the new documents at the trial, their significance would have immediately have impressed themselves upon him, and he would have used them as already indicated. It appears from the grounds of appeal before us that this point was indeed taken at the review hearing. The tribunal did not refer to it, and were right not to do so. The significance of the documents was not as documents, but as to the state of affairs that they revealed. The tribunal found that that was already known to the employers at the time of the hearing. I appreciate that Dr Cohen urges before us that the new information was different from and more significant than that which was apparent from his company's own correspondence: but that is not what the tribunal found. Granted that finding as to the employers' knowledge, justice cannot possibly require a review because there was another means to the same knowledge that was kept from them.

**[49]** In truth, the main point of this appeal, and indeed almost the whole content of the grounds of appeal, is the failure of the chairman to put to the parties at the review hearing the two cases that he referred to in his ruling. That is said to have deprived the employers of their 'absolute right' to a fair trial, in breach of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). If Judge Serota QC intended, in his judgment in *Albion Hotel (Freshwater) Ltd v Maia E Silva* [2002] IRLR 200 at 203 (para 34), to say that any failure to refer parties to material authority rendered the proceedings necessarily unfair (and I very much doubt whether he did so intend), then I am unable to agree. It is central to the procedural provisions of art 6 that an assessment must be made of the fairness of the proceedings as a whole. One authority amongst many to that effect is *Nielsen v Denmark* (1989) 11 EHRR 175. A procedural failure, even one such as the present, will not lead to the proceedings being quashed or set aside unless substantial unfairness has occurred. I am satisfied, as was the EAT, that the outcome would not have been different had the chairman taken the course that Dr Cohen urges. That is not only because of the considerations relied on by the EAT, but also for the more fundamental reason set out above that, once the tribunal had found as it did as to the 'new' evidence, there was as a matter of fact, not just of law, no room for recourse to r 13(1)(e).

**[50]** It would of course have been a lot better had the chairman told the advocates of the authorities that he intended to cite, if for no other reason than to avoid the subsequent extensive use of court time over a dispute in which some £3,000 is in issue. But his failure to do so cannot possibly justify the

allowing of the appeal. It may also be noted that the only effect of such a decision would be remission of the case to a further inquiry in which, because of the unchallenged findings already made by the tribunal, the outcome would inevitably be the same.

**MANCE LJ.**

[51] I agree with both judgments.

*Appeal dismissed.*

Kate O'Hanlon Barrister.

# R (on the application of Davies and others) v Financial Services Authority

[2003] EWCA Civ 1128

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, MUMMERY AND CARNWATH LJJ

12 JUNE, 30 JULY 2003

*Financial services – Financial Services Authority (FSA) – Powers – Prohibition order – Whether FSA having power to make prohibition order in disciplinary proceedings – Financial Services and Markets Act 2000, ss 56, 66.*

The respondent, the Financial Services Authority (the FSA) was the independent regulator of the financial services industry under the Financial Services and Markets Act 2000. It was required to discharge its statutory responsibilities in accordance with the provisions of the 2000 Act and its handbook of rules and guidance. The applicants were, at the relevant time, employed by a member of the London Metal Exchange and subject to the regulation of the Securities and Futures Authority (the SFA) under the Financial Services Act 1986. Following an investigation the SFA brought disciplinary proceedings against the applicants. Before those proceedings could be determined, the 1986 Act was superseded by the 2000 Act and the SFA ceased to have jurisdiction. Under s 66[a] of the 2000 Act, the FSA had power to take disciplinary action for misconduct, but could not do so as by then proceedings against the applicants under s 66 were time-barred. However, if it appeared to the FSA that an individual was not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person, s 56 of the 2000 Act empowered it to make an order prohibiting him from performing any one or more specified functions. The FSA issued the applicants with statutory notices warning them that it proposed to make prohibition orders against them under s 56. In its handbook, the FSA stated that it might exercise its power under s 56 where it considered that an individual presented such a risk to the market generally that it was necessary to prevent him carrying out any function. The applicants sought permission to apply for judicial review. The judge refused permission, holding, inter alia, that the FSA was not acting incompatibly with its own published guidance as the handbook did not require it to establish as a fact, before commencing proceedings under s 56 of the 2000 Act, that the individuals concerned intended to carry on the functions to be prohibited. The applicants appealed, contending, inter alia, that s 66 contained punitive powers and procedures relating to past misconduct and s 56 contained preventive ones relating to future activities; that the proposed use of the s 56 power was therefore improper as it would use a power conferred for one specific purpose for a different purpose; and that the issue of the warning notices was ultra vires and an abuse of process as the FSA had not established that the applicants intended to participate in any of the activities proposed to be prohibited.

a Section 66, so far as material, is set out at [15], below

**Held** – The procedures in both s 56 and s 66 were regulatory. There was no clear and sharp divide between them with the one section looking only forward to the prevention of future activities and the other section looking only backward to punishment of past misconduct. Section 56 enabled the FSA to take prohibition proceedings in respect of past misconduct in order to afford the necessary future protection of the public. There was no requirement that, in order to be legally entitled to give a warning notice, the FSA had to satisfy itself that the individuals concerned had a present or future intention to work in the financial services industry. The fact that the applicants in the instant case appeared to the FSA to be unfit persons was sufficient to justify the giving of the warning notice setting out the proposed prohibition order. The judge had rightly rejected the submissions on the handbook and had been correct to conclude that the applicants' grounds were unarguable. Accordingly, the appeal would be dismissed (see [21]–[24], [35]–[37], below).

Decision of Lightman J [2003] 1 All ER 859 affirmed.

Per curiam. Only in the most exceptional cases should the Administrative Court entertain applications for judicial review of the actions and decisions of the FSA, which are amenable to the procedures for making representations to the FSA, for referring matters to the Financial Services and Markets Tribunal, and for appealing direct from that tribunal to the Court of Appeal (see [31], [36], [37], below).

**Notes**

For prohibition orders, see Supp to 32 *Halsbury's Laws* (4th edn reissue) para 385.

For the Financial Services and Markets Act 2000, ss 56, 66, see 18 *Halsbury's Statutes* (4th edn) (2002 reissue) 126, 135.

**Case referred to in judgments**

*Lo-Line Electric Motors Ltd, Re* [1988] 2 All ER 692, [1988] Ch 477, [1988] 3 WLR 26.

**Appeal**

The applicants, Vivian John Davies, Rawdon Quentin Vevers and Colin Mark Gamwells appealed, with permission of Laws LJ granted on 27 February 2003, from the decision of Lightman J on 18 December 2003 ([2002] EWHC 2997 (Admin), [2003] 1 All ER 859) refusing their application for permission to apply for judicial review of the decision of the respondent, the Financial Services Authority, to issue notices under s 57 of the Financial Services and Markets Act 2000 warning the applicants of its intention to make prohibition orders under s 56 of the 2000 Act. The facts are set out in the judgment of Mummery LJ.

*Michael Beloff QC* and *Pushpinder Saini* (instructed by *Denton Wilde Sapte*) for the applicants.

*Javan Herberg* (instructed by the *Financial Services Authority*) for the authority.

*Cur adv vult*

30 July 2003. The following judgments were delivered.

**MUMMERY LJ** (giving the first judgment at the invitation of Kennedy LJ).

**[1]** This is an appeal from the refusal of Lightman J on 18 December 2002 ([2002] EWHC 2997 (Admin), [2003] 1 All ER 859, [2003] 1 WLR 1284), after an inter partes oral hearing of a renewed application, to grant permission for judicial

review of warning notices given to the applicants by the Financial Services Authority (the Authority) under s 57 of the Financial Services and Markets Act 2000. Laws LJ granted permission to appeal. The issue on the appeal is whether Lightman J was right in holding that the grounds on which the applicants sought judicial review were unarguable.

THE AUTHORITY

[2] The appeal raises some points of practical importance on the exercise of the regulatory powers of the Authority and the appropriate procedures for challenging its decisions and actions. It is the first occasion on which the Court of Appeal has had to consider the points.

[3] The Authority is the independent, non-governmental regulator of the financial services industry under the 2000 Act. It is required to discharge its statutory responsibilities in accordance with the provisions of the 2000 Act and its *Handbook of Rules and Guidance*.

[4] The Authority must maintain arrangements designed to enable it to determine whether persons, on whom requirements are imposed by or under the 2000 Act, are complying with them. There is a general prohibition on a person carrying on a regulated activity in the United Kingdom, unless he is an authorised person or an exempt person. The Authority has powers of authorisation, supervision and enforcement. It has defined, regulatory objectives: market confidence, public awareness, the protection of consumers and the reduction of financial crime. (It is not alleged that the applicants have been involved in criminal activities.) The Authority, which is responsible for maintaining confidence in the financial system, must act compatibly with its objectives and in a way which it considers most appropriate for the purposes of meeting them.

[5] The Authority has disciplinary powers. It may use them to take action against a person, who appears to the Authority to be guilty of misconduct. There is a time limit for taking action. The Authority may not take action under those powers after the end of two years from the date on which it first knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period.

[6] The Authority also has specific powers to make orders (prohibition orders) prohibiting an individual from performing functions. If the Authority proposes to make a prohibition order, it must first give the individual concerned a warning notice setting out the terms of the prohibition. If the Authority then decides to make a prohibition order, it must give the individual concerned a decision notice setting out the terms of the order. There is nothing to prevent any person who would be affected by the Authority's decisions from corresponding with or making representations to the Authority.

[7] A person against whom a decision to make a prohibition order is made may refer the matter to the Financial Services and Markets Tribunal (the tribunal). The Authority also has power to vary or revoke a prohibition order. If it refuses to do so, the applicant may refer that matter to the tribunal.

[8] The tribunal is independent of the Authority. Its function is to hear and determine references from decisions of the Authority. The tribunal conducts a de novo review of the matters referred to it. It may consider evidence whether or not it was available to the Authority at the material time. It may decide points of law, including disputes about the limits of its own jurisdiction and the lawfulness of the decisions and actions of the Authority.

[9] A party to a reference may (with permission) appeal to the Court of Appeal on a point of law arising from the decision of the tribunal disposing of the reference. The prohibition notice is not enforced pending the determination of the tribunal or of the Court of Appeal. The 2000 Act is silent on the availability of judicial review of the decisions and acts of the Authority.

THE APPLICATION

[10] The applicants wish to challenge, by way of judicial review, the lawfulness of the decision of the Authority under s 57 of the 2000 Act to issue warning notices to them. In the notices the Authority, acting through its Regulatory Decisions Committee, warned the applicants of its proposals to make prohibition orders against them under s 56 of the 2000 Act on the ground that they are not fit and proper persons to perform specified functions relating to regulated activities. The application was issued on 6 September 2002.

THE BACKGROUND FACTS

[11] The applicants were formerly employed by Brandeis (Brokers) Ltd (BBL), a ring dealing member of the London Metal Exchange (the LME). In late 1997 one of BBL's largest customers, Mr Herbert Black, made serious complaints against BBL about the mispricing of Mr Black's accounts and customers and the misuse of confidential information by its employees. In early 1998 BBL reported the complaints to the Securities and Futures Authority (the SFA). At that time the SFA was the self-regulatory organisation responsible for the regulation of its member firms operating on the LME. It had been established under the Financial Services Act 1986.

[12] The SFA had power to institute proceedings if a registered person committed an act of misconduct, or if he ceased to be a fit and proper person. The SFA conducted its own investigations into the conduct of the applicants. On 31 July 2001 it started proceedings against the applicants. (The Authority had power to make a disqualification direction under s 59 of the 1986 Act against an individual, who was not a fit and proper person, but it did not see occasion to do so while the SFA was proceeding with its charges.) Before the SFA proceedings were determined and before any substantive hearing had taken place, the 2000 Act came into force. It replaced the 1986 Act. The SFA ceased to have any jurisdiction to proceed with its charges. Accordingly the proceedings were discontinued. In December 2001 the regulatory jurisdiction of the SFA over its member firms operating on the LME passed to the Authority. There were no relevant transitional provisions enabling the Authority to be substituted for the SFA in the existing proceedings.

[13] The Authority was unable to use its powers to take disciplinary proceedings against the applicants for misconduct under s 66 of the 2000 Act, as the two-year time limit imposed by s 66(4) had expired. The investigations by the predecessor SFA had started four years previously.

[14] On 24 June 2002 the Authority issued the warning notices against the applicants under s 57 of the 2000 Act. The Authority warned them that it proposed to make prohibition orders against them under s 56 of the 2000 Act on the grounds that they were not fit and proper persons to perform certain functions relating to regulated activities.

THE STATUTORY PROVISIONS

[15]The arguments on the appeal turn principally on whether the Authority was acting lawfully in seeking to use its powers against the applicants under s 56

of the 2000 Act when, as is agreed, it was no longer entitled to use its powers against them under s 66. It is accordingly necessary to set out the provisions of those sections. The disciplinary powers conferred on the Authority by s 66 provide:

> '(1) The Authority may take action against a person under this section if—(a) it appears to the Authority that he is guilty of misconduct; and (b) the Authority is satisfied that it is appropriate in all the circumstances to take action against him.
>
> (2) A person is guilty of misconduct if, while an approved person—(a) he has failed to comply with a statement of principle issued under section 64; or (b) he has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under this Act
>
> (3) If the Authority is entitled to take action under this section against a person, it may—(a) impose a penalty on him of such amount as it considers appropriate; or (b) publish a statement of his misconduct.
>
> (4) The Authority may not take action under this section after the end of the period of two years beginning with the first day on which the Authority knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period.
>
> (5) For the purposes of subsection (4)—(a) the Authority is to be treated as knowing of misconduct if it has information from which the misconduct can reasonably be inferred; and (b) proceedings against a person in respect of misconduct are to be treated as begun when a warning notice is given to him under section 67(1).
>
> (6) "Approved person" has the same meaning as in section 64.
>
> (7) "Relevant authorised person", in relation to an approved person, means the person on whose application approval under section 59 was given.'

**[16]** The power to make prohibition orders was conferred on the Authority in the following terms by s 56. The exercise of the powers had to be preceded by the giving of a warning notice under s 57:

> '(1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.
>
> (2) The Authority may make an order ("a prohibition order") prohibiting the individual from performing a specified function, any function falling within a specified description or any function.
>
> (3) A prohibition order may relate to—(a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities; (b) authorised persons generally or any person within a specified class of authorised person.
>
> (4) An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.'

**[17]** As already indicated it is common ground that the Authority was not entitled to use its powers under s 66 to take action against the applicants, as the two-year time limit had expired by the time that the Authority took over the jurisdiction of the SFA over the LME. The critical issue is whether the Authority

could lawfully take the action that it has given notice that it proposes to take against the applicants under s 56.

THE APPLICANTS' SUBMISSIONS

**[18]** The applicants challenged the lawfulness of the warning notices on a number of grounds, principally that the issue of them was improper and an abuse of process, as it was proposed to use the prohibition procedure under s 56 for disciplinary purposes in respect of alleged past misconduct in order to avoid the time bar imposed on the Authority bringing such proceedings under s 66.

**[19]** Mr Michael Beloff QC, who appeared on behalf of the applicants, focused on three points. He contended that, at the very least, they were reasonably arguable at the permission stage. This court should therefore reverse the judge and grant permission for judicial review.

**[20]** In summary the applicants' main submissions in the court below and on the appeal were as follows. (1) The Authority proposed to use its s 56 power to make prohibition orders in order to circumvent the statutory time bar in s 66(4) applicable to disciplinary proceedings for past misconduct. It was making virtually identical charges to those previously made by the SFA in the proceedings which had been discontinued. The Authority was no longer entitled to pursue those charges because of the time bar. The proposed use of the s 56 power was improper. A power conferred for a specific purpose, namely the future protection of the public by prohibiting and preventing the applicants' activities, was proposed to be used for a different purpose, namely in order to punish the applicants by disciplinary action for alleged misconduct in the past. In other words, the only reason underlying the Authority's proposed use of the 'prevention route' was that the 'punishment route' adopted by the SFA was blocked by the statutory limitation period. (2) In support of a claimed clear and sharp distinction between preventive and punitive powers and procedures Mr Beloff relied on the analogy of proceedings for the disqualification of directors, which have been characterised as fundamentally preventive and for the protection of the public, rather than penal (see *Re Lo-Line Electric Motors Ltd* [1988] 2 All ER 692 at 696–697, [1988] Ch 477 at 486). (3) The issue of the warning notices was ultra vires and an abuse of process, as the Authority had not established that the applicants intended to participate in any of the activities proposed to be prohibited. The applicants have no 'immediate plans' to work in a regulated industry. There was no need to take steps to protect the public from activities which are not going to take place. (4) The warning notices were an abuse of process, as the Authority failed to consider and apply its own criteria, as published in its *Handbook* (*Enforcement Manual* ('ENF')) for initiating proceedings (ENF, paras 8.1 and 8.4). The Authority was unable to show the necessary risk to confidence in the market from past activities of the applicants. The applicants had no intention of being in the market. It would be inappropriate to make an order targeted on the future, which was based on past misconduct and in the absence of any future risk.

THE JUDGMENT BELOW

**[21]** Lightman J ([2003] 1 All ER 859, [2003] 1 WLR 1284) concluded that the grounds were unarguable. I agree with his reasons for refusing permission and add some of my own. It is unnecessary to cite authority, as the relevant legal principles were not in dispute. The dispute centred on their application to the particular facts of this case.

[22] Although there are different statutory criteria for invoking the procedures in ss 56 and 66, there is no clear and sharp punitive/preventive divide between them, the one looking only forwards to the prevention of future activities and the other looking only backwards to punishment of past misconduct. Both procedures are regulatory. Section 56 is available in cases of past misconduct, enabling the Authority to take prohibition proceedings in respect of it in order afford the necessary future protection of the public. Section 66, under which action was time barred, is not the only provision in the 2000 Act available to the Authority in respect of past misconduct.

[23] The Authority's proposal to use of s 56 was not barred by the applicants' protestations that they do not intend to carry out the functions, which the prohibition order might forbid. The fact that the applicants appeared to the Authority to be unfit persons was sufficient to justify the giving of the warning notice setting out the proposed prohibition order. There was no requirement that, in order to be legally entitled to give a warning notice, the Authority had to satisfy itself that the applicants had a present or a future intention to work in the financial services industry. The applicants' assertions that they have no present plans is not an adequate substitute for or alternative to a prohibition order. Present plans and future intentions are factual points on which the applicants would be entitled to make representations to the Authority or, failing that, to the tribunal on a reference to it.

[24] Lightman J rightly rejected the submission that the Authority was acting incompatibly with its own published guidance in the *Handbook*, because it could not show the necessary risk to confidence in the market. I agree with Lightman J's judgment at [10], [11].

[25] In view of his conclusions on the substantive points, with which I agree, the judge did not find it necessary to deal with the procedural objection that the application was premature and should be rejected on the ground that there was a satisfactory alternative procedure provided by the Act itself, namely to make representations and to refer the matter to the tribunal. I would, however, add some comments on the further reasons advanced by the Authority for rejecting the application and dismissing the appeal.

NATURE OF SFA PROCEEDINGS

[26] I agree with Mr Herberg, who made excellent submissions on behalf of the Authority, that the applicants' submissions do not correctly characterise the nature of the previous SFA proceedings in describing them as disciplinary proceedings for past misconduct. They are also wrong in asserting that the Authority is seeking to continue the SFA's 'disciplinary proceedings' as prohibition proceedings aimed only at future conduct.

[27] Examination of the SFA proceedings reveals that they were never purely 'disciplinary proceedings' for past misconduct. There was a forward-looking element in the proceedings. The SFA was alleging that the applicants were not fit and proper persons. It sought expulsion of them from the SFA's registers. In accordance with r 7.24A of the rules, under which the SFA acted, the proceedings set out not only the alleged acts of misconduct, but also the reasons why the applicants had ceased to be fit and proper persons.

[28] The Authority was not simply seeking to continue time barred 'disciplinary proceedings' by different means. Like the SFA, the Authority was seeking expulsion on the ground that the applicants were not fit and proper persons. Section 56, not s 66, of the 2000 Act was the appropriate procedure

available to the Authority to take action, which involved virtually identical charges brought with the same objective. The same considerations applied to both. I would add that, although it is true that there are different statutory criteria for making prohibition orders and for taking disciplinary action, both are available to the Authority in order to send out messages to the financial services industry and to the public about unacceptable conduct in the financial markets and in order to deter others.

ALTERNATIVE REMEDY

[29] Although Mr Herberg did not contend that there was a lack of jurisdiction to entertain an application for judicial review, he invoked the general principle that judicial review is a remedy of last resort. This means that, in the absence of exceptional circumstances, it should not be used, unless the applicant has first exhausted available procedures for objecting to, or appealing against, the decision sought to be judicially reviewed.

[30] The application in this case would, if granted, bypass the comprehensive statutory scheme. It was specially set up by the 2000 Act. It enabled persons against whom decisions are made and actions taken to refer the matter to the specialist tribunal, with a right of appeal on points of law direct from the tribunal to the Court of Appeal. Even if the only point raised was a point of law on the lawfulness of the decision or action of the Authority, that could be dealt with by the tribunal. It was unnecessary to apply for judicial review to resolve it. There are no exceptional circumstances in this case, in which the grounds of challenge to the warning notice are not restricted to purely jurisdictional grounds.

[31] The legislative purpose evident from the detailed statutory scheme was that those aggrieved by the decisions and actions of the Authority should have recourse to the special procedures and to the specialist tribunal rather than to the general jurisdiction of the Administrative Court. Only in the most exceptional cases should the Administrative Court entertain applications for judicial review of the actions and decisions of the Authority, which are amenable to the procedures for making representations to the Authority, for referring matters to the tribunal and for appealing direct from the tribunal to the Court of Appeal.

[32] I am unable to accept Mr Beloff's submission that exceptional circumstances exist in this case, which would justify following the judicial review route rather than leaving the applicants to invoke the statutory procedure. He contended that, if the application were rejected on the 'alternative remedy' ground, the applicants would be forced to defend themselves at great expense against the allegations of misconduct in proceedings which, on the applicants' case, the Authority could not lawfully bring against them. They should not, he said, be subjected to the regulatory statutory machinery at all. For the reasons already advanced, the regime under ss 56 and 57 was simply not applicable to their cases.

[33] In my judgment, the points raised in the grounds on which judicial review is sought could and should, if pursued, be the subject of representations to the Authority, or of submissions to the tribunal. The statutory course could be taken without substantially increasing the expenses already incurred in preparations to defend the discontinued proceedings brought by the SFA. It would be open to the applicants to ask the tribunal to deal with their contentions on the lawfulness of the Authority's decisions and actions as preliminary issues. An application by way of judicial review is, in all the circumstances of this case, unjustified.

PREMATURITY

[34] Mr Herberg also submitted that the application for judicial review was premature and that permission should be refused for that reason. There is force in this submission. The only decision taken by the Authority against the applicants was to issue the warning notices. Standing alone the notices have no legal effect or adverse consequences for the applicants. Further action is required under s 56 before a decision notice is issued. I would not, however, decline to entertain the application on that ground alone. It is reasonable to suppose that, in the circumstances of this case, the giving of the warning notices under s 57 is likely to be followed by decision notices under s 56 and by the making of prohibition orders.

RESULT

[35] I would dismiss the appeal and order the applicants to pay the costs of the respondent to be subject to a detailed assessment, if not agreed.

**CARNWATH LJ.**

[36] I agree.

**KENNEDY LJ.**

[37] I also agree.

*Appeal dismissed.*

Dilys Tausz Barrister.

# Hackney London Borough Council v Driscoll

[2003] EWCA Civ 1037

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, BROOKE LJJ AND HOLMAN J

16 JULY 2003

*County court – Practice – Notice of trial date – Defendant having knowledge of proceedings but not receiving notice of trial date –Whether order made at trial to be set aside – CPR 39.3(5).*

The defendant owned premises in Hackney which were mortgaged to the claimant authority. Arrears accrued under the mortgage and the authority issued proceedings claiming possession. The court served the claim form on the defendant at the Hackney address but he had let the premises and was no longer living there. In due course the defendant became aware of the proceedings and attended court for procedural hearings, however, he did not receive notice of the trial date. At trial in November 1996 an order for immediate possession was made in the defendant's absence. In 1997 the defendant heard that the authority had evicted his tenants and recovered possession but by that time he was suffering from a severe mental illness and remained under hospital care until August 1999. In January 2001 he applied for an order setting aside the possession order. Both the district judge and the circuit judge refused his application, finding that he did not satisfy the first and third criteria in CPR 39.3(5)[a] which provided that where an application to set aside a judgment was made by a party who had failed to attend the trial, the court could grant the application only if the applicant: (a) had acted promptly when he found out that the court had exercised its power to enter judgment against him; (b) had a good reason for not attending the trial; and (c) had a reasonable prospect of success. The defendant appealed contending that he should have obtained an order setting aside possession, as of right, because he had not received notice of the trial date.

**Held** – A distinction was to be made between a case in which a party had no knowledge of the proceedings at all and a case in which he had no knowledge of the date fixed for a hearing. Once a defendant knew about the proceedings and had participated in them, the court had the necessary jurisdiction to make an order affecting him. In the instant case the judge and the district judge had been correct to apply CPR 39.3(5). That rule gave the absent party the opportunity of explaining why he had a reasonable prospect of success. It also gave the party in whose favour the judgment had been given the chance of not having to prove his case all over again, with the expense that that would involve, if a court were satisfied that there was no reasonable prospect that the judgment would be reversed. Accordingly, the appeal would be dismissed (see [24], [26]–[30], below).

*White v Weston* [1968] 2 All ER 842, *Willowgreen Ltd v Smithers* [1994] 2 All ER 533 and *Al-Tobaishi v Aung* [1994] CA Transcript 233 considered.

a CPR 39.3, so far as material, is set out at [9], below

Per curiam. The criteria set out in CPR 39.3(5)(a) and (b) merely reproduce the effect of the former county court practice. The criterion set out in sub-r (c) is new, but does not offend any fundamental principle of justice or any principle of Strasbourg jurisprudence (see [27], below).

**Notes**

For failure to attend trial of claims, see 37 *Halsbury's Laws* (4th edn reissue) para 1072.

**Cases referred to in judgments**

*Al-Tobaishi v Aung* [1994] CA Transcript 233, (1994) Times, 10 March.

*Golden Ocean Assurance Ltd v Martin, The Golden Mariner* [1990] 2 Lloyd's Rep 215, CA.

*R v Appeal Committee of County of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670, [1956] 1 QB 682, [1956] 2 WLR 800, CA.

*White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647, [1968] 2 WLR 1459, CA.

*Willowgreen Ltd v Smithers* [1994] 2 All ER 533, [1994] 1 WLR 832, CA.

**Introduction**

The defendant, Robert Driscoll, appealed with permission of the Court of Appeal from the order of Judge Marr-Johnson in the Mayor's and City of London Court on 15 October 2002 dismissing the defendant's appeal from the order of District Judge Wright on 7 February 2001 refusing to set aside an order for possession in favour of the claimant, Hackney London Borough Council, made on 27 November 1996. The facts are set out in the judgment of Brooke LJ.

*Andrew Gumbiti-Zimuto* (instructed by *Kirk & Partners*) for the defendant.

*Edmund Robb* (instructed by *Claer Lloyd-Jones*) for the claimant.

**BROOKE LJ** (giving the first judgment at the invitation of Kennedy LJ).

**[1]** This is an appeal by the defendant Robert Driscoll against an order made by Judge Marr-Johnson in the Mayor's and City of London Court on 15 October 2002 whereby he dismissed his appeal against the order of District Judge Wright made on 7 February 2001 whereby she had refused to set aside the order for possession made against him on 27 November 1996. This appeal is therefore a second appeal, brought by permission of this court because it raises an important point of practice.

**[2]** In 1991 the defendant had become the owner of a long leasehold interest in premises at 5 Glendown House, Amhurst Road, Hackney after exercising his rights under a statutory right to buy scheme. The claimant council, who were his former landlords, advanced him a mortgage loan of £30,000. Arrears accrued under the mortgage, and eventually the claimants issued proceedings claiming possession of the premises by reason of the mortgage arrears. The court served the claim form on the defendant at 5 Glendown House, but he was no longer living at that address. In 1995 he had let those premises to a tenant, and he was now living in Plumstead. He maintains that he told the claimants about this move, and they are not in a position to dispute this. The claimants were unable to locate the mortgage deed, so that they were unable to rely on any agreed terms as to service of documents which may have appeared on the deed. Indeed Mr Robb, who appeared for Hackney, told us that it was not his clients' practice to include such a provision in their mortgage deeds.

[3] In due course Mr Driscoll became aware that proceedings had been started against him, and he attended court on 22 July and 15 August 1996 for procedural hearings in connection with the matter. On the latter occasion the claimants obtained an adjournment because they had lost the charge certificate. They then obtained a replacement certificate, and the court gave the parties notice of a new trial date of 27 November 1996 pursuant to CCR Ord 13, r 3. The court sent this notice to him at 5 Glendown House: it is not clear whether the claimants had told the court of the new address. At all events, he did not attend the hearing on 27 November, when an order for immediate possession was made in his absence.

[4] In due course the claimants evicted the defendant's tenants, regained physical possession of the premises, and sold them at a public auction on 10 July 1997 for a sum which for all practical purposes cleared off the mortgage debt.

[5] The defendant heard that the claimants had recovered possession of the premises some time before Easter 1997, but by this time he was suffering from a severe mental illness. He remained under hospital care for his schizophrenia either as an in-patient or as an out-patient until he was discharged from hospital care whilst on leave on 24 August 1999.

[6] He told the judge that although he had a number of telephone conversations with the claimants in 1999 in an attempt to discover what had happened to his property, he was not able to find a solicitor willing to assist him, and the court could not help him if he was unable to provide a case number. A considerable time then elapsed before he found a case number among his papers. Eventually on 26 January 2001 he applied for an order setting aside the possession order. Both the district judge and the circuit judge refused his application, being unwilling to exercise discretion in his favour under CPR 39.3(5). There was a gap of nearly two years between these two hearings because an earlier decision by a circuit judge had been set aside by this court, which directed a rehearing.

[7] The central issue on this appeal is whether Mr Driscoll should have obtained an order setting aside the possession order as of right because he was not given notice of the hearing date. Heavy reliance is placed in this regard on the decision of this court in *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647.

[8] It is convenient to start the legal analysis of this case by referring to CPR 3.10 (which applied to this case in 2001: see the practice direction to CPR Pt 51) and CPR 39.3. Rule 3.10 provides:

> 'Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.'

[9] Rule 39.3 provides, so far as is relevant:

> '(1) The court may proceed with a trial in the absence of a party ...
>
> (3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside ...
>
> (5) Where an application is made under paragraph ... (3) by a party who failed to attend the trial, the court may grant the application only if the applicant—(a) acted promptly when he found out that the court had exercised its power to ... enter judgment ... against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial.'

**[10]** The district judge accepted that the second criterion was satisfied, but she found against Mr Driscoll on the first and third. In particular she said that even if he had attended on 27 November she did not think that the court would have made any other order than the order it did in fact make. Criterion (c) was therefore not satisfied.

**[11]** After the judge found that he, too, should apply the criterion set out in r 39.3(5), he came to exactly the same conclusion on each point as the district judge. In particular he said:

> 'Having regard to his previous poor payment record I have no doubt that even if the defendant had attended the hearing in November 1996 an outright order for possession of the property would still have been made, and I note that this is also the conclusion of District Judge Wright who is very experienced in these matters. I am unable to conclude therefore that the defendant would have any reasonable prospect of success if the matter were now to be retried.'

**[12]** If this was all there was to the case, there would have been no question of a second appeal to this court. The reason why we are hearing this appeal is that it is necessary to clear up once and for all the question whether the principles set out by this court in *White*'s case apply not only to a case where a defendant had no notice of the proceedings at all, but also to a case where he knew about the proceedings and had attended court twice in connection with them but received no notice of the date appointed for the trial.

**[13]** In *White*'s case the county court directed service of the ordinary summons by post to the address where the defendant was believed to be living. In fact he had moved house six months earlier, and the summons was returned to the court some time later. In the meantime a judge had conducted the trial and awarded damages against him. The defendant heard about the judgment by chance, and the question arose whether he was entitled to have the judgment set aside as a matter of entitlement or as a matter of discretion.

**[14]** Russell LJ found on the facts that the defendant had not been served with the proceedings. He said ([1968] 2 All ER 842 at 846, [1968] 2 QB 647 at 659):

> 'I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as "irregular" or "a nullity". The defect is in my judgment so fundamental as to entitle the defendant as of right, ex debito justitiae, to have the judgment avoided and set aside ... In my view the county court judge misdirected himself in considering that he had any power to visit, even contingently, on the defendant the plaintiff's costs of a hearing that, as against this defendant, should never have taken place at all, and to which he was a stranger.'

**[15]** Sachs LJ, for his part, reminded himself at the outset of his judgment ([1968] 2 All ER 842 at 846, [1968] 2 QB 647 at 660) of the well-known dictum of Denning LJ in *R v Appeal Committee of County of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670 at 674, [1956] 1 QB 682 at 691:

> '[I]t is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them.'

**[16]** Like Russell LJ, he approached the case on the basis that the plaintiff had obtained judgment despite the fact that there had been no service of process on

the defendant, and he agreed that in those circumstances the defendant was quite plainly entitled to have the judgment set aside ex debito justitiae (see [1968] 2 All ER 842 at 848, [1968] 2 QB 647 at 662). He distinguished the different situation where a summons was sent by post to the wrong address but it reached the defendant 14 clear days before the return day.

**[17]** In *White's* case the court did not have to consider whether the result would have been different if the defendant had waited a very long time between hearing about the judgment and taking effective steps to have it set aside: in other words whether the court could exercise its discretion not to grant him relief because he had delayed so long that there could no longer be as fair a trial as before because witnesses had died or disappeared, documents had been destroyed, or memories had faded.

**[18]** Modern examples of the application of the rule in *White's* case are to be seen in the decision of this court in *Willowgreen Ltd v Smithers* [1994] 2 All ER 533, [1994] 1 WLR 832 and *Al-Tobaishi v Aung* [1994] CA Transcript 233, (1994) Times, 10 March).

**[19]** The second of these cases is particularly instructive in the present context. The plaintiff lived in Senegal, and his English solicitors effectively came off the record on 16 July 1991. On 24 June 1991 the defendant's solicitors served on them a summons seeking an 'unless' order following a failure to supply copies of documents identified on their client's list. The 'unless' order was made on 26 July 1991 and judgment was duly entered on the counterclaim when the plaintiff failed to comply with it within the period set out in the order or at all. The plaintiff was unaware of what had happened until February 1992 when he acted promptly to have the judgment set aside.

**[20]** Stuart-Smith LJ, with whom Kennedy LJ agreed, held on the facts that the order dated 26 July 1991 had never been served on the plaintiff. After quoting from *White's* case and the *Willowgreen Ltd* case he said:

> 'Whether it is entirely right to say that there is no discretion in the matter or whether, as it seems to me, the Court of Appeal in *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647 said that there may be a discretion but it can only be exercised one way, is I think immaterial. If it is an exercise of discretion, where there has been no service at all, the discretion can only be exercised in one way as appears to have been the view of the court in *Golden Ocean Assurance Ltd v Martin, The Golden Mariner* [1990] 2 Lloyd's Rep 215.'

**[21]** In my judgment the answer in that case was obvious, and it could be reached without reference to *White's* case. If an order is made which contains a sanction if it is not complied with, and the other party has no knowledge of that order and was never served with it, then of course the sanction cannot take effect in the event of non-compliance with the order.

**[22]** During the course of the hearing we were reminded of the wording of RSC Ord 2, rr 1 and 2 and CCR Ord 37, r 2, which were in a certain sense the lineal predecessors of CPR 37.3. The former abolished the old distinction between a step in the proceedings which was a nullity and a step which was an irregularity. Any failure to comply with the requirement of the rules 'whether in respect of time, place, manner, form or content or in any other respect' was to be treated as an irregularity (RSC Ord 2, r 1(1)). The court had power to set aside the irregularity 'on such terms as to costs or otherwise as it thinks just' (RSC Ord 2, r 1(2)), provided that the relevant application was made 'within a reasonable time' (RSC Ord 2, r 2(1)). The comparable county court rule

(CCR Ord 37, r 2(1)) which related to 'setting aside judgment given in party's absence' was very much simpler:

> 'Any judgment or order obtained against a party in his absence at the hearing may be set aside by the court on application by that party on notice.'

A long note in the old *County Court Practice* headed 'Discretion to set aside' set out the principles to be derived from the relevant case law.

**[23]** Mr Gumbiti-Zimuto submitted that the judge had been wrong to make a distinction between a case in which a party had no knowledge of the proceedings at all and a case in which he had no knowledge of the date fixed for a hearing. He said that exactly the same principle was in issue in each case. This was the principle articulated by Denning LJ in *Ex p Rossi* (see [15], above). He accepted that the court would be entitled to dismiss an application to set aside a judgment in these circumstances if a defendant had delayed so long after hearing about it that he could be said to have affirmed it (although he did not accept that the application of this principle should penalise his present client). But he argued strenuously that if the application did not fall foul of that principle, and if there was a good reason (as there was here) why the defendant did not attend the hearing, then the court was not entitled to go on to consider whether he had a reasonable prospect of success at the trial. He was entitled to have his 'day in court' even if he had no reasonable prospect of success.

**[24]** Mr Gumbiti-Zimuto did not submit that r 39.3(5)(c) was ultra vires in the present context or adduce any arguments under the Human Rights Act 1998 to try and persuade us to give that sub-rule a distinctive interpretation. He simply argued that the principle enunciated by this court in *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647 was so powerful that in a case where the court had proceeded with a trial in the absence of a party because that party had not been notified of the hearing date, then a judge should not regard himself as bound to take into account all the criteria set out in r 39.3(5). Provided that the applicant had acted promptly and he had a good reason for not attending the trial, then he should be entitled to have the judgment set aside as of right.

**[25]** For my part I would prefer to express no views about the correct legal analysis when a 'defendant' avers that he had no notice of the proceedings against him at all, so that he might be regarded as a 'stranger' to them (see the quotation from Russell LJ's judgment in *White*'s case in [14], above). The resolution of that issue will have to await another day. I consider, however, that the judge was correct to make the distinction which Mr Gumbiti-Zimuto challenges. Once a defendant knows about the proceedings and participates in them, the court has the necessary jurisdiction to make an order affecting him. This judgment is therefore concerned only with the latter situation.

**[26]** We asked Mr Gumbiti-Zimuto whether he was submitting that even if the failure to give notice was the fault of the court and not of the claimant, and the claimant had attended court with his lawyers and all his witnesses and proved his case, the court was nevertheless obliged to set aside the judgment as a matter of the defendant's entitlement even if it considered the defendant's prospects of success to be only 'fanciful', so that the claimant would be put to the expense of proving his case all over again. He said 'Yes' unequivocally. When we asked him who should pay the costs thrown away on the first occasion when the error had been made by the court, we did not receive a very clear answer. It is not easy to see why the taxpayer should pay this bill when the defendant by definition has no reasonable prospect of success at the rehearing that has to be arranged.

[27] In my judgment the judge and the district judge were right to apply r 39.3(5) to the solution of this problem. The criteria set out in sub-rr (a) and (b) merely reproduce the effect of the former practice. The criterion set out in (c) is new, but I do not consider that it offends any fundamental principle of justice or any principle of Strasbourg jurisprudence. The rule gives the absent party the opportunity of explaining why he had a reasonable prospect of success, and if he fails to persuade a lower court judge, he can seek permission to appeal against that ruling if it appears to be perverse. It also gives the party in whose favour the judgment was given the chance of not having to prove his case all over again, with all the attendant expense that this will involve (which will very often be irrecoverable in practice), if a court is satisfied that there is in truth no reasonable prospect that the judgment would be reversed.

[28] For these reasons I would dismiss this appeal.

**HOLMAN J.**

[29] I agree.

**KENNEDY LJ.**

[30] I also agree.

*Appeal dismissed.*

Dilys Tausz Barrister.

# Giambrone and others v JMC Holidays Ltd (formerly Sunworld Holidays Ltd) (No 2)

[2003] EWHC 2619 (QB)

QUEEN'S BENCH DIVISION AT BIRMINGHAM

JUDGE MACDUFF QC

3 MARCH, 1 MAY 2003

*Damages – Personal injury – Carer services – Gratuitous carer services provided to claimant by relative living in same household – Whether claimant in personal injury action able to recover damages in respect of gratuitous care – Whether claimant having to pass certain threshold before being able to recover damages – Approach to assessing awards.*

The defendant company provided holidays at a hotel in Majorca. Many of their customers developed gastro-enteritis or similar illness as a result of food eaten within the hotel. Those customers brought a group action against the company. The company admitted liability. The claimants' cases were those selected as lead cases. Five of the claims involved children between the ages of 17 months and 8 years old. The sixth involved an adult. In all six cases there was a claim for the value of care after the claimants returned home. That included nursing and other care and attendance provided by the parents in the case of the first five claimants, and the spouse in the case of the sixth. The company rejected the claims for damages for care as a matter of principle. It relied on Court of Appeal authority submitting that before such an award could be made the claimants had to satisfy three stages. First, that the claimant would have otherwise required nursing care. Secondly, that the care provided went distinctly beyond that which was part of the ordinary regime of family life, and thirdly, that it was a very serious case. The defendant argued that the instant claims did not cross that threshold.

**Held** – (1) There was no rigid test, involving the fixing of some arbitrary threshold or watershed. Provided the evidence established that the illness or injury was sufficiently serious to give rise to a need for care and attendance above and beyond the normal call of ordinary family life and that it was significantly so, compensation, properly assessed, should be awarded. It was not a condition precedent to an award of damages that actual nursing care, requiring technical expertise, as opposed to loving attendance, was required. Nor could it be said that it was part of the regime of ordinary life for parents to spend their time looking after sick children. Moreover, there was no requirement that it should be a very serious case; a carer would be entitled to be compensated when an illness became sufficiently serious to require significant extra care. In the instant cases, the claims for care, gratuitously provided, had to be allowed (see [41], [42], [44] and [49]–[50], below); *Mills v British Rail Engineering Ltd* [1992] PIQR Q130 explained.

(2) Where a parent of a young child was providing a mixture of love, support, and care, it would be artificial to adopt the traditional approach to assessing damages. It was not possible to separate out the extra hours or minutes superimposed on the normal daily round by the illness. Rather, a proportionate and proper award should be reached by considering the type and severity of the

child's illness; the length of time for which care was necessary; the fact that the child was getting better for part of the time; whether the claim included child minding where the child was unable to go to school or nursery and could not be left; and the nature of the additional burden on the parent. Taking those factors into account in relation to the first five claimants, and in the case of the sixth claimant, the care his spouse had provided, damages would be awarded to all the claimants (see [55]–[57], below); *Evans v Pontypridd Roofing Ltd* [2001] All ER (D) 131 (Nov) considered.

**Cases referred to in judgment**

*Best v Samuel Fox & Co Ltd* [1952] 2 All ER 394, [1952] AC 716, HL.
*Cunningham v Harrison* [1973] 3 All ER 463, [1973] QB 942, [1973] 3 WLR 97, CA.
*Donnelly v Joyce* [1973] 3 All ER 475, [1974] QB 454, [1973] 3 WLR 514, CA.
*Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657, [2001] All ER (D) 131 (Nov).
*Housecroft v Burnett* [1986] 1 All ER 332, CA.
*Hunt v Severs* [1994] 2 All ER 385, [1994] 2 AC 350, [1994] 2 WLR 602, HL.
*Lowe v Guise* [2002] EWCA Civ 197, [2002] 3 All ER 454, [2002] QB 1369, [2002] 3 WLR 562.
*Mills v British Rail Engineering Ltd* [1992] PIQR Q130, CA.

**Case referred to in skeleton arguments**

*Nash v Southmead Health Authority* [1993] PIQR Q156.

**Claims**

The defendant, JMC Holidays Ltd (formerly Sunworld Holidays Ltd) admitted liability in a group action brought against it by Anita Giambrone and 651 others for personal injury as a result of developing gastro-enteritis while on holidays provided by the defendant. Twenty-five of the cases selected as lead cases settled. In the remaining six cases, the claimants, Sean Paul Mason, Lauren Ilic, Emma Farrar, Molly Woodier, Lauren Hunt and Patrick Brennan, sought awards of damages for the value of care after their return home. Patrick Brennan also sought damages for value of services. The facts are set out in the judgment.

*Andrew Spink QC* (instructed by *Irwin Mitchell*, Birmingham) for the claimants.
*Charles Haddon-Cave QC* and *John Russell* (instructed by *Field Fisher Waterhouse*) for the defendant.

*Cur adv vult*

1 May 2003. The following judgment was delivered.

**JUDGE MACDUFF QC.**

[1] In 1997 and 1998 these defendants provided holidays at the Club Aguamar in Majorca. Many of their customers developed gastro-enteritis or similar illness as a result of food eaten within the hotel. Six hundred and fifty two of those customers have had the good fortune to obtain representation from Irwin Mitchell of this city, and have brought claims against the defendants.

[2] This is part of the group action brought by those claimants. I have case managed the case throughout. At an early stage, the defendants admitted liability. Also, a number of cases were selected as lead cases, with the intention that decisions would be made in those cases, which would facilitate settlement of the others. Of the 652 cases, some 401 have settled, including 25 of the 31 lead

cases. Thus 251 of the 652 cases are still to be decided or settled, including 6 remaining lead cases. a

[3] This is the final determination of the quantum of those six lead cases.

[4] Many, indeed most, of these many claims, are of relatively modest value. Fortunately, most claimants suffered symptoms for only a short time, or their symptoms were not severe beyond the initial stages. That is true of all the six cases with which I am concerned. b

[5] Sean Paul Mason was three years old at the time of his holiday in the summer of 1998. His symptoms, regular vomiting, lasted about three weeks, although he was improving gradually over that time. The details may be found in his mother's witness statement.

[6] Lauren Ilic was aged seven years at the time of her holiday in the summer of 1997. Her symptoms lasted a little longer. She suffered from diarrhoea and sickness. There is an account of Lauren's illness in her mother's statement. c

[7] Emma Farrar was eight years old in 1998, when she visited the Club Aguamar. Her illness is recounted in her father's witness statement. Her symptoms lasted for two or more months, although she was gradually improving over that period. She had to have time off school after returning to the United Kingdom. d

[8] Molly Woodier was ill for several months. She was a toddler, only 17 months old, at the time of her holiday in June 1998. Her illness is described in the witness statements of her parents. She was ill for around six months.

[9] Lauren Hunt was seven years old when she visited the Club Aguamar in May and June 1998. Her main symptom was diarrhoea. Although she returned to school after the holiday, she continued to suffer from stomach cramps until early 1999 (mother's statement). e

[10] Patrick Brennan was born in February 1967 and is a sales office manager. He took seven days off work after returning from his holiday in 1998. He describes how, although improving, he continued to have symptoms, for many months. f

[11] These are the six claimants whose claims are to be determined, in part, by me. I say 'in part' because most heads of damage have already been agreed. In all these 652 cases, claims have been brought under several heads: pain and suffering, special damages (medical expenses and the like), loss of enjoyment of holiday, diminution in value of holiday and so on. All heads of claim have been the subject of negotiation, and, in respect of these six claimants, all heads of damage have been agreed (subject to approval in the first five cases) save for one. In all six cases there is a claim for what has been called 'the value of care'. This is only the value of care after the return home; the parties have settled the care claims for the period when the claimants were still on holiday. In all six cases, the claim is modest. But these claims for care are entirely rejected by the defendants as a matter of principle; the defendants submit that they cannot succeed in law. g h

[12] Although these six individual claims for care are not large, I am told that there is a wider significance. Many of the outstanding claims also include claims for care, and the potential total damages may be large. Also, quite apart from this group of cases, there are many other group claims making their way through the courts, and my decision may affect those cases also. j

[13] A word or two about this head of damage. These are claims for the cost or value of care, that is the cost (or value) of making provision for the needs of the claimant. This includes nursing and other care and attendance. These are

needs of the claimant which arise because of his injury, and are those damages usually labelled 'care and attendance' or 'gratuitous care', and with which we are concerned in this case. The authorities demonstrate that, in general, a claimant is entitled to recover a sum representing the value of that which has been provided, so that the provider may be reasonably remunerated for that which he has gratuitously provided.

**[14]** There is also a similar head of damage, underpinned by similar principles. It permits the recovery of the cost of undertaking tasks, previously performed by the claimant, but which he can no longer do. This involves placing a value on those tasks, where they are performed gratuitously. Where a claimant, as a consequence of his injuries, is unable to perform some task (eg gardening, household chores or decorating etc) which he used to perform, and pays a third party to do it for him, that cost may be recovered. That has long been the law. Where he does not pay for the gardening or other task to be done by a third party, he may nevertheless recover the reasonable value of the work which he can no longer do. This head of damage is often referred to as 'the cost of services'. There is a claim in the case of Mr Brennan for what I call 'the cost of services', but I will deal with this separately, towards the end of this judgment.

**[15]** But otherwise, we are concerned with care claims, not services claims. This is an area of the law which has developed radically in the last thirty or so years, and which is still developing. Before *Cunningham v Harrison* [1973] 3 All ER 463, [1973] QB 942 and *Donnelly v Joyce* [1973] 3 All ER 475, [1974] QB 454 were decided, it was thought that a claim for care and attendance could only succeed to the extent that the claimant had actually expended money (or contracted to do so) for the nursing services which he needed. This led to the unedifying spectacle of a claimant contracting with a spouse, on lawyer's advice, to pay so much per hour or week for the care which that spouse was providing. This enabled the court to award damages for care as an item of special damage. This process had to be followed because of the principle established in *Best v Samuel Fox & Co Ltd* [1952] 2 All ER 394, [1952] AC 716: the third party owed no duty to the care provider and, unless the claimant had a legal obligation to pay for the care, he could not recover on behalf of the provider who had provided the service gratuitously.

**[16]** But *Cunningham*'s and *Donnelly*'s cases established that the claimant could recover the value of gratuitous care. The jurisprudence in those two cases was different, but the result was the same. Over the years, some jurists have preferred the route in *Cunningham*'s case (as propounded by Lord Denning MR) and others have preferred the route in *Donnelly*'s case (per Megaw LJ). I do not need, in this judgment, to explain the two different approaches, the two different routes by which the same result was achieved. There have been detailed analyses of the two cases in numerous later decisions, both in the Court of Appeal and in the House of Lords. The difference of approach has been considered on many occasions, notably by O'Connor LJ in *Housecroft v Burnett* [1986] 1 All ER 332 at 342 and by the House of Lords in *Hunt v Severs* [1994] 2 All ER 385, [1994] 2 AC 350. The House of Lords preferred the reasoning in *Cunningham*'s case; this included that the injured claimant should hold these damages on trust for the voluntary carer.

**[17]** The history of the development of this area of law has been recounted and explained recently in two decisions of the Court of Appeal namely *Lowe v Guise* [2002] EWCA Civ 197, [2002] 3 All ER 454, [2002] QB 1369 and *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657, [2001] All ER (D) 131 (Nov). I do not propose

to embark on a similar exercise, if only because I would just be duplicating unnecessarily the analysis and explanations of eminent Lords Justices. Strictly speaking *Lowe*'s case was concerned with what I have called a 'services claim'. It was concerned with the services which the injured claimant had previously provided to his family, and which, because of his injury, he could no longer provide. It was not concerned with the cost of providing care and attendance for him, or valuing the care which he reasonably required. In fact, the injured claimant was claiming the value of the care which he had gratuitously provided for his brother.

**[18]** In respect of care claims in general, I would venture the following general principles. (a) Where a claimant, as a consequence of his injuries, expends money on paid help (whether nursing care or some other 'care') so that he can be properly looked after, that expenditure may be recovered from the tortfeasor. This has ever been the law. (b) Where he does not pay for the 'care' under (a), above, and it is provided freely by another, usually a spouse or other relative, that care is to be valued, and the value is recoverable. (c) Where the carer loses wages in order to make the provision, the value of the services/care is calculated with reference to the provider's lost earnings, subject to the test of reasonableness. (d) The value of the 'care' is not just to be calculated with reference to the nursing 'work' (the fetching, carrying, food and medicine providing, and so on). Attendance on the claimant, providing company, support, and comfort (again provided it is reasonable), has a recoverable value. Thus, for example, a claimant in an appropriate case would be entitled to recover in respect of visits by a relative or friend to hospital (provided the visits were beneficial, not excessive, and reasonable) notwithstanding that all his nursing requirements were being provided. (e) In recent times, the value of care and attendance provided by, eg, a spouse has usually been calculated by a multiplier and multiplicand approach. This involves making an assessment of the number of hours per day or per week which the spouse has devoted to the care and attendance, then taking an hourly rate, which might be charged by a professional carer for the type of care provided, and applying a discount, perhaps of one-third or one-quarter, to reflect the fact that there are savings where the provision is made gratuitously.

**[19]** I propose to deal first with the five infant claimants. Mr Brennan's case raises different issues, and I will defer my decision in his case until the end of this judgment. The infant claims fall firmly within the first of the two heads of damage. They are 'care claims' as opposed to 'services claims'. The claims may be divided into two parts. First, there is the personal care provided by a parent, looking after an ill child. This may involve what, for want of a better description, might be called 'nursing care'—helping with dressing or washing or visiting the lavatory, helping with feeding, and so on. But it would also involve the parent's attending on the child, sitting at the bedside, providing comfort, company and support, including attending on the child if he or she woke in the night. Secondly, in some but not all of the cases, there is an element of extra child minding, for example when the child was too ill to go to school and was looked after at home.

**[20]** In all these claims, the care (be it 'nursing' care and attendance, or child minding) was provided by a parent and not by some third party for payment. In all these claims, the claim is for the value of that which the parent provided. I do not think there is any distinction to be drawn between these different categories (nursing care and child minding). They are part and parcel of the same need—to look after the child during his/her illness. The 'care' may attract different labels. It may be child minding: attending the child when, but for the illness, it would not

be necessary. It may be nursing care in the narrow sense: helping to the lavatory, administering medicine, changing the bedding, or cleaning up after an accident. It may be care (or attendance) in the wider sense: being at the bedside, to provide comfort and support to an ill child. These different roles all fall within the generic term 'care and attendance' or (where the provision is by a parent and not a professionally engaged carer) 'gratuitous care'.

[21] It is necessary to look briefly at the five claims. According to the particulars, Sean Mason, aged three, needed care for a period of two weeks. He spent a day in hospital on his return to the United Kingdom. He was repeatedly sick and not well enough to go to his nursery/playgroup. He needed reassurance and comfort, and could not be left alone at night until he was asleep. The evidence, not contested, is within the statement of Anne Mason. There is some support for the care claim in a letter from Dr Miller.

[22] The care claim in respect of Lauren Ilic is made over a period of approximately two weeks, between 30 September and 10 October 1997. She was seven years old at the time. The relevant evidence, again not challenged, is in the mother's statement. There is a child minding element within this claim because Lauren was off school for two weeks.

[23] Emma Farrar. Care was provided between 8 and 19 June 1998. There is some support for this level of care from the medical expert. The care and attendance provided by the parents is described in the father's statement. It included carrying Emma to the lavatory, taking food and drink to her, changing the bedding, and generally looking after her in a way which would not have been necessary if she had not been ill. It also included just 'being with her' and providing comfort and company. In addition, Emma was unable to attend school, because of the illness, for some two weeks, and she spent much of this time in bed. This, of course, meant that someone had to remain in the house, so that the claim also includes an element of additional child care.

[24] Molly Woodier was only about 17 months old. In her case, the care claim covers a longer period. The need for care is described within the statements of her father and of her mother.

[25] The care claim of Lauren Hunt is made in respect of a period of approximately two weeks, between 7 June and 21 June 1998. She was seven years old at the time. The relevant evidence is to be found in the mother's statement.

[26] In all these cases it is accepted that the claim can only be for the *extra* parental input which was caused by the illness. There would have been a certain amount of fetching and carrying, changing of bedclothes and the like, if the children had been well. What has to be valued (if these are well-founded claims at all) is the extra care and attendance resulting from the illness.

[27] At first blush, it would seem that, in principle, these claimants should be able to recover the value of the care which their parents provided during their illnesses. Some might find it slightly distasteful that a parent, nursing a sick child after a nasty bout of diarrhoea and vomiting, would say to the defendant: 'I provided care and support for my child through the illness. I had to get up in the night. I had to fetch and carry. I estimate that I gave her about four extra hours a day on average than I would normally give her, and I would like compensation of £200 (or whatever sum).' But, in principle, there seems no reason why the parent should not do so. The defendant is responsible for the illness. As a consequence there is a need for care and child minding. It is a reasonable need, caused by the tortious act. If the parent fills that need, it should be valued and

compensated. In one sense, it is a straightforward matter of breach of duty and causation of damage. a

**[28]** The defendants contend that these cases are not sufficiently serious to merit an award in respect of gratuitous care. They submit that there is, at law, a threshold to be passed before such a claim will lie. None of these cases reaches that threshold. They rely upon *Mills v British Rail Engineering Ltd* [1992] PIQR Q130. It is a decision of the Court of Appeal. In that case the Court of Appeal b upheld a claim for gratuitous care by a terminally ill claimant who had an asbestos-related disease. The claimant was receiving long-term care from his wife. It is submitted that there is a three-stage test, and that, in order to qualify for an award, the claimant must satisfy each of the three stages.

**[29]** The three stages of the test are as follows. First, that the claimant 'would otherwise require nursing care' (attributed to Dillon LJ at 136–137). Second, that c the care provided should go 'distinctly beyond that which is part of the ordinary regime of family life' (per Staughton LJ at 138). And, thirdly, taken in the round, 'it must ... only be in a very serious case that an award is justified' (per Dillon LJ at 137).

**[30]** The facts of that case were as follows. The claim was brought under the d Fatal Accidents Act 1976 by the widow of Mr Mills. He had inhaled asbestos in his earlier life, had suffered lung cancer, which had led to his death. Liability was admitted. The first symptoms of his illness occurred at the very end of 1989, when he was 60 years old. The early symptoms consisted of a cough which would not go away. He was referred for medical investigation in early 1990. He e underwent a bronchoscopy in February 1990 and was diagnosed with lung cancer in March. He was treated by chemotherapy in March and April, with two further short treatments in August and September. Although he suffered from increasing breathlessness, particularly towards the end of 1990, he suffered little or no pain until the end of November. He died in January 1991.

**[31]** There was a claim for the care which the widow had provided. It was f calculated in the following way. A claim was made for the whole of the 14-month period, November 1989 to January 1991. It was contended that the widow provided the equivalent of approximately two hours of care per day in the first two months. In January 1990, the claim increased to three hours per day. In February 1990, care was claimed at four hours per day. The cancer was g diagnosed in March. From March to October, the claim was put at ten hours per day. From November 1990 to January 1991, it was 14 hours per day. The hourly rate claimed was the rate of a professional carer.

**[32]** It seems that these calculations were accepted by the judge, subject to a reduction of one-third (this being gratuitous care rather than commercial care) and subtracting the extra charges which an agency would have required to supply h the carer. Using that formulation, he awarded the sum of £8,000.

**[33]** The Court of Appeal reduced the award to £5,000 (per Dillon LJ at 138):

> 'To my mind however, if one looks at [the] schedule for a wife's care beyond what she would anyhow have been doing for her husband in her part of the household tasks and cooking, it comes out too high ... I take the view j that the figure that the judge awarded, having regard to the way [the] schedule is made up and the extent to which it goes back, was too high.'

**[34]** It is clear, from a reading of the judgments, that Dillon, Neill and Staughton LJJ were satisfied that, in the first few weeks and months, the deceased, apart from his cough, suffered little or no disability which would justify

the provision of care for two, three or four hours per day. Secondly, although the wife took on significant additional duties throughout the remainder of the period, when he was becoming increasingly breathless, her 'care' was being charged, subject to the discount, as a full-time resident carer. This ran from March (when the disability would have been fairly minor) through to death. In effect, a further discount needed to be applied to reflect two things: that Mrs Mills would have been providing care for him, in any event, as part of her housewifely duties; and that the nature of the illness did not justify the need for full-time care for the whole period from March to the date of death. Without doing a precise calculation, the Court of Appeal reduced the award from £8,000 to £5,000.

[35] At face value, that decision would appear to do no more than emphasise that awards for gratuitous care must be carefully scrutinised, and supported by the evidence. Incidentally, it was accepted that the provision of love, affection and support formed part of the 'care' for which damages were to be awarded.

[36] But the defendants rely upon specific passages in the report. The relevant part of the headnote (at 130–131), it is said, accurately summarises the ratio of the case.

> '... in relation to the award for the widow's nursing services a court can properly award a sum of damages to enable a sufferer or his estate to make a reasonable recompense to a relative in respect of nursing care provided to the sufferer or deceased which would otherwise have required the services of a trained nurse. An award can be made even where the carer has not lost wages of her or his own in order to look after the patient. There can be no justification in principle differentiating between full-time care needing a trained nurse and full-time care needing a carer giving love and affection to a dying person to a far greater degree than would be expected in any ordinary way of life, but an award is only justified in a very serious case and in recompense for care by the relative well beyond the ordinary call of duty. In the circumstances of the case an award under this heading was appropriate. Although it was not possible to make a really precise calculation the judge's award was too high and should be reduced to £5,000.'

[37] The defendant's specifically rely upon the words 'a far greater degree than would be expected in any ordinary way of life' and 'an award is only justified in a very serious case' and 'in recompense for care ... well beyond the ordinary call of duty'.

[38] These features of the headnote can be extrapolated, it is said, from the judgments. The defendants rely upon the following passage (per Dillon LJ at 137):

> 'To my mind there can be no justification in principle for differentiating between full-time care needing really a trained nurse and full-time care needing a carer giving love and affection to the patient, the dying person, *to a degree far more than would be expected in any ordinary way of life*. In principle it must be, in my judgment, a matter for an award only in recompense for care by the relative *well beyond the ordinary call of duty for the special needs of the sufferer*. The basis ... is that the court will make an award to enable the sufferer or his estate to make reasonable recompense to the relative who has cared so devotedly. *So it must indeed only be in a very serious case that an award is justified*—where, as here, there is no question of the carer having lost wages of her or his own to look after the patient.' (My emphasis.)

Neill LJ agreed with this judgment.

[39] Reliance is also placed upon a passage from Staughton LJ (at 138).

> 'It seems to me that a plaintiff would naturally wish to pay some reward or compensation, if he had the money to do so, for care and attendance by a relative, *which goes distinctly beyond that which is part of the ordinary regime of family life*; and, where his disability has been caused by the fault of the defendant, it is right that he should be provided with the money to do so.' (My emphasis.)

[40] It is from these passages that the defendants say the three-stage test can be divined. They say further that this is the ratio decidendi of the case (or this part of the case), that it is a decision of the Court of Appeal, and that I am bound to follow it. They say that none of the five infants' claims passes the watershed, and that the claims for care must be dismissed.

[41] I have reached the conclusion, for reasons which I will set out, that the Court of Appeal was not intending to impose some rigid test, involving the fixing of some arbitrary threshold or watershed. In any event, it seems clear to me that the particular phrases, upon which the defendants rely, were obiter only, and were not part of the ratio of the case. They were not an essential part of the decision which was made; the decision was no more than the upholding of an appeal that the damages were too high, and that the judge had erred in his approach to the evidence. It was no part of the actual decision that only serious cases should be compensated; *Mills v British Rail Engineering Ltd* [1992] PIQR Q130 was a serious case. Moreover, even if I were wrong about that, I am satisfied, on a proper reading of *Mills'* case, that, at all three stages of the so-called threshold, these infant claims satisfy the test.

[42] It seems to me that a careful analysis of the case does not lead to the interpretation for which the defendants contend. Let us look at the three stages of the supposed test. First, reliance is placed on a passage said to lie in the judgment of Dillon LJ (at 136–137). It is contended that, before the claim can be allowed, it must be shown that the claimant required 'nursing care'. Apart from a concession made by counsel for the defendant (at 136)—'a court can properly award a sum of damages to compensate a relative in respect of nursing care provided to the deceased which would otherwise have required the services of a trained nurse'—and which is hardly to the point, I can see no justification in that passage for the assertion. Nowhere, as it seems to me, does Dillon LJ suggest that it is a condition precedent to an award of damages, that actual *nursing* care (as opposed to loving attendance, for example) is required. Still less does it appear that he is stating that *professional* nursing care is a requirement (although this has found its way into the defendants' skeleton argument). I have been unable to find the short quotation attributed to Dillon LJ ('would otherwise require nursing care'). Nor does it seem to me that that quotation is an accurate summary of anything else which he said at any point in his judgment. Maybe I have missed something. In so far as the case headnote may be thought to lend support to such a proposition, it is not supported, as it seems to me, by the judgments. But, in any event there is no magic in the concept of nursing care. The verb 'to nurse' is defined in the *Oxford Dictionary* as including 'to attend to a sick person'. It seems to me that all these five children needed to be nursed during their illnesses. Nursing care cannot be divorced from 'attendance upon a sick person'. It seems that there is, implicit in the defendants' argument, an assumption that 'nursing'

imports some technical expertise, or some minimum amount of professional-type care, and that, in some way, the fetching, carrying, cleaning, and comforting which these parents dispensed does not qualify as true 'nursing'. I reject that implicit submission.

[43] But, even if it were so, I disagree with the defendants' suggestion that none of the children in these cases did in fact require nursing care. Consider Molly Woodier and the statement of her father. Molly was, at times, suffering from a temperature. She was suffering recurrent diarrhoea, so that, for one period, her nappy needed changing every 30 minutes. The period of her acute illness may have been relatively short, but it is difficult to imagine a situation in which the need for nursing care could be greater. If the parents had not been available to look after this little girl, during the day and during the night, and if a trained nurse or care assistant had been employed, it is difficult to see how the claim for the costs of the nurse/carer could have been refused. Where a child is ill, for example during the night, and is repeatedly vomiting and suffering from diarrhoea, and running a temperature, and requiring medication, it is axiomatic that he/she requires nursing care; whether that care is provided professionally or by a parent is, as it seems to me, irrelevant.

[44] Secondly, the defendants contend that there is a requirement that the care provided should go 'distinctly beyond that which is part of the ordinary regime of family life' (the words of Staughton LJ at 138) or, 'to a degree far more than would be expected in any ordinary way of life' (the words of Dillon LJ at 137). What does that mean? In my judgment, it can only mean 'ordinary regime of family life when no one is ill or injured to a degree where he/she needs to be looked after/nursed'. It is not part of the regime of ordinary life that parents spend their time looking after sick children, running to and from the lavatory, clearing up the mess, administering medicine, and child minding when the child is unfit to go to school. In 'ordinary life' children are not sick and they go to school.

[45] As I understand the defendants' argument, it is contended that children are unwell from time to time. When they are unwell, their parents look after them. This is all part and parcel of life's tapestry—'the ordinary regime of family life'.

[46] If that were true of these cases, it would also be true of *Mills'* case. Spouses are ill from time to time. It is, in that sense, part of the normal pattern of life that the other spouse will provide the care and comfort which is needed. If Mr Mills had been unwell some months earlier, unrelated to his asbestos inhalation, Mrs Mills would have cared for him. Why could the defendants not say, in that case, that looking after a sick husband was part of the ordinary regime of family life? Why should sick husbands be different from sick children?

[47] In my judgment, Dillon and Staughton LJJ were saying no more than that the care provided must be significantly different from the care which would have been provided if the husband had been well. At a time when he was only coughing mildly, his wife would have treated him little differently than when he was well. It is only when the illness becomes sufficiently serious to require significant extra care that the carer is entitled to be compensated. On that analysis, the cases of these five children pass the threshold.

[48] The defendants contend for a third strand to the test. '[I]t must ... only be in a very serious case that an award is justified' (per Dillon LJ at 137). They say that these five cases are not very serious.

**[49]** How is seriousness to be judged? Why is it not serious if a young child is so ill that he/she requires the sort of care which I have described above? The defendants are right to say that the illnesses lasted for a mercifully short time. But, in my judgment, these claimants were, albeit for that short time, seriously ill. Putting that another way, these are serious cases, notwithstanding that total damages may not be great. Why, then was it necessary to include these words ('it must ... only be in a very serious case that an award is justified') in the judgments? It seems to me that those words do no more than to emphasise that the illness/injury must be sufficiently serious to give rise to a need for care and attendance significantly over and above that which would be given anyway, in the ordinary course of family life.

**[50]** In those circumstances, I find nothing in the judgment in *Mills'* case to lead me to the conclusion that, as a matter of principle, these claims for care, gratuitously provided, should not be allowed. Provided the evidence establishes that the parents provided care and attendance above and beyond the normal call of ordinary family life and that it was significantly so, compensation, properly assessed, should be awarded.

**[51]** Subject to quantification (and subject to dealing with the claim of Mr Brennan) that would be sufficient to dispose of these cases. But, out of deference to the argument which has been put before me, I propose to make a few further short comments.

**[52]** Mr Haddon-Cave QC told me that he had done a thorough search of all reported cases concerned with the provision of care, and that every single reported case was a large and (on any view) serious case. I do not find that surprising. One might expect that the larger cases would be the ones to be reported, the ones to establish the relevant principles of law. Although the reported cases are all cases of severe illness or injury, it is, perhaps, surprising that there is no mention in any of them (and many of them do give a detailed exposition of the development of this area of law) of this supposed principle in *Mills'* case.

**[53]** I obtain further comfort from the fact that, as a matter of practice, these claims are regularly made and regularly allowed. I know this to be the case from my own experience of trying and case managing these cases, both in the High Court and in the county court.

**[54]** In the course of argument, I asked Mr Haddon-Cave why the Court of Appeal would wish to impose such a rule to regulate the circumstances in which such a claim could be brought. The answer was that it could only be a policy decision, to prevent small unverifiable claims from being brought in a host of claims. I confess that I do not find that to be a persuasive argument. No such limit is placed on other heads of damage, and the courts may surely be relied upon to police these claims, and to make proportionate and sensible awards, in accordance with the evidence.

**[55]** I have been referred to the case of *Evans v Pontypridd Roofing Ltd* [2001] All ER (D) 131 (Nov). I note that, in a detailed examination of the way in which this head of damage has developed over the years, including a detailed statement of the current state of the law, as well as an appraisal of how these damages are to be approached and assessed, May LJ made no mention of any threshold test. Mr Haddon-Cave says that that is not surprising; that was a case concerned with quantification, and not with the principle of recoverability. That, he says, was a case in which the threshold was patently reached, and the question did not arise. There is force in that submission, and I agree that it is of no great assistance to me,

a one way or the other, that *Mills v British Rail Engineering Ltd* [1992] PIQR Q130 made no appearance in the judgment. But I do draw assistance from the case. The Court of Appeal took the opportunity to emphasise that a judge of first instance should not be put into a straitjacket when assessing this head of damage. In many cases, it might be inappropriate to adopt the traditional approach (assessing a number of hours input per day or week, applying a commercial b hourly rate, and then discounting, in the way described earlier in this judgment). It is open to a judge to assess the value of the care, very much as he might assess general damages for pain and suffering, by having regard to what the carer has done and fixing appropriate compensation. In this case it seems to me that such an approach is the correct one. It is artificial to adopt what I have called the conventional approach where a parent of young children is providing a mixture c of love, support, and care. It is just not possible to separate out the 'extra' hours or minutes superimposed on the normal daily round by the illness. It is possible to understand the general nature of the extra burden placed upon the parent, and to make a proportionate and proper award. That is how I propose to assess the damages in these cases. I should emphasise that I have read the judgment d carefully, and have found the general guidance helpful. Mr Spink QC, on behalf of the claimants, referred me, in particular, to [18], [22]–[25], and [30]. It seems to me that the judgment supports the approach which I am adopting, but also lends support to the decision which I have already made—that there is no threshold, that each case is to be determined on its own facts, and that the guiding principle is that, however limited or however extensive the care, 'the court has to e assess proper recompense' which will 'obviously depend on the circumstances of each case' and the care services to be compensated 'should not exceed those which are properly determined to be care services consequent upon the claimant's injuries' (per May LJ at [30]).

[56] I turn to the individual assessments. Although modestly pleaded, it was f conceded by counsel on behalf of the claimants that the sums claimed fell to be reduced by some discount, as the amounts claimed were calculated on full commercial care rates (albeit the lowest rates for personal care support). That is of small significance in view of the fact that I intend, as I have said, to adopt a more broad brush approach. I have read the evidence of the parents carefully. I have read the medical evidence, because it seems to me that the nature and g severity of the child's illness is a relevant factor. I have noted the number of days or weeks over which care was said to be necessary. I have taken account of the fact that, for part of the time, the claimant was getting better and that the need for care would, at that time, reduce. I have taken account of whether or not the claim incorporates a claim for 'child minding' (where the claimant was unable to h go to nursery or school and needed to be attended) and I have taken account, in each case, of the nature of the additional burden, as described by the parent. My awards for care in the five cases involving infant claimants are: Sean Mason, £150; Lauren Ilic, £175; Emma Farrar, £175; Molly Woodier, £275; and Lauren Hunt, £150.

j [57] That leaves the sixth claimant, Patrick Brennan. His is a mixed claim for both care and services. I have read his evidence carefully. He had some days off work after his return home. But this part of the claim is (a) for the care and attendance provided by his wife after the return home and (b) the value of the daily tasks which, because he was ill, he was unable to perform. It does not seem to me that, on any view, the services claim under (b), above can possibly be 'caught' by the decision in *Mills'* case. But, in any event, I am satisfied

that damages are recoverable under both. In summary, during this illness, Mrs Brennan provided care (fetching and carrying, helping with bathing, and purchasing vitamins and so on). Also Mr Brennan was unable to take his full share of child minding duties and housework. This part of the claim is undoubtedly for the value of services, as opposed to care. I do not propose to distinguish between the two, and, having regard to the relatively short period involved, and the very modest amount of care provided by Mrs Brennan, I assess Mr Brennan's claim at £120.

*Order accordingly. Permission to appeal granted.*

Martyn Gurr Barrister.

# Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit and others

[2003] EWHC 703 (Comm)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

TOMLINSON J

16 JANUARY, 3 APRIL 2003

*Proceeds of crime – Declaratory relief – Claimant informing police of suspect transactions – Claimant seeking consent of police to transfer related moneys – Police refusing consent – Claimant seeking declaration that moneys not proceeds of crime – Whether appropriate for claimant to seek declaration – Criminal Justice Act 1988, s 93A.*

The claimant provided trading services to the second defendant company. It developed concerns about the integrity of the second defendant, in particular about receipt of large sums of money from companies connected to two entities, A Ltd and R plc. Both those entities had collapsed with significant losses, leading to litigation in which a massive fraud was alleged and in which the second defendant was implicated. After the claimant raised its suspicions with the second defendant, all remaining positions were closed out by agreement, resulting in a credit balance of approximately $US 450,000 (the balance) in favour of the second defendant. The claimant sought the consent of the first defendant, the City of London Police, implicitly under s 93A(3)(b)(i)[a] of the Criminal Justice Act 1988, for the transfer of the balance to the second defendant. The police declined to give such consent, which would have provided the claimant with a defence to any prosecution under s 93 of the 1988 Act for being concerned in an arrangement facilitating the retention or control by another of the proceeds of crime. The police stated that they had reasonable cause to believe that the second defendant had been involved in fraudulent actions with A Ltd and R plc. The claimant issued proceedings seeking a declaration as against the first defendant that the balance was not the proceeds of crime. On the same day, it also issued an application notice seeking an interim declaration to the same effect. The interim application was subsequently rejected, following which the second defendant was joined and particulars of claim served, seeking the same declaratory relief as against the first defendant. On being joined, the second defendant issued an application for the first defendant to provide full particulars of its suspicion or belief that the balance was the proceeds of crime, and for an order that the money be paid into court. The proceedings were later stayed against the first defendant and an order made to join the Serious Fraud Office (SFO) in its place, since the SFO had taken over the criminal investigation. The instant proceedings were concerned with a restored hearing for directions and an application by the SFO for the proceedings against it to be stayed. The second defendant applied to introduce a counterclaim seeking payment of the money by the claimant.

a Section 93A is set out at [8], below

**Held** – (1) The court could not regard the course which the claimant had adopted as appropriate, nor was that course sanctioned by authority. It had never been appropriate for the claimant to seek a declaration against the police that the balance was not the proceeds of criminal conduct. Whether the balance represented such proceeds was never an issue between those parties and there was no occasion for the creation of a lis between them directed to determination of that point. The only question which the police had been asked was whether they consented to the payment being made. Had they given consent, the claimant would have had a defence under s 93A of the 1988 Act to any prosecution under that section. Section 93A would manifestly be unworkable if the police could only justify the withholding of consent if they could demonstrate their satisfaction, to whatever might be the appropriate standard, that the funds were in fact derived from or used in connection with criminal conduct. It was clear from s 93A as a whole that the existence of a suspicion was sufficient to ground a proper refusal of consent. It would be odd if a legitimate withholding of consent which could be justified on grounds of suspicion were to lead to the situation in which the police had to defend proceedings directed towards determination of a question wholly different from that which they had been asked, namely, the ultimate question of whether the funds had in fact derived from criminal conduct. Nor in such circumstances should the court grant interim declaratory relief on that ultimate question. Moreover, the granting of declaratory relief on the ultimate question as against the police, whether on an interim or a final basis, could prejudice future criminal prosecutions. Accordingly, the action against the SFO fulfilled no useful or legitimate purpose and would be stayed (see [24], [27], [28], [31], below); *Governor and Company of the Bank of Scotland v A Ltd* [2001] 1 All ER (Comm) 1023 distinguished.

(2) The instant case had been transformed by the second defendant's application to introduce a counterclaim, since such a claim would at last result in issue being joined between the two parties in contention. As matters stood, the claimant was simply seeking declaratory relief against the second defendant which had no interest in opposing it. Permission would therefore be granted for the second defendant to serve a defence and counterclaim. Since that rendered the claim wholly redundant, if asked to do so, the court would consider permitting the claimant to withdraw its claim entirely, and directing that the second defendant be claimant in the action and the claimant the sole defendant (see [30], below).

**Notes**

For money laundering and other offences, see 12(2) *Halsbury's Laws* (4th edn reissue) para 541B.

For the Criminal Justice Act 1988, s 93A, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 986. Section 93A has been repealed by the Proceeds of Crime Act 2002, s 457, Sch 11, paras 1, 17((2)(a), save where the conduct constituting an offence under the section began before 24 February 2003 and ended on or after that date.

**Cases referred to in judgment**

*F v Riverside Mental Health NHS Trust* [1994] 2 FCR 577, Fam D and CA.

*Governor and Company of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 1 All ER (Comm) 1023, [2001] 1 WLR 751.

**Applications**

The claimant, Amalgamated Metal Trading Ltd (AMT), issued on 31 May 2002 a claim form seeking a declaration that a sum of money received from companies connected to, inter alia, RBG Resources plc (RBG), was not the proceeds of criminal conduct, and also issued an application notice seeking an interim declaration to that effect. The first defendant was the City of London Police Financial Investigation Unit (FIU). The interim application was rejected by Ouseley J on 7 June 2002, who permitted the joinder of the second defendant, Wavesmetco LLC, and service on it out of the jurisdiction. On being joined, Wavesmetco issued an application for the FIU to provide full particulars of its suspicion or belief that the sum held by AMT was the proceeds of crime, and for an order that the money be paid into court. On 18 September 2002, Andrew Smith J stayed the proceedings against the FIU and ordered the joinder of the third defendant, the Serious Fraud Office (SFO), on the SFO taking over the criminal investigation from the FIU. The instant hearing was a restored hearing for directions, to which was added the application of the SFO for the proceedings against it to be stayed. Wavesmetco also applied to introduce a counterclaim seeking payment of the money by AMT. The liquidators of RBG attended by counsel as a courtesy to the court. The facts are set out in the judgment.

*Paul Downes* (instructed by *Wragge & Co*) for AMT.
*Richard Bendall* (instructed by the *Corporation of London*) for the FIU.
*Sudhanshu Swaroop* (instructed by *Morgan Walker*) for Wavesmetco.
*James Eadie* (instructed by the *Treasury Solicitor*) for the SFO.
*Clive Jones* (instructed by *Lovells*) for the liquidators of RBG.

*Cur adv vult*

3 April 2003. The following judgment was delivered.

**TOMLINSON J.**

[1] The applications before the court have once again highlighted some of the practical problems faced by financial institutions in the light of the provisions dealing with money laundering and other offences introduced into Pt VI of the Criminal Justice Act 1988 by the Criminal Justice Act 1993 and the Proceeds of Crime Act 1995.

[2] The claimant, to which I will refer as 'AMT', is a ring dealing member of the London Metal Exchange. From about 1997 AMT provided metal trading services to the second defendant, a Dubai company to which I will refer as Wavesmetco.

[3] Evidence before the court suggests that Wavesmetco is wholly beneficially owned and controlled by Mr Ravindra Rastogi. He himself so told Mr Latcham, AMT's managing director, trading, in the course of a telephone discussion on 28 March 2002. The notes to the accounts of Wavesmetco for the year ended 31 December 2001 prepared by independent auditors AGN MAK record that 'the management and control of the company is vested with (sic) Mr Ravindra Rastogi'. The same notes show that the share capital of Wavesmetco is owned as to 51% by an United Arab Emirates (UAE) national, Mr Abdul Rahman Ahmed Mohammed Hassan, and as to 49% by Mr Ravindra Rastogi. However, yet further evidence before the court demonstrates that it is a requirement of the law of the United Arab Emirates that a majority of the shares in any limited liability

company should be held by a citizen of the UAE, and that it is likely that Mr Hassan is merely a nominee with no direct interest in the management of the company or in its profits.

[4] AMT has had concerns about the integrity of its customer Wavesmetco since at least April 2000. In particular amongst other matters there was concern about receipt of large sums of money from companies connected to Allied Deals Pty Ltd and RBG Resources plc to which I will refer hereafter simply as 'Allied Deals' and 'RBG'. Allied Deals and RBG are groups of companies in which members of the Rastogi family have or had substantial interests. In particular Mr Virendra Rastogi, brother of Ravindra, was chief executive officer of RBG, now in liquidation. A yet further brother, Narendra, was involved in Allied Deals. Both Virendra and Narendra Rastogi have as I understand it been arrested in the United States on suspicion of defrauding financial institutions. Ravindra Rastogi has been charged in India with offences involving substantial duty fraud against the Indian government. One of the earliest concerns of AMT concerned large margin calls being funded by Wavesmetco with money which had possibly been taken out of India.

[5] The Allied Deals and RBG groups have collapsed with massive losses. Particulars of claim served by the liquidators of RBG in an action brought against the former directors of that company, including Virendra Rastogi, allege that that came about as a result of a massive fraud. In brief summary, the fraud involved a worldwide network of bogus trading counterparties used to create bogus trades for the purpose of extracting funds from financiers. One of the counterparties identified by the liquidators is Wavesmetco. The benefit of the bogus deals, the receivables, was or were sold to the financiers in return for cash which was then misappropriated. Some $US 440m of receivables were sold/assigned in this way, of which, on the liquidators' initial assessment, only $US 40m related to genuine trades.

[6] So far as AMT were concerned, matters came to a head when PriceWaterhouse resigned as auditors of RBG in February 2002 and that fact was published to the London Metal Exchange in March of that year. That triggered questions to Wavesmetco from AMT about its current relationship with RBG and associated companies. AMT was not convinced as to the accuracy of the answer received. It may be that AMT would have been well advised to couch the question in terms not just of current but also past dealings with RBG. However that may be, the provisional liquidators' investigations show that there has been very substantial trading or purported trading between RBG and Wavesmetco and in particular that between April 1999 and September 2000 RBG paid $US 42m to Wavesmetco. Documents unearthed by the liquidators evidence a mixing of funds from RBG to and between various counterparties, including Wavesmetco, which counterparties it is alleged were all involved in perpetrating or assisting in the fraud in respect of which the above-mentioned proceedings have been brought. It is the view of the liquidators that the trading funds or working capital of Wavesmetco are likely to be or to have been funds which can be traced back to RBG and the frauds alleged.

[7] AMT having raised their suspicions with Wavesmetco, it was agreed between them that all remaining positions should be closed out. That was done on or about 17 May 2002 resulting in a credit balance in AMT's books in favour of Wavesmetco in the sum of approximately $US 450,000. The concerns of AMT were such that they sought the consent of the first defendant, the City of London Police Financial Investigation Unit, to whom I shall refer hereafter as the 'FIU', to their paying out this balance to Wavesmetco.

[8] Without specifically mentioning it, AMT was seeking consent pursuant to s 93A(3)(b)(i) of the Criminal Justice Act 1988 as amended. Section 93A provides:

'**93A.**—(1) Subject to subsection (3) below, if a person enters into or is otherwise concerned in an arrangement whereby—(a) the retention or control by or on behalf of another ("A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or (b) A's proceeds of criminal conduct—(i) are used to secure that funds are placed at A's disposal; or (ii) are used for A's benefit to acquire property by way of investment, knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.

(2) In this section, references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of criminal conduct.

(3) Where a person discloses to a constable a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to a constable any matter on which such a suspicion or belief is based—(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise; and (b) if he does any act in contravention of subsection (1) above and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if—(i) the disclosure is made before he does the act concerned and the act is done with the consent of the constable; or (ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.

(4) In proceedings against a person for an offence under this section, it is a defence to prove—(a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct; or (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used, as mentioned in subsection (1) above; or (c) that—(i) he intended to disclose to a constable such a suspicion, belief or matter as is mentioned in subsection (3) above in relation to the arrangement, but (ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3) (b) above.

(5) In the case of a person who was in employment at the relevant time, subsections (3) and (4) above shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to a constable.

(6) A person guilty of an offence under this section shall be liable—(a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or to both; or (b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or a fine or to both.

(7) In this Part of this Act "criminal conduct" means conduct which constitutes an offence to which this Part of this Act applies or would

constitute such an offence if it had occurred in England and Wales or (as the case may be) Scotland.'

I need not set out any further part of this group of sections. In particular I should emphasise that I am not, for obvious reasons, on the facts of this case, concerned with the 'tipping-off' provisions in s 93D of the 1988 Act as the FIU itself pointed out when responding to AMT declining to give its consent to the payment. The FIU said it had reasonable cause to believe that Wavesmetco had been involved in fraudulent actions with the RBG and Allied Deals companies.

[9] The criminal investigation into the affairs of RBG is wide-ranging, extensive, and in its early stages. The Serious Fraud Office, to which I will refer hereafter as the 'SFO', is working closely with the prosecuting authorities in the United States and with the provisional liquidators of RBG as well as with other investigating and prosecuting authorities elsewhere. The nature of that exercise, and the reasons why the SFO is concerned not to be required to take part in these proceedings, are set out in the following passages from a witness statement of Claire Louise Shaw, a case controller at the SFO:

'6. The SFO is working closely with the prosecuting authorities in the United States of America and with the Provisional Liquidators of RBG, namely Malcolm Shierson and Kevin Mawer of Grant Thornton, as well as other investigating and prosecuting authorities elsewhere. The investigation will entail further substantial and extensive co-operation with overseas investigating and other authorities around the world. In order for such co-operation to exist, and in order for the SFO to obtain intelligence which can legally be used in the course of the investigation and which will result in admissible evidence at any subsequent trial, complex diplomatic protocols and procedures have to be followed.

7. Some of the enquires are on a police to police basis and are intelligence led. Other assistance, requiring specific intervention by the appropriate judicial authority in the jurisdiction concerned is governed by a number of possible means. The model followed for co-operation between EU member states can be found in the European Convention on Mutual Assistance in Criminal Matters, 1959. Other mutual assistance is provided under the terms of the Criminal Justice (International Co-operation) Act 1990. Other assistance, usually with remoter jurisdictions, is often obtained by careful negotiation and diplomacy based on equal benefit to both authorities.

8. Whichever route is pursued, it is a common factor that, as part of that co-operation, the Serious Fraud Office gives undertakings to those authorities that information divulged to the SFO will not be used for any purpose other than a criminal investigation and trial. There are therefore policy considerations to consider—if other jurisdictions thought that information obtained from them was being used for a purpose other than that for which it was provided, there is a real risk those authorities would be likely to be less forthcoming on future occasions.

9. The SFO is very concerned not to do anything which would risk jeopardising actual or potential lines of enquiry. It is extremely difficult, and in some cases impossible, to be sure about whether disclosure of a particular matter would or might risk doing so. That is particularly so when the investigation is in its early stages. The disclosure of operational information to the Court in any hearing at which the Second Defendant is present or represented would potentially be extremely damaging and prejudicial to the

SFO's investigation, and indeed to investigations which are proceeding in other jurisdictions. As the Second Defendant is a company owned in no small part by one of the brothers of the main suspect in SFO's enquiry, Virendra Rastogi, it is clear that there is a real risk of operational material finding its way to him.

10. The SFO is concerned to complete its inquiry without delay. If the SFO were to be required to take part in these proceedings valuable time and resources would inevitably be taken up to the detriment of the efficient and effective progress of the criminal investigation. Each piece of material would need to be sifted and considered to see whether it was relevant, whether it could properly be disclosed and if so on what basis.'

I should also record that Claire Louise Shaw makes the point that the SFO makes no claim to the funds or debt the subject of the action and that it could not at this stage seek to restrain them. She continues, 'The SFO makes no positive case at this stage as to whether the obvious suspicion dealt with in DS Reeman's statement is or is not fact'. Detective Sgt Reeman is the officer from the FIU from whose witness statement I have taken most of the information which I have summarised above as to the source of the liquidators' suspicions regarding RBG and Wavesmetco. Detective Sgt Reeman has in turn relied heavily upon the information supplied to him by the liquidators.

**[10]** On 31 May 2002 AMT launched this action by issuing a claim form which at that stage named only the FIU as the sole defendant to the action. The relief claimed in the action was 'a declaration that the sum of $US 453,110·20 held by the claimant is not the proceeds of criminal conduct.' I read that as an invitation to the court finally to determine, at trial, as between the parties to the action, that the credit balance is not the proceeds of criminal conduct. However, on the same day AMT issued an application notice giving notice of their intention to apply, pursuant to CPR 25.2(1)(b), for an 'interim declaration that the sum of $US 453,110·20 held by the claimant is not the proceeds of criminal conduct'. That application was supported by a witness statement from AMT's head of compliance which stated:

'I can confirm that there are no facts within my knowledge that cause me to believe or suspect that the credit balance being held by AMT on behalf of Wavesmetco are the proceeds of crime.'

It is right to point out that that witness statement preceded service by the FIU of the witness statement of Det Sgt Reeman to which I have already referred. Presumably the intended reference in AMT's application notice was to CPR 25.1(1)(b) which provides: 'The court may grant the following interim remedies—an interim declaration.' It used to be the case that 'interim declaratory relief is unknown to English law, and consequently the court has no jurisdiction to grant an interim declaratory order'—see the decision of the Court of Appeal in *F v Riverside Mental Health NHS Trust* [1994] 2 FCR 577. It remains to be worked out what are the circumstances in which it might be appropriate to resort to this new jurisdiction. For my part I find it difficult to conceive that the court would ever be prepared to grant an 'interim declaration' of the type here sought. Either the relevant sum is the proceeds of crime or it is not. Whilst the question could only be decided as between the parties before the court, and on the basis of such evidence as they chose to place before it, the court would surely only be prepared to pronounce upon the question, if at all, on a final basis, not upon the basis that

whatever is the position today may by further or different evidence tomorrow be shown to be different.

[11] The application for an interim declaration came before the vacation judge, Ouseley J, on 7 June 2002. Unsurprisingly, as I think, he rejected it. He pointed out that—

> 'it is not enough in order to persuade a court to exercise its discretionary jurisdiction for AMT to say that it has no evidence to the effect that Wavesmetco has been engaged in criminal conduct and to contend that the suspicions of the police have not yet ripened into firm evidence. The absence of criminality must be proved by positive evidence, rather than by the absence of evidence from Wavesmetco dealing with obvious suspicions being used alone to justify an assertion that criminality has been disproved.'

However, Ouseley J was also concerned that the court should, so far as possible, afford to AMT some degree of pragmatic protection. He pointed out that one possible course of action was simply to dismiss the proceedings and leave Wavesmetco to sue AMT. On balance he concluded that the interests of justice and the affording of protection to AMT were best served and achieved by allowing the proceedings to continue and by permitting Wavesmetco to be joined as a second defendant. Accordingly, although there were strictly speaking no relevant applications before him, he granted permission both for the joinder of Wavesmetco and for service upon it out of the jurisdiction. Finally Ouseley J indicated his own view that the issue was going to have to be tried, by which he meant I think determined at trial rather than on an interlocutory application. He also observed that he for his part would decline to grant the declaration sought without a very clear explanation from directors from Wavesmetco as to the source of their funds, in the absence of which an order for cross-examination of the directors or a stay of the proceedings might be ordered. Plainly, Ouseley J did not envisage that the court would be prepared to exercise its discretionary jurisdiction simply upon the basis of an absence of evidence proving that the money is the proceeds of criminal conduct. With that approach I respectfully agree.

[12] Wavesmetco was duly joined and particulars of claim served. The particulars of claim seek the same declaratory relief as in the claim form together with a declaration that the claimant, ie AMT, is entitled to deduct its reasonable costs and expenses from the credit balance.

[13] Wavesmetco, on being joined, issued an application that the City Police provide full particulars of its suspicion or belief that the $US450,000 was the proceeds of crime, and that the money be paid into court. This was supported by a witness statement from Wavesmetco's solicitor. Since the solicitor's source of knowledge was said to be his conduct of 'this dispute' on Wavesmetco's behalf, rather than information supplied by any natural person, it is not surprising that his witness statement contains argument but little if any evidence, at any rate none that takes matters forward.

[14] On 10 September 2002 Mr Abdul Rahman Ahmed Mohammed Hassan made a witness statement. I have already referred at [3], above, to his likely role and status in relation to Wavesmetco. In his witness statement he says that he is a major shareholder and partner in Wavesmetco. He says that 'the facts and matters which I set out [in] this witness statement are derived from my work at Wavesmetco' although he does not say what that work is. I cannot give any very substantial weight to this evidence but in any event Mr Hassan gives no adequate

explanation as to the source of Wavesmetco's working capital used to fund the trading through AMT.

**[15]** On 18 September 2002 the matter came back before Andrew Smith J on Wavesmetco's application for provision of particulars and payment in. On being told by FIU that the investigation had been taken over by the SFO and at the suggestion of both AMT and FIU he stayed the proceedings against the City Police and ordered the joinder of the SFO in their place. The judge was not told that the SFO had been given no notice of either the hearing or the suggestion that they should be joined. Andrew Smith J also set out a future timetable as follows: (a) AMT was to serve on the SFO and Wavesmetco within 14 days a schedule of sums received by AMT from Wavesmetco; (b) within 28 days of the service of that Schedule Wavesmetco and the SFO were to set out particulars of their cases as to the source of the funds and any facts relied on by the SFO in support of the allegation that the funds were the proceeds of crime, beyond those set out in a letter of 6 June 2002 from Lovells acting for the provisional liquidators of RBG; (c) Lovells were to be informed of the order and told that the SFO had leave to include in their particulars any observations which RBG wished to draw to the attention of the court. Finally, Andrew Smith J directed that the application was to be restored before the Commercial Court for further directions on the first available date after 4 November 2002, if possible to be listed before himself.

**[16]** AMT provided a schedule setting out receipts from and payments to Wavesmetco.

**[17]** On 3 November 2002 Mr Hassan made a second witness statement in which he states:

> 'To the best of my knowledge and belief, the sums paid into the accounts by Westmetco (as described above) are NOT the source of criminal conduct. All such sums were remitted out of our trading proceeds which is part of our working capital. To the best of my knowledge our trading proceeds and working capital are entirely legitimate and are not at all the proceeds of criminal conduct. Unless someone puts forward a positive case identifying the alleged crime and the funds said to be generated by that crime, it is difficult for me to be more specific.'

Again, no proper source of knowledge and belief is put forward, nor is any evidence as to the actual source of Wavesmetco's working capital.

**[18]** On 23 December 2002 the SFO, rather than comply with the order of Andrew Smith J made in their absence, issued an application seeking an order that the proceedings against them be stayed. As Mr Eadie put it on their behalf, in reliance in part upon the witness statement of Claire Shaw, the SFO have carefully considered whether they are in any position to act on the information currently before the court, including in particular the information and material in and exhibited to the statement of Det Sgt Reeman, and the latest information from the liquidator of RBG, represented by Lovells, which was provided on 10 January 2003. They have concluded that they are not. The reference to the further material from the liquidator is to a further report from Mr Mawer, one of the joint liquidators, dated 10 January 2003. That was circulated to all parties in advance of the hearing which took place before me on Thursday 16 January 2003.

**[19]** The hearing before me was the restored hearing for directions, to which was added the application of the SFO for the proceedings against them to be stayed. However, Mr Eadie for the SFO also suggested that the proper course was in any event that the proceedings, however cast, should be stayed in their

entirety pending the outcome of any criminal prosecution or of the civil proceedings brought by the liquidators of RBG. a

[20] Mr Downes, for AMT, was neutral on the SFO's application that the proceedings as against them should be stayed and neutral as regards the suggestion that the entire proceedings should be stayed. He submitted that it would be unfair should the court simply dismiss the proceedings as misconceived, as I indicated I was considering, since he suggested that the court had already gone down the road of giving directions which were aimed towards allowing the action to proceed to a final trial. He emphasised, however, that AMT was no longer pursuing its claim for interim declaratory relief. It was also his position that AMT, who had nothing to say on the issue whether the money is the proceeds of crime, would 'welcome a direction that it be permitted to take no further part in the proceedings until after the issue of whether the balance represents the proceeds of crime has been determined'. He also added that 'the Claimant would expect its costs to be paid by the losing party'. b c

[21] Mr Swaroop for Wavesmetco, although he had no application before the court, asked for a final declaration that the moneys do not represent the proceeds of crime. He pointed out that that is an order sought by two of the parties before the court, the claimant and the second defendants. He also suggested that the FIU and/or the SFO should pay Wavesmetco's costs of the action on the ground that they had acted unreasonably. In the alternative he submitted that it would be unsatisfactory to stay the action and he sought leave to serve a defence and counterclaim, a draft of which was placed before the court. d

[22] The suggestion that the FIU should pay the costs of the action caused them also to be represented before me, notwithstanding the action against them stood stayed. e

[23] Finally the liquidators of RBG also attended by counsel as a matter of courtesy to the court in case further assistance might be provided. I am grateful to them for the very considerable assistance which they have given to the court. f

[24] Naturally I understand the dilemma in which AMT, a reputable financial institution, has found itself. It is axiomatic that the court will do everything which it properly can to assist. With the best will in the world, however, I cannot regard as appropriate the course which AMT has adopted, and I do not consider that it has been sanctioned by the decision of the Court of Appeal in *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 1 All ER (Comm) 1023, [2001] 1 WLR 751. That was a case concerned with the tipping-off provisions. The dilemma which the bank there faced, anticipating as it did the proceedings which could be expected if it refused to honour the instructions of its customer, was as to the extent of the information upon which it could properly rely. It is true that Lord Woolf CJ spoke ([2001] 1 All ER (Comm) 1023 at [43]) of cases where there is a dispute as to whether a payment can be made or disclosure made by the bank as being those which could be the subject of an application for interim declaratory relief in the way the court had earlier suggested. But the earlier discussion, at [40], in fact related only to a declaration setting out upon what information it would be proper for the bank to rely. Moreover it was stressed that 'the life of the interim declaration would probably be short since in the majority of cases it would only be necessary to conceal the existence of the investigations for a fairly limited period'. Furthermore Lord Woolf CJ continued: 'The issue as to what information could be disclosed having been resolved, *the bank* could then decide what course it wished to adopt.' (My emphasis.) Lord Woolf CJ observed (at [43]): 'If proceedings are brought by a customer of the bank, the bank will have to take g h j

a a commercial decision as to whether to contest the proceedings or not.' Finally, I note that Lord Woolf CJ said:

> '[46] ... The "tipping-off" legislation which was the source of the problem with which this appeals deals, gave extensive powers to the police. Properly used they were beneficial. Misused they could create unintended consequences. It is of the greatest importance that use of those powers is confined to situations where it is appropriate. Institutions such as banks need to be able to ensure that they are not affected adversely unnecessarily because of the existence of the police's powers. The ability of the court to grant interim advisory declarations achieves this purpose. The fact that the courts now have these powers, must not, however, be regarded as a substitute for financial institutions taking the decisions which should be their commercial responsibility. The court's powers are discretionary and only to be used where there is a real dilemma which requires their intervention.
>
> [47] The use of the court's power to grant interim declarations in proceedings involving the SFO will protect a bank from criminal proceedings but it will not automatically provide protection for the bank against actions by customers or third parties.'

[25] When read as a whole, rather than focusing on individual passages without regard to the context, I do not detect in Lord Woolf CJ's judgment in the *Bank of Scotland* case any support for the approach which AMT has here adopted. On the contrary, in a case like this where tipping-off was never an issue, it is implicit in what Lord Woolf CJ said that a bank or other financial institution will have to take a commercial decision as to whether to contest proceedings if they are brought.

[26] The essential futility of AMT's proceedings is underscored by the position which it has now adopted. These are proceedings in which AMT seeks declaratory relief, yet it seeks to drop out of the proceedings, unprepared to place before the court material upon the basis of which the court might be able to consider granting the relief claimed. Furthermore AMT no longer seeks interim relief. Once the pursuit of interim relief against the police is out of the picture, it is axiomatic that the proceedings as originally constituted against the police alone can have no further purpose. They can be saved only by joinder of other parties. That does not mean that they were not misconceived when launched.

[27] As to that, it was never in my judgment appropriate for AMT to seek as against the police a declaration that the moneys are not the proceeds of criminal conduct. It was never an issue between those parties whether the moneys were such proceeds, and there was and is no occasion for the creation of a lis between them directed to determination of that point. The only question which the police ('the constable' in the language of the statute) were asked was whether they consented to the payment being made. Had they given their consent, AMT would have a defence under s 93A. The 1988 Act is, however, silent as to the basis upon which consent is to be given or refused. The provision would manifestly be unworkable if the constable could only justify the withholding of consent if he could demonstrate his satisfaction, to whatever might be the appropriate standard, that the funds are in fact derived from or used in connection with criminal conduct. It seems clear from the section as a whole that the existence of a suspicion is sufficient to ground a proper refusal of consent. It is important to note that there has here been no public law challenge to the propriety of the exercise by the constable of his discretion. It would surely be odd if a legitimate

withholding of consent which can be justified on grounds of suspicion were to lead to the situation in which the police must defend (and perhaps pay the costs of) proceedings directed towards determination of a question wholly different from that which they were asked, viz the ultimate question whether the funds are *in fact* derived from or used in criminal conduct. I cannot think that either Parliament or the Court of Appeal envisaged that this would be the procedure to be followed consequent upon a proper withholding of consent. Such a procedure places an undue and inappropriate burden upon the police, effectively requiring them to litigate at public expense what are in truth private disputes between financial institutions and their customers. The arising of such disputes is one of the ordinary commercial risks which any financial institution faces. I also think it most unlikely that the Court of Appeal can have had in mind that the court would in such circumstances grant interim declaratory relief on the ultimate substantive question whether the funds are derived from criminal conduct. Such a question only permits of a final answer, not a temporary answer, and it is only appropriate to answer it as and when it arises, and then as between the parties between whom it arises. Then it is decided, if it is necessary so to do, upon the basis of such evidence as the parties place before the court, and having regard to the incidence of the burden of proof. Finally the granting of declaratory relief on this ultimate question as against the police whether on an interim or a final basis could prejudice future criminal prosecutions.

**[28]** For all these reasons, therefore, the action against the SFO must in my judgment be stayed. It fulfils no useful or legitimate purpose.

**[29]** It is plain to me from the transcript of the proceedings before Andrew Smith J that he like me had difficulty in seeing how the court could conduct a trial in order to resolve whether AMT should have the declaration which it seeks, a difficulty which is magnified by the suggestion now made by AMT that they themselves have no desire to be involved in such a trial. As the FIU was able to point out that it was no longer involved in the investigation Andrew Smith J did not have the benefit of submissions of the sort which have been placed before me by Mr Eadie for the SFO. By the time the matter came before Andrew Smith J Wavesmetco was before the court, seeking interlocutory orders, although seeking no relief in the action. Andrew Smith J conducted essentially a holding exercise to discover how precisely the battle lines were drawn before giving further directions. As Mr Downes aptly put it, he ordered the next round of pleadings.

**[30]** The situation is now, however, transformed by Wavesmetco's application to introduce a counterclaim seeking payment of the money by AMT. If I grant permission for that counterclaim to be introduced then at last issue will be joined between the two parties in contention. As matters stand AMT is simply seeking declaratory relief against Wavesmetco which Wavesmetco has no interest in opposing. Indeed, for obvious reasons it supports the granting of such relief. Mr Downes did not resist the application to introduce the counterclaim, although he would wish to address me further on the steps which AMT may wish to take before serving a defence to counterclaim. Accordingly I grant permission to Wavesmetco to serve a defence and counterclaim substantially in the form of a draft which was placed before the court. It seems to me that that in fact renders wholly redundant AMT's claim and indeed its particulars of claim save in so far as they contain an admitted recital of events. If asked to do so, I would consider permitting AMT to withdraw its claim entirely, directing that henceforth Wavesmetco shall be the claimant in this action and AMT the sole defendant. If

there is any procedural advantage in being defendant rather than claimant, it should be enjoyed by AMT rather than by Wavesmetco. The natural order should be restored.

[31] I should indicate, in so far as it is not already apparent, that I reject as wholly inappropriate Wavesmetco's suggestion that I should now make a final declaration to the effect that the moneys are not the proceeds of criminal conduct. For the reasons I have already given that is an order of a type which the court could only consider making after trial of the issue. Furthermore Wavesmetco has done nothing whatever to rebut the inferences which can be drawn from the material placed before the court by the liquidators. If anything, its conspicuous failure to grapple with the issues has made the inferences more compelling. In any event the issue now is not whether there should be made a declaration that the moneys are not the proceeds of criminal conduct but rather whether Wavesmetco has an enforceable claim to payment by AMT. In that regard I would merely remind Wavesmetco of Lord Woolf CJ's observations in the *Bank of Scotland* case. He there observed ([2001] 1 All ER (Comm) 1023 at [41]):

> 'The commencement of proceedings [against the bank] would no doubt be closely followed by an application for summary judgment under Pt 24.2. Under Pt 24.2, the court will only give judgment to a claimant if the bank has no real prospect of successfully defending the claim or issue and *there is no other compelling reason why the case or issue should be disposed of at a trial.* Where the circumstances are as suspicious as they were in this case they could well provide very good reason for the court not being prepared to grant summary judgment.' (My emphasis.)

[32] As I have indicated above I am not unsympathetic to the dilemma in which AMT finds itself. I recognise that financial institutions do not wish to have judgments entered against them. There are also increasing regulatory constraints upon their action. However, there will be circumstances, as envisaged by the Court of Appeal in the *Bank of Scotland* case, in which the court simply cannot assist, and the bank will have to take a commercial decision whether to contest proceedings or not. It is to my mind inconceivable that there could be criminal proceedings brought under s 93A against a bank or other financial institution which has taken such steps as are reasonable in all the circumstances to resist proceedings but has nonetheless been ordered by the court to pay over money which subsequently is proved to be the proceeds of criminal conduct. Consultation and liaison with the police is obviously always prudent. Every case will depend upon its own facts, but I cannot think that the court will require financial institutions to run defences which in the view of their responsible legal advisers are unsustainable on the basis of the evidence reasonably available to them.

[33] In the course of the argument I was told by Mr Downes that in two cases, both heard in private, Commercial Court judges had made 'show cause' orders against the police which had ultimately resulted in payment being made to the customer. The first of those two cases undoubtedly involved a 'tipping-off' issue—as Mr Downes pointed out a refusal to comply with a customer's instruction may itself tip off the customer as to the existence of an investigation. I was myself the judge in the second case. I suspect that it too involved a tipping-off problem, which is no doubt why it was held in private. Cases such as these raise considerations different from those which obtain in this case.

[34] Nothing I have said in this judgment bears on the circumstances which will obtain where the 'tipping-off' provisions are potentially engaged, in which cases banks and other financial institutions must of course pay careful regard to the guidance given by the Court of Appeal in the *Bank of Scotland* case. a

[35] In so far as there may have been discussion, in these cases heard in private, as to the extent to which the court might be able to grant interim declaratory relief either to the effect that a bank has insufficient grounds for suspicion that money may be the proceeds of crime or more positively to the effect that money is not the proceeds of crime, I am satisfied, in the light of the full contested argument which I have now heard, that in a case such as the present it would be inappropriate to grant such relief. b

*Order accordingly.* c

James Wilson Barrister (NZ).

# R (on the application of Khan) v Secretary of State for Health

[2003] EWCA Civ 1129

COURT OF APPEAL, CIVIL DIVISION
BROOKE, WALLER AND CLARKE LJJ
11, 12 SEPTEMBER, 10 OCTOBER 2003

*Human rights – Right to life – State's obligation to investigate death in circumstances where state arguably in breach of substantive obligation under convention right to life – Whether state's investigatory obligation requiring public inquiry with participation of deceased's family – Human Rights Act 1998, Sch 1, Pt I, art 2.*

*Human rights – Right to life – NHS hospital trust admitting liability for death of child in hospital before coming into force of human rights legislation – Availability of relief for breach of convention right in national courts – Human Rights Act 1998, Sch 1, Pt I, art 2.*

The claimant's daughter, who was aged three, died from a heart attack while undergoing haemodialyis in hospital in 1999. A police investigation took place during which the police asked the hospital trust not to communicate with the claimant's family. An expert report prepared during the police investigation indicated that the nursing sister on duty and the trust as a whole had been grossly negligent. The trust also carried out its own investigation but did not pass any information on to the child's family. In 2001 the Crown Prosecution Service told the claimant that no criminal proceedings would be taken arising out of his daughter's death. The claimant instructed a solicitor who requested funding from the trust and the NHS Litigation Authority for the claimant to be legally represented at the inquest as he was by that time suffering from a psychiatric illness, in consequence of his daughter's death, and would be unable to participate effectively himself. The authority replied that it could not assist towards the costs of an inquest but made a full and complete admission of liability. The inquest opened and adjourned in February 2002. The solicitor wrote to the defendant requesting funding for legal representation for the claimant at the inquest when it resumed, or that there be a separate public non-statutory inquiry. In July 2002, the defendant replied that he had no power to provide funding and that he was not prepared to hold a separate inquiry. The claimant applied for judicial review. The judge considered the defendant's procedural duties under art 2[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) to investigate deaths where arguably there had been a breach of the right to life contained in art 2. He held that, despite the fact that the claimant and his wife had taken no part in either investigation, the combination of the police investigation and the inquiries undertaken by the trust had been sufficient to comply with the state's procedural obligations under art 2, coupled as they were by an admission of liability by the trust. He further ruled that as the claimant's daughter had died before the 1998 Act came into force, the state did not have any art 2 obligations that were

a Article 2 provides, so far as material: 'Everyone's right to life shall be protected by law ...'

enforceable by the claimant as a matter of national law. The claimant appealed. The Court of Appeal addressed, inter alia, the questions: (i) what was the state's art 2 obligation in the instant case; (ii) had that obligation already been performed; (iii) if not, could the holding of the inquest satisfy that obligation if the claimant could not play an effective part in it himself; (iv) if not, did the 1998 Act apply, allowing the claimant to obtain relief in a national court?

**Held** – (1) Where the agents of a state bore potential responsibility for the loss of a human life, the state's obligation under art 2 of the convention was to provide a procedural mechanism whereby the cause of death could be investigated and responsibility for the death ascertained, through an investigation held in public which had to be both judicial and effective. The families of the deceased should be involved in the procedure to the extent that was necessary to safeguard their interests. A flexible approach to what was required by way of an investigation was needed, which was responsive to the dictates of the facts. But a coroner's inquest would furnish the natural occasion for the effective judicial inquiry into the cause of a death which art 2 of the convention required. In the instant case the state's art 2 obligation had not yet been performed. The holding of the inquest would not satisfy that obligation, as the claimant was in no fit state to take part in it himself, unless the claimant had legal representation (see [62], [63], [67], [69]–[72], [74], [75], below); *R (on the application of Amin) v Secretary of State for the Home Dept, R (on the application of Middleton) v West Yorkshire Coroner* [2002] 4 All ER 336 applied; *Powell v UK* App No 45305/99 (4 May 2000, unreported), *Sieminska v Poland* App No 37602/97 (29 March 2001, unreported), *Calvelli v Italy* [2002] ECHR 32967/96, *Edwards v UK* (2002) 12 BHRC 190 considered.

(2) The claimant was entitled to relief in a national court under the 1998 Act. The claimant's daughter's right to life was at the centre of the instant case. Her parents acted as her proxy in requiring effective investigation by the state to take place and her death in 1999 did not provide any effective bar to the relief which had first been sought in 2002, after the coming into force of the 1998 Act. Accordingly, the appeal would be allowed (see [84]–[86], below).

**Notes**

For the right to life, see 8(2) *Halsbury's Laws* (4th edn reissue) para 123.

For the Human Rights Act 1998, Sch 1, Pt I, art 2, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 553.

**Cases referred to in judgment**

*Calvelli v Italy* [2002] ECHR 32967/96, ECt HR.
*Crédit Suisse v Waltham Forest London BC* [1996] 4 All ER 176, [1997] QB 362, [1996] 3 WLR 943, CA.
*Edwards v UK* (2002) 12 BHRC 190, ECt HR.
*Gül v Turkey* [2000] ECHR 22676/93, ECt HR.
*Güleç v Turkey* (1999) 28 EHRR 121, [1998] ECHR 21593/93, ECt HR.
*Jordan v UK* (2001) 11 BHRC 1, ECt HR.
*Mastromatteo v Italy* [2002] ECHR 37703/97, ECt HR.
*Ögur v Turkey* (2000) 31 EHRR 912, [1999] ECHR 21594/93, ECt HR.
*Oneryildiz v Turkey* App No 48939/99 (18 June 2002, unreported), ECt HR.
*Osman v UK* (1998) 5 BHRC 293, ECt HR.
*Powell v UK* App No 45305/99 (4 May 2000, unreported), ECt HR.

*R (on the application of Amin) v Secretary of State for the Home Dept, R (on the application of Middleton) v West Yorkshire Coroner* [2002] EWCA Civ 390, [2002] 4 All ER 336, [2003] QB 581, [2002] 3 WLR 505.

*R (on the application of Green) v Police Complaints Authority* [2002] EWCA Civ 389, [2002] All ER (D) 397 (Mar).

*R (on the application of Hurst) v HM Coroner for the Northern District of London* [2003] EWHC 1721 (Admin), [2003] All ER (D) 80 (Jul), DC.

*R (Wagstaff) v Secretary of State for Health, R (Associated Newspapers Ltd) v Secretary of State for Health* [2001] 1 WLR 292, DC.

*Sacker v West Yorkshire Coroner* [2003] EWCA Civ 217, [2003] 2 All ER 278.

*Sieminska v Poland* App No 37602/97 (29 March 2001, unreported), ECt HR.

**Appeal**

The claimant, Mohammed Farooq Khan, appealed from the decision of Silber J on 17 June 2003 ([2003] EWHC 1414 (Admin), [2003] All ER (D) 220 (Jun) dismissing his application (i) for judicial review of the decision of the defendant, the Secretary of State for Health, to refuse to fund legal representation for the claimant at the inquest into the death of his infant daughter, Naazish Farooq Khan; or (ii) in the alternative, for an independent non-statutory public inquiry into her death. The facts are set out in the judgment of the court.

*Philip Havers QC* (instructed by *Freeth Cartwright*, Nottingham) for Mr Khan.

*Nigel Giffin QC* (instructed by the *Solicitor for the Department of Health*) for the Secretary of State.

*Cur adv vult*

10 October 2003. The following judgment of the court was delivered.

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| | (8) | QUESTION (1): WHAT IS THE CONTENT OF THE STATE'S ART 2 OBLIGATION IN THE PRESENT CASE? | [47] |
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(10) QUESTION (3): IF THE STATE HAS NOT YET FULFILLED ITS ART 2 OBLIGATION, CAN THE HOLDING OF THE INQUEST SATISFY THAT OBLIGATION IF MR KHAN CANNOT PLAY AN EFFECTIVE PART IN IT HIMSELF? [73]

(11) QUESTION (4): IF THE ANSWER TO QUESTION (3) IS NO, DOES THE 1998 ACT APPLY, SO THAT MR KHAN MAY OBTAIN RELIEF IN A NATIONAL COURT? [78]

(12) QUESTION 5: WHATEVER THE ANSWER TO THE FIRST FOUR QUESTIONS, DOES THE SECRETARY OF STATE HAVE POWER TO MAKE THE NECESSARY FUNDING AVAILABLE? [87]

**BROOKE LJ.**

(1) INTRODUCTORY: THE FACTS

[1] This is a sad and disturbing case.

[2] The applicant Mohammed Farooq Khan came to England from Pakistan when he was a child. He graduated at Bradford University, and in September 1999 he had a good job as new products controller at a firm in Leeds which specialised in making video transmission products. He was intelligent, articulate in both Urdu and English, and was heading for a senior management post in the firm.

[3] He and his wife Safia had six children, and the only real cloud in their married life had been the death of one of their daughters at St James's Hospital, Leeds in 1994. They were very concerned about the quality of the treatment their daughter had received there before she died.

[4] In the summer of 1999 their fifth daughter Naazish Farooq Khan, aged three, began to complain of earache and a discharge from her ear. Her condition failed to respond to treatment and she was eventually admitted to St Luke's Hospital, Bradford on 20 September 1999. It was discovered that her lymph nodes and her spleen had become enlarged. By 24 September 1999, her condition had deteriorated and she was suffering from some respiratory difficulties. She was transferred to St James's Hospital, Leeds. A biopsy was carried out, and she was transferred to the intensive care unit. A provisional diagnosis of B cell lymphoma was in due course confirmed. She began a course of chemotherapy on 5 October 1999.

[5] In anticipation of the need for chemotherapy, and in order to guard against any damage to her kidneys in the course of that treatment, haemodialysis had started on 25 September 1999. This treatment included the administration of potassium in such quantities as were required to maintain the appropriate potassium level. Potassium chloride was infused through the dialysis machine by means of a mixture of fluids run in from a bag of fluids. Every time the infusion bag was changed, a blood analysis should have been carried out in order to obtain, among other things, an accurate reading of the potassium level. If the level was too low, more potassium was added to the next bag. If it was too high, less potassium was added. The prescription for potassium was attached to her bed, and it stated the specific quantity of potassium that had to be given for each level on the blood analysis reading.

[6] Because potassium is a heavy solution, the bag containing the potassium and the diluent had to be shaken vigorously in order to mix it properly.

Otherwise the potassium would lie at the bottom of the bag where the line entered the bag, and the patient would receive a bolus dose of potassium. This was to be avoided at all costs because an excessive infusion of potassium can cause heart problems, heart attacks, and eventually death.

[7] Shortly after Naazish's chemotherapy treatment began, in the early hours of 8 October 1999, something went catastrophically wrong with the administration of potassium. A blood gas analysis carried out at 00.17 hrs that morning appears to have showed an appropriate level of potassium in the blood. At about 02.30 hrs a fresh bag was put up containing what was apparently a grossly excessive amount of potassium. A police report suggests that one of the reasons why this happened was because no blood gas test was carried out before the bag was made up, the nurse failed to mix the bag properly when she added potassium to it, and her actions were then not checked by another nurse, as they should have been. An independent medical expert was later to castigate this series of omissions as having been grossly negligent (see [13], below).

[8] Naazish suffered a heart attack about an hour-and-a-half later. Attempts were then made to revive her, and during the course of these efforts a blood gas reading was taken. This disclosed an alarmingly high potassium reading of 18·9. This can be compared with a normal therapeutic level of 3·5–5. A level of 9–10 would be high enough to cause death. Twenty minutes later, a second blood gas test disclosed a potassium level of 13·4. Although this represented a significant reduction, it was still far too high a level, and Naazish died soon after that second test was taken. A doctor at the hospital discussed the situation with her parents at some length, but it is said that he regarded the very high potassium levels as an artefact and made no reference to them at all.

[9] Nor did anybody at the hospital say anything to the coroner's officer about these potassium levels. The cause of death was certified by the hospital staff as 'cardio-respiratory attack and B Cell Lymphoma', and Naazish's body was released for burial. She was buried within 24 hours of her death in accordance with Muslim law. Although he has read the evidence collected in the investigations that have so far taken place, Mr Khan's solicitor is of the view that the circumstances surrounding the defective notification of death in this case 'cry out' for exhaustive inquiry, if for no other reason than to overturn the perception that there was a medically-orchestrated cover-up of the cause of Naazish's death, which led to all the distressing consequences we now describe.

(2) THE POLICE INVESTIGATIONS

[10] On the following Monday the police started to investigate Naazish's death, and at an early stage of their investigations they applied to the coroner for her body to be exhumed. The very idea that his daughter's body should be dug up caused the greatest possible distress to her father. He believed passionately that nobody should tamper with his daughter's body after it had been buried. He made desperate, but unsuccessful, attempts to contact the coroner between 8 pm on 2 November 1999, when he was told of the proposed exhumation, and 4 am the following morning when the exhumation was carried out. He was later to tell a psychiatrist that he went through absolute hell from that day until his daughter's body was released for reburial a year later. He became deeply depressed and was off work for a year. He then returned to a much more junior post with his old firm. This was all he was able to manage.

[11] After the exhumation, a post-mortem was carried out. The pathologist, Dr Milroy, concluded:

> 'Taking the findings of a high potassium at collapse, combined with the post-mortem findings and the experiments performed on 25 November 1999, described by Professor Forrest, in my opinion death is consistent with potassium poisoning.'

[12] The police inquiries were extensive. Their aim was to consider if any criminal charge could be brought in respect of any of the acts and omissions that led to Naazish's death. A case might have been established to the effect that one or more of the members of the hospital staff responsible for Naazish's care had been guilty of manslaughter by gross negligence. The police asked the hospital trust (the trust) not to contact Naazish's family or to conduct any investigations of their own while the police investigation was under way. They wished any communication with the family to be channelled through them, and not through the trust. Mr Khan was not in the event involved in the police investigations in any way.

[13] In due course they prepared a detailed report on the results of their investigation. This report extended to 84 pages, and its substantial exhibits included witness statements, copies of medical notes and medical reports. One of those reports had been prepared for them by Dr Mark Bradbury, a consultant paediatrician and paediatric nephrologist at the Manchester Children's Hospital. Dr Bradbury was of the opinion that the most likely cause of Naazish's death was an excessive infusion of potassium from the dialysis solution. He considered that both the sister on duty and the trust as a whole had been grossly negligent.

[14] It appears that there were a number of possible reasons for the cardiac arrest which preceded Naazish's death. These included tumourlysis (caused by her cancerous tumour), respiratory failure, haemolysis, an incorrect dosage of potassium chloride, the potassium chloride being not mixed properly with the haemofiltration fluid, the potassium levels in her blood not being adequately monitored, and faults in the haemofiltration equipment itself. As a result the view has been taken both by the prosecuting authorities and by the NHS authorities that it may not be possible to determine the precise cause of her death with any certainty. The reason for this is said not to stem from the fact that not enough steps have been taken to determine the cause of death, but because in all the circumstances, and particularly because of the lack of blood measurements during the evening before her death and the very nature of her serious illness, it is now very difficult to find the evidence to prove what precisely happened.

(3) MR BALEN'S ACTIVITIES

[15] In May 2001 the Crown Prosecution Service (CPS) told Mr Khan that no criminal proceedings would be taken arising out of his daughter's death. Mr Khan's brother then approached Mr Balen, a partner in the solicitors' firm Freeth Cartwright, who has thereafter acted for Mr Khan. No praise can be high enough for the efforts Mr Balen has made on his client's behalf.

[16] At a very early date Mr Khan and Mr Balen met a senior police officer, now retired, who had taken part in the police investigations and who expressed surprise at their eventual outcome. Mr Balen then contacted the coroner, who

gave him a copy of the post-mortem report, and said he would contact him again once his own inquiries were complete.

[17] Mr Balen and his client next had a meeting with the branch Crown prosecutor from the CPS's casework directorate. He explained to them in some detail why there was insufficient evidence to prosecute anybody for the events leading to Naazish's death. They were given the opportunity to ask questions about the matters that had emerged from the police investigation, but Mr Balen did not at that time ask any questions about Naazish's treatment or about the police investigation into it. During the next three months he was engaged in obtaining all the relevant hospital notes and records.

[18] By November of that year he had completed his study of this material, and he then inquired of the trust whether it would admit liability and causation. He received no reply. On 3 December the coroner told him that his inquiries were now complete, and that the inquest would be held in just under three months' time. The coroner enclosed with his letter a list of witnesses and copies of the statements he had obtained. On 10 December Mr Balen told the trust that it would be clearly right for his client to be legally represented at the inquest. He asked whether the trust itself or the Department of Health would provide an indemnity for his legal costs. He received no reply. Three chasing letters similarly went unanswered.

[19] On 13 February he repeated his request to the chief executive of the NHS Litigation Authority. His client had told him that his means were marginally over the financial limit for publicly-funded legal representation at an inquest, and Mr Balen feared that the cost of representation could easily swallow up the sum of £7,500, which was then the value attributed to a claim for the loss of a child's life.

[20] The response to this approach, in contrast to the non-response of the trust, was both immediate and sympathetic, but he was told that the authority could not assist towards the costs at an inquest. Before the inquest took place he received from the same source a full and complete admission of liability for Naazish's death.

[21] On 22 February the trust at long last broke cover. Its solicitors told Mr Balen that the best deal their clients could offer was that they would not be legally represented at the inquest if Mr Khan was not. Mr Balen turned this offer down, since if it were accepted it would mean that no proper inquiry would be held at all.

[22] The inquest opened on 25 February 2002. The coroner at first refused to adjourn the inquest to enable Mr Balen to continue his quest for funding. He was then told that the doctors and nurses insisted on legal representation, and in those circumstances he acceded to Mr Khan's personal request for an adjournment. Mr Khan had told him that this was the second of his children to die in questionable circumstances at this hospital. All the family wished to know were the facts. They had not wanted the exhumation or the post-mortem. After further adjournments, the inquest has now been fixed to start in November of this year.

[23] This breathing space allowed Mr Balen to pursue his quest for funding. Pro bono help was not available because of the length and complexity of the inquest, and on 26 March 2002 he wrote to the Secretary of State for Health himself. He asked for funding, alternatively for a separate public non-statutory inquiry. He said:

'To expect our clients to pay for the Health Service's admitted actions leading to their daughter's death, to pay to discover what happened, and to pay for lessons to emerge from such a tragedy is, we are sure you will agree, entirely unacceptable. Since their daughter's death, no one from the hospital has been in touch with the family; no legal admission of liability was made until two days before the inquest and then not by the hospital or its lawyers; and no response made to a whole series of letters from ourselves on the family's behalf.'

**[24]** Two-and-a-half years had now elapsed since Naazish's death. By this time Mr Khan and his wife had withdrawn into themselves. Mrs Khan had effectively become a hermit, and Mr Khan was suffering from what was later diagnosed as a psychiatric illness. He did not open letters, and he allowed county court judgments to be entered against him by default as a consequence. He felt unable to deal with people. The junior post he now held with his firm did not involve this necessity, and his solicitor sometimes experienced difficulty and delay in obtaining instructions. In particular he was quite unable to obtain instructions about his client's precise means.

**[25]** On 8 July 2002 Mr Balen received the Secretary of State's substantive reply to his letter. He was told that there was no power to provide the funding he sought, and that the Secretary of State was not prepared to hold a separate inquiry. The trust had conducted a number of separate investigations of its own. The Regional Director for Public Health had now been asked to review the adequacy of these investigations, and he would then be willing to meet Mr and Mrs Khan in order to discuss his findings and answer any inquiries they might make. In the event no such meeting was suggested at any time before these proceedings were started against both the Secretary of State and the trust in November 2002.

(4) THE TRUST'S INVESTIGATIONS

**[26]** The trust had indeed been making its own fairly intensive investigations into the cause of Naazish's death and the way in which such tragedies might be averted in future, but it does not seem to have occurred to anyone to tell her parents what was going on.

**[27]** All these investigations were undertaken by people who were not directly involved in providing care for Naazish, but they were nevertheless employees of the trust. The trust's head of health and safety examined certain aspects of Naazish's care and treatment in the hospital and made recommendations aimed at reducing the likelihood of a similar incident ever occurring again. The assistant chief nurse made a number of recommendations in relation to the administration of potassium to patients. A consultant in paediatrics, anaesthesia and intensive care produced a report in which he considered the cause of Naazish's death and also made recommendations for changes. Three members of the staff of the department of medical physics and engineering produced their own report which dealt with the equipment in operation when Naazish was being treated.

**[28]** These reports, together with Dr Bradbury's report, considered wider issues relating to Naazish's treatment. These included the design and maintenance of equipment, the keeping of records, the training and development of staff, the supervision of staff, the development and use of protocols and procedures, medical prescribing practices and the establishment of a critical incident team. They provided a comprehensive account of the care and

treatment provided to Naazish when she was receiving treatment at the hospital, and included an analysis of the practices for administering potassium, and of the design and maintenance of equipment.

(5) THE JUDICIAL REVIEW PROCEEDINGS: THE RESPONDENTS' EVIDENCE

[29] From the perspective of the issues raised in this litigation, however, all this activity contained a serious inherent flaw. Nobody had taken any steps at all to tell Naazish's parents what was going on and to involve them in it.

[30] In these proceedings Mr Khan sought an order quashing the defendants' refusal to fund legal representation for Naazish's family at the inquest and a mandatory order requiring them to do so. Alternatively he sought an independent non-statutory public inquiry. In the event, the claims against the trust were not pursued, and the Secretary of State was the only effective respondent at the hearing before Silber J ([2003] EWHC 1414 (Admin), [2003] All ER (D) 220 (Jun)).

[31] The trust's involvement at the outset of these proceedings led to their disclosing to Mr Khan for the first time the reports they had commissioned. They also explained the steps they had taken to try and prevent the recurrence of such a tragedy. Dr Sugden, the trust's associate medical director, said that the clinicians involved with Naazish's care initially had contact with the family, but when the police came on the scene the trust was told that more than one line of communication would be confusing for the family.

[32] Dr Sugden said that by pursuing an admission of liability Mr Khan had put himself outside the scope of the trust's complaint procedures, which included the possibility of independent review. He said he was willing to provide answers to 30 questions posed by Mr Balen in his second witness statement: in the event, the trust has done nothing at all to follow up that offer. Dr Sugden said that he had not realised that the results of the trust's own investigations had not been passed on to the Khan family by the police.

[33] His witness statement contained the following passages:

> 'As a general principle, my approach to providing information to bereaved families is that every effort will always be made to answer questions or concerns but I would not generally send information to a family uninvited, because that information may be distressing, disturbing, or otherwise not appreciated or welcome. Given the knowledge I now have of the family's concerns I can see it might have been possible to communicate more effectively with them, although there were significant impediments. The family themselves did not trigger other opportunities for dialogue. Quite apart from the outcome of the specific investigations into Naazish's death, lessons learned from the communication difficulties referred to above have been taken on board by the trust. The investigations looked at a wide range of issues, actions to improve the delivery of the service were recommended and have been taken or are being worked on. A key result is that if Naazish's death was due to the administration of too much potassium, the protocols now in place very significantly reduce that risk. Further lessons can be learned from the regrettable breakdown in communications with the family, which occurred for a variety of reasons.'

[34] Evidence on behalf of the Secretary of State was furnished by Professor Johnstone, who was appointed to the post of Regional Director of Public Health for Yorkshire and the Humber on 15 July 2002. He did not explain why the meeting foreshadowed in the letter dated 8 July 2002 did not take place until after these proceedings were instituted. On 9 January 2003 he wrote to Mr and Mrs Khan to suggest a meeting, and such a meeting eventually took place in early April 2003, with Mr Balen and representatives of the trust also present.

[35] For his part, Professor Johnstone said that when he was appointed to his present position, he wished to consider a number of matters concerning the investigations into Naazish's death. He wished to find out whether the investigators were truly independent of the clinical team which had been directly involved in providing care to Naazish, how promptly the investigations were conducted, the extent to which there was public scrutiny, whether the next of kin were involved in the investigations, whether the care and treatment provided to Naazish was considered, whether wider systems factors were considered, whether the reports contained clear recommendations, and whether follow-up action was clearly identified and effective arrangements put in place to monitor the implementation of those recommendations.

[36] He thought that a number of lessons had been learnt. Proposals had been made for actions to remedy system deficiencies identified in the various reports. These had been brought together in an action plan prepared by the trust's head of health and safety in January 2001. His view was that the investigations carried out by the trust and the West Yorkshire police, which benefited from independent expertise where appropriate, had provided an effective, thorough and reasonably prompt scrutiny of the care and treatment of Naazish and wider deficiencies within the trust. He doubted whether any further investigations would identify any additional facts.

[37] Professor Johnstone had also considered a report prepared by the trust on 10 December 2002, which set out the progress that had been made on implementing some of the recommendations. He considered that in most respects the trust had taken the necessary action needed to remedy the deficiencies identified. He observed that there were still some areas in which he was dissatisfied with the progress that had been made towards implementing the recommendations.

[38] He said that he was liaising closely with the West Yorkshire Strategic Health Authority to ensure that the remaining outstanding recommendations for change were implemented within appropriate timescales. He added that the dangers associated with intravenous administration of potassium were well recognised. Indeed, the new National Patient Safety Agency had issued its first patient safety alert in July 2002 on this very topic. He said that issues raised as a result of Naazish's death were being considered in the context of the development of both the new Renal Services National Service Framework and the module of the Children's National Service Framework relating to medicine for children.

[39] Mr Balen had prepared a list of queries 'based on a relatively cursory glance through the police statements surrendered to the coroner'. Professor Johnstone considered that only a small number of them related to the care and treatment of Naazish. He said that those relating to entries made in Naazish's medical records, the print-outs of her blood gas levels, and the results of the laboratory tests, and the reporting of her death to the coroner's office were matters which the coroner might wish to consider at the inquest. He expressed

the opinion that Mr Balen had not raised any further questions of substance which would necessitate a further NHS investigation. He believes that Mr Balen's other inquiries, which related to the wider context within which Naazish's care had been given, had been answered either in the trust's investigation reports or in clinical good practice now adopted by the trust.

(6) THE IMPORTANCE OF INVOLVING THE DECEASED'S FAMILY

[40] Mr Balen's response to this evidence is epitomised in the following passages of his third and final witness statement:

> 'In my experience, [relatives'] involvement in these tragic cases is beneficial, not only to the relatives, but also to the health care workers concerned. Many relatives have important contributions to make to the improvement of health care through lessons learnt from tragedies. They want to know why the system failed their relative; what actually happened; who were responsible and what disciplinary or retraining steps were taken and what steps have been implemented to prevent such a tragedy happening again. Participation in such processes is of the utmost importance to the relatives. The benefit to the health of the relatives dealing with the reaction to the bereavement and the circumstances of the bereavement is considerable. When the opposite takes place and there is no communication and no involvement, damage to the health of the relatives is often in my experience substantial and that appears to be the position in this case. I note Professor Johnstone's expectation of the main contribution given by a bereaved family in such circumstances. This however is only part of the picture in my experience. Bereaved families may have an enormous contribution to make, not only to an understanding of what went wrong, but how improvements can be implemented. Professionals working in this field—both legal and medical—widely recognise in my experience that families have a real contribution to make in such circumstances. But the importance of their contribution also works the other way. As I have indicated, it is of enormous importance for the family to be involved. It benefits them to understand the processes involved; that lessons have been learnt and that their loved one's life may not have been in vain. To remove participation generally in my experience leads to a breakdown in the trust between relatives and the medical services and frequently ... a breakdown or deterioration in health.'

[41] A little later in his statement, after expressing his own view that it was far too early to say whether the investigations so far carried out had been effective, Mr Balen observed that one of the purposes of holding an inquest or an inquiry was to explore the lessons to be learned on such occasions from such incidents. The Department of Health's paper called *Building A Safer NHS for Patients* (2001) impliedly accepted the criticism of ad hoc investigations commissioned by trusts and the fact that patients and carers should have a role in the procedures following adverse events. Its paper *An Organisation with a Memory* (2000) recognised that internal reviews were often not trusted by patients as sufficiently impartial or searching.

[42] Mr Balen's views are supported by the experience of those who have recently conducted public inquiries in circumstances where the families of the deceased had encountered institutional resistance to the idea that an inquiry into

the cause of the death or deaths that have caused them such distress should be held in public by an independent arbiter. In Ch 2 of his recent report into events at the Bristol Royal Infirmary (*Learning from Bristol: The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984–1995* (July 2001) (Cm 5207) Professor Sir Ian Kennedy suggested that such an inquiry fulfilled the following four purposes: (1) it restored public confidence because a full, fair and fearless investigation was being carried out into the events that had led to the death or deaths; (2) its object was to identify the lessons to be learned, and then to frame recommendations designed to give effect to those lessons, again for the purpose of restoring public confidence; (3) it should be a means—and Professor Kennedy suggested that this might be as much a duty as a purpose of the inquiry—whereby those affected by the events in question could feel that their concerns had been aired, and that life could move on; (4) it offered an opportunity on a public stage for: (a) those in authority to be held to account; and (b) the public venting of anger, distress and frustration.

**[43]** Professor Kennedy summed up the position by saying that the process of inquiry could serve at least four functions: learning, discipline, catharsis and reassurance. Everyone who could assist should be enabled to do so. They should be seen as 'participants' in the process of seeking to understand the matters into which inquiry was being made.

(7) THE JUDGMENT IN THE COURT BELOW AND THE ISSUES ON THE APPEAL

**[44]** It is evident that this process has not really started in the present case, although nearly four years have elapsed since Naazish's death. The question we have to determine is whether Silber J was right to hold that no fuller inquiry is now required by human rights law than that which has already taken place, or whether that law demands something more, and if so, what.

**[45]** The judge dismissed Mr Khan's application in a careful and thoughtfully reasoned judgment ([2003] All ER (D) 220 (Jun)), to which we would pay tribute. He considered that the state had complied with its adjectival duties under art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Even if it had not, he did not consider that art 2 obliged the state to fund Mr Khan's legal representation at his daughter's inquest. In any event, since she died before the 1998 Act came into effect, the state did not have any art 2 obligations that were enforceable by Naazish's family as a matter of national law.

**[46]** It is convenient to address the legal issues on this appeal by asking five questions: (1) What is the content of the state's art 2 obligation in the present case? (2) Has that obligation already been performed? (3) If the state has not yet performed that obligation, can the holding of the inquest satisfy that obligation if Mr Khan cannot play an effective part in it himself? (4) If the answer to question (3) is No, does the 1998 Act apply, so that Mr Khan can obtain relief in a national court? (5) Whatever the answer to the first four questions does the Secretary of State have power to make the necessary funding available?

(8) QUESTION (1): WHAT IS THE CONTENT OF THE STATE'S ART 2 OBLIGATION IN THE PRESENT CASE?

**[47]** To answer the first question, it is necessary to consider recent case law both in Strasbourg and in this jurisdiction.

**[48]** We were shown a number of cases decided in recent years by the European Court of Human Rights (the European Court) which cast some light on the issues we have to decide. The first is *Powell v UK* App No 45305/99 (4 May

2000, unreported). A ten-year-old boy had died from Addison's disease. No inquest took place, because the coroner decided that the boy had died of natural causes. By the time the case reached Strasbourg, where it was declared inadmissible, the boy's parents, who had also been very seriously affected by what had taken place, had accepted £80,000 in compensation from the local health authority. They had thereupon discontinued a similar claim for damages for negligence against some of the doctors at their local health centre, and a claim against those doctors in respect of alleged falsification of records had been struck out.

**[49]** Their real grievance, which they took to the Strasbourg court, related to the falsification of these records. They faced the difficulties, however, in the eyes of the Strasbourg court that they had abandoned an appeal against a decision of a local NHS Medical Services Committee with which they were dissatisfied, and they had not pursued their negligence claim against the doctors to trial. The facts of that case were so far removed from the present case that little of value can be derived from the court's conclusions.

**[50]** What is important about this decision is that the judgment of the court contains the first clear identification of what Lord Woolf CJ described in *R (on the application of Amin) v Secretary of State for the Home Dept, R (on the application of Middleton) v West Yorkshire Coroner* [2002] EWCA Civ 390, [2002] 4 All ER 336, [2003] QB 581 as the state's adjectival duty under art 2 of the convention in a case which did not involve an allegation of an intentional killing.

**[51]** The genesis of such a duty was discussed in the judgment of the European Court in *Osman v UK* (1998) 5 BHRC 293 at 320, 321 (paras 113, 116). Since these paragraphs are quoted in full by Lord Woolf CJ in *Amin*'s case (at [31]) we need not repeat them here. In *Powell v UK* the court distinguished the cases where a duty might evolve on a law enforcement agency to take preventional operative measures to protect someone's life, and then continued:

> 'The issue before the court in the present case is an entirely different one in terms of both the context and scope of the obligation. Admittedly the first sentence of art 2 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction ... The court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of art 2. However, where a contracting state has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as errors of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a contracting state to account from the standpoint of its positive obligations under art 2 of the convention to protect life. *In the court's opinion, the events leading to the tragic death of the applicants' son and the responsibility of the health professionals involved are matters which must be addressed from the angle of the adequacy of the mechanisms in place for shedding light on the course of those events, allowing the facts of the case to be exposed to public scrutiny—not least for the benefit of the applicant.* The court has attached particular weight to the procedural requirement implicit in art 2 of the convention ... The court considers that the procedural obligation as described cannot be confined to circumstances

in which an individual has lost his life as a result of an act of violence. In its opinion, and with reference to the facts of the instant case, *the obligation at issue extends to the need for an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter.*' (Our emphasis.)

**[52]** In *Sieminska v Poland* App No 37602/97 (29 March 2001, unreported) the applicant's husband died of natural causes in hospital, but after his death she complained that the ambulance which had taken him to hospital had not been equipped with the necessary resuscitation devices. Under Polish law she had a right (which she exercised) to appeal against decisions of the prosecuting authorities not to bring criminal proceedings. She could also bring a civil action or initiate disciplinary proceedings against the medical practitioners concerned. The court not surprisingly declared her application inadmissible on the grounds that there was no indication that there had been any failure to provide a mechanism whereby the criminal, disciplinary or civil responsibility of persons who might be held answerable could be established.

**[53]** The case is important for its restatement of the relevant obligation of the state in these terms:

'The court recalls that the first sentence of art 2 obliges the states not only to refrain from "intentionally" causing death but also to take adequate measures to protect life. The court considers that art 2 of the convention imposes that, even in cases such as the present one, in which the deprivation of life was not the result of the use of lethal force by agents of the state but where agents of the state potentially bear responsibility for loss of life, *the events in question should be subject to an effective investigation or scrutiny which enables the facts to become known to the public and in particular to the relatives of any victims* ... In particular, the positive obligation a state has to protect life under art 2 of the convention includes the requirement for hospitals to have regulations for the protection of their patients' lives and *also the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned.* The procedural element contained in art 2 of the convention imposes the minimum requirement that where a state or its agents potentially bear responsibility for loss of life, the events should be subject to an effective investigation or scrutiny which enables the facts to become known to the public, and in particular to the relatives of any victims.' (Our emphasis.)

**[54]** *Calvelli v Italy* [2002] ECHR 32967/96 was a decision of a Grand Chamber of the European Court. The case arose out of the death of a two-year-old baby in a private clinic in February 1987. There were very long delays in the prosecution of the subsequent criminal proceedings. Eventually a retrial had to be ordered, but the case was then struck out as time-barred. Because the criminal court declined to award provisional compensation to the civil parties, civil proceedings were then started, but the applicants were willing to enter into a settlement with the insurers of the clinic and the responsible doctor, and the civil proceedings were ultimately struck out, too.

**[55]** In Strasbourg the applicants placed great weight on the fact that the state had not pursued the criminal proceedings effectively. The court was influenced, however, by the fact that in settling their civil claim the applicants had lost their

opportunity to obtain an order against the doctor for the payment of damages, and possibly the publication of the judgment in the press. A judgment in the civil court could also have led to disciplinary action against the doctor.

[56] One needs to be very wary of the applicability of the conclusions reached by the court in the context of a legal system which is so different from our own. Relevant passages of the judgment that set out the court's approach to a case of this kind are as follows:

> '48. The court reiterates that the first sentence of art 2 ... enjoins the state not only to refrain from the "intentional" taking of life, but also to safeguard the lives of those within its jurisdiction ...
>
> 49. These principles apply in the public health sphere too. The aforementioned positive obligations therefore require states to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable ...
>
> 51. ... [I]f the infringement of the right to life ... is not caused intentionally, the positive obligation imposed by art 2 to set up an effective judicial system does not necessarily require the provision of a criminal law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged ...
>
> 55. [Because the applicants entered into a settlement agreement] [t]he court accordingly considers that the applicants denied themselves access to the best means—and one that in the special circumstances of the instant case, would have satisfied the positive obligations arising under art 2—of elucidating the extent of the doctor's responsibility for the death of their child.'

[57] *Edwards v UK* (2002) 12 BHRC 190 was a very different case. A psychiatrically disturbed prisoner had been placed in a prison cell with another prisoner who was displaying symptoms of bizarre behaviour, and he was killed by him as a result of their being locked up together. The state authorities appointed a distinguished panel, headed by a QC, to conduct a private non-statutory inquiry. Although the European Court praised the thoroughness and sensitivity of the inquiry report, it held that there had been a violation of art 2 because the panel had no power to compel two of the prison officers to give evidence to them, and because the deceased's parents were excluded from the inquiry except when they were giving evidence.

[58] The court concluded on the facts of that case that because the deceased was a vulnerable individual who had lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible. It ended this part of its judgment in these terms (at 213 (para 84)):

'The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses, whether through their own counsel or, for example, through the inquiry panel. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. *Given their close and personal concern with the subject-matter of the inquiry, the court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests.*' (Our emphasis.)

**[59]** This passage contains an echo of what the court said in the earlier case of *Jordan v UK* (2001) 11 BHRC 1 at 31 (para 109):

'For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. *In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests* (see [*Güleç v Turkey* (1999) 28 EHRR 121 at 165 (para 82)], where the father of the victim was not informed of the decisions not to prosecute; [*Ögur v Turkey* (2000) 31 EHRR 912 at 945 (para 92)], where the family of the victim had no access to the investigation and court documents; [*Gül v Turkey* [2000] ECHR 22676/93]).' (Our emphasis.)

**[60]** Mr Giffin QC, who appeared for the Secretary of State, drew our attention to two later judgments of the European Court in cases of intentional killing where the court referred briefly to its approach in clinical negligence cases. Thus in *Oneryildiz v Turkey* App No 48939/99 (18 June 2002, unreported) the court said that the positive obligation under art 2 to set up an effective judicial system might be satisfied if the legal system afforded victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts. And in *Mastromatteo v Italy* [2002] ECHR 37703/97 the court said that the form of investigation might vary according to the circumstances. In the sphere of negligence a civil or disciplinary remedy might suffice. The court went on to say that in an investigation for which state agents or authorities are allegedly responsible, it is necessary for the persons responsible for the investigation to be independent from those implicated in the events. This meant hierarchical or institutional independence and also practical independence.

**[61]** It is noteworthy, however that in the first of these cases the court concluded that the case of Mr Oneryildiz bore no comparison with that of the applicants Calvelli and Ciglio (see *Calvelli v Italy* [2002] ECHR 32967/96) due, among other things, to the fact that the repercussions of the risk in question were likely to affect more than one individual and to the tragic nature of the events which had occurred. Neither of these two cases, in any event, were concerned to make any new law in this area: they merely summarised the effect of the earlier decisions to which we have referred.

**[62]** It is possible to derive from these Strasbourg cases the following principles. (1) Where agents of a state bear potential responsibility for the loss of a human life, the state should provide a procedural mechanism whereby the cause of death may be investigated, and responsibility for the death ascertained, through an investigation held in public which must be both judicial and effective. (2) The convention is not prescriptive about the manner in which this

investigation should take place, but the more serious the events that call for inquiry, the more intensive should be the process of public scrutiny. In such cases the families of the deceased should be involved in the procedure to the extent that is necessary to safeguard their interests.

**[63]** For reasons that may appear obvious, the present case cannot be simply categorised as one involving errors of judgment on the part of a health professional or negligent co-ordination among health professionals (see the passage in *Powell v UK* App No 45305/99 (4 May 2000, unreported) cited in [51], above). This is a case in which the conduct of those responsible for Naazish's care has already been stigmatised by an independent expert as 'grossly negligent', and where the family's solicitor is not unreasonably concerned that there may have been a medically-orchestrated cover-up which caused his clients the additional heart-breaking distress to which we have referred in [10], above.

**[64]** The leading authority in this jurisdiction on some of the issues raised in this case is the judgment of Lord Woolf CJ, giving the judgment of the court in *R (on the application of Amin) v Secretary of State for the Home Dept, R (on the application of Middleton) v West Yorkshire Coroner* [2002] 4 All ER 336, [2003] QB 581 (see [44], above). That case was concerned with the adequacy of the state's investigations of two deaths in prison custody, but in [32] appear some observations on art 2 that are of general relevance:

> 'Against this framework of obligations created by art 2, it is useful ... to make some general observations about the nature of the procedural duty to investigate. Plainly there is no duty on the face of the convention to investigate a death. It is clear that such a duty has been constructed or developed by the court at Strasbourg out of a perception that, without it, the substantive rights conferred by art 2 would or might in some cases be rendered nugatory or ineffective. Thus the duty to investigate is adjectival to the duty to protect the right to life, and to the prohibition of the taking of life. It follows that by its nature it cannot be a duty defined by reference to fixed rules. It only has life case by case; contingent upon what is required in any individual instance for the substantive right's protection. Across the spectrum of possible art 2 violations, there are classes of case which can readily be distinguished. One class is that of allegations of deliberate killing—murder—by servants of the state. *A second is that of allegations of killing by gross negligence—manslaughter—by servants of the state.* A third is that of plain negligence by servants of the state, leading to a death or allowing it to happen. In the context of any of these classes, there exists the lamentable possibility that the State has concealed or is concealing its responsibility for the death. That possibility gives rise to the paradigm case of the duty to investigate. The duty is in every instance fashioned to support and make good the substantive art 2 rights. We shall see, as we go through the movements of the argument, that this approach sits with the Strasbourg jurisprudence, whose character has always been essentially pragmatic.' (Our emphasis.)

**[65]** The court asked itself (at [45]):

> 'How far may the nature and quality of any investigation embarked upon in satisfaction of the art 2 adjectival duty vary according to the context and subject matter of the case? Are such requirements such as publicity and family participation, and other virtuous procedures, constant?

**[66]** It gave its answer (at [62]):

> 'Accordingly, this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts. Just as, in our view, on question (2) [counsel for the Crown] originally adopted too rigid an approach to the European Court of Human Rights' jurisprudence in submitting that the duty to investigate was only triggered in cases of the use of unlawful force by state agents, so also on question (3) [counsel for the claimants] makes the same error in submitting that there are fixed requirements of publicity and family participation, uniformly applicable to every investigation. What is required will vary with the circumstances. A credible accusation of murder or manslaughter by state agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the state has laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including *Edwards v UK* are perfectly consistent with this. And it is an approach which embraces what we will say in *Middleton*'s appeal about the coroner's jurisdiction and inquest verdicts of neglect.'

**[67]** While this court is now bound to take into account the decisions of the court at Strasbourg, it is bound by the force of precedent by its own earlier judgments. From the judgment in *Amin*'s case (on which we are now awaiting the decision of the House of Lords) one can derive the following principles. (1) A case involving, as this one does, an allegation of gross negligence by a servant or servants of the state falls in the middle of the spectrum that extends from allegations of deliberate killing by a servant of the state to allegations of plain negligence by such servants that lead to a death or allow it to happen. (2) The 'lamentable possibility' that the state might have concealed its responsibility for the death, as is alleged in the present case, may arise at any point on this spectrum. (3) The procedural obligation introduced by art 2 has three interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; and to assuage the anxieties of the public. (4) What is required by way of an investigation cannot be reduced to a catechism of rules; a flexible approach is needed, responsive to the dictates of the facts, case by case.

(9) QUESTION (2): HAS THE STATE'S ART 2 OBLIGATION IN THIS CASE ALREADY BEEN PERFORMED?

**[68]** Silber J considered ([2003] All ER (D) 220 (Jun)) that the combination of the thorough police investigation and the thorough inquiries undertaken by the trust were sufficient in themselves to comply with this obligation, coupled as they were by an admission of liability by the trust. He reached this conclusion even though Mr and Mrs Khan had played no part in either investigation. They were merely told of the results and invited to ask questions about them after they were all over. The judge categorised the failure to involve the family as regrettable and unfortunate, but he thought that this could not gainsay the fact that thorough

investigations had taken place. The fact that the trust had admitted liability satisfied in his mind one of the main purposes of the requisite investigation, namely to ascertain who was to blame for the death, and he considered that the duty to investigate in this case was pitched at a lower level than in a case of a death in custody.

**[69]** We do not agree with the judge's conclusion. Subject to what we say in [76], below, under our law it is the coroner's inquest, when it takes place, which furnishes the natural occasion for the effective judicial inquiry into the cause of a death that the convention requires. The police investigation, in which the family played no part, and which culminated in a decision not to prosecute, could not act as a substitute. Nor could the investigations carried out privately by the trust, in which again the family played no part, particularly as the trust could not be regarded as having the requisite independence.

**[70]** In our judgment the judge seriously underestimated the gravity of this case. It is, as we have said, a case in which allegations of gross negligence have been made by an independent expert, and these are compounded by the events that led the family's solicitor to express concern about a medically-orchestrated cover-up. So far as the latter is concerned, this case is a long way from the case of *Powell v UK* where the alleged falsification of records was discrete and separate from the negligent omissions with which the doctors were charged. Here the alleged cover-up was close to the centre of the events into which the coroner will be inquiring, and the evidence as to what really happened could cast light on the credibility of the trust's witnesses in this respect.

**[71]** Nor do we consider that in this case the admission of liability takes matters very much further. The trust has not formally identified the acts or omissions which it considers to have been negligent, and this blanket admission leaves the family not very much the wiser. This is not a case where a single act of negligence is alleged against a single person, and it is dangerous to extrapolate from the facts of one case to the facts of another. We would add that both the Strasbourg court in *Edwards v UK* (2002) 12 BHRC 190 at 211 (para 74) and this court in *Amin*'s case [2002] 4 All ER 336 at [57] made it clear that there was no obligation on the deceased's family to initiate civil proceedings in order to find out what happened in a case like this. The state itself must initiate the necessary inquiry. The idea that the family should be obliged to initiate disciplinary proceedings against any of the nurses or the doctors in order to ascertain the facts of their daughter's death is not one that can be seriously entertained on the facts of the present case.

**[72]** For these reasons we do not consider that the state has yet fulfilled the obligation imposed on it by art 2.

(10) QUESTION (3): IF THE STATE HAS NOT YET FULFILLED ITS ART 2 OBLIGATION, CAN THE HOLDING OF THE INQUEST SATISFY THAT OBLIGATION IF MR KHAN CANNOT PLAY AN EFFECTIVE PART IN IT HIMSELF?

**[73]** We have described how the response required of a state by art 2 varies with the seriousness of the subject matter. Although this of course is not a case in which a servant of the state is charged with intentional killing, it is high up in the second category of cases identified by Lord Woolf CJ in *Amin*'s case. A little girl has died in circumstances where gross negligence has been imputed to the hospital staff, and the case has the other distressing features we have described in [3], [10] and [24], above.

**[74]** If the public judicial investigation required by art 2 is to be an effective one—and by 'effective' we mean an investigation that satisfies the purposes

described in [40]–[43], above, reinforced as they are by the third principle we have derived from Lord Woolf CJ's judgment in *Amin's* case (see [67], above)—the inquest will not be an effective one unless Naazish's family can play an effective part in it. The evidence shows (see [24], above) that they are in no fit state to play that part themselves. Although the function of an inquest is inquisitorial, and in the overwhelming majority of cases the coroner can conduct an effective judicial investigation himself without there being any need for the family of the deceased to be represented, every rule has its exceptions, and this, in our judgment, is an exceptional case. We note that the authors of the recent *Report of a Fundamental Review into Death Certification and Investigation in England, Wales and Northern Ireland* (June 2003) (Cm 5831) share our view, in Ch 9 of their report, that in an exceptional case something more is needed.

[75] In particular, the evidence is so complex that the coroner has enlisted the services of an independent medical expert to assist him. The trust and its doctors and nurses will have the benefit of legal representation at public expense, and the family are likely to wish to explore the prospects of a verdict of neglect and/or a report by the coroner pursuant to r 43 of the Coroners Rules 1984, SI 1984/552. Mr Khan clearly could not manage this on his own.

[76] In the recent case of *Sacker v West Yorkshire Coroner* [2003] EWCA Civ 217 at [24]–[25], [2003] 2 All ER 278 at [24]–[25] Pill LJ expressed some scepticism about the suitability of a coroner's inquest, in its present form, as a vehicle for carrying out a state's obligations under art 2. Those considerations may accentuate the need for an overdue improvement in the arrangements for inquests: it cannot in our judgment serve as a valid excuse for effectively excluding a family from participating in them in a case of this seriousness.

[77] For the sake of completeness we would add that we do not consider that the judgments of this court in *R (on the application of Green) v Police Complaints Authority* [2002] EWCA Civ 389, [2002] All ER (D) 397 (Mar), to which Mr Giffin referred us, cast any useful light on the matters we have to decide in the present case. We therefore consider that the answer to question (3) is No.

(11) QUESTION (4): IF THE ANSWER TO QUESTION (3) IS NO, DOES THE 1998 ACT APPLY, SO THAT MR KHAN MAY OBTAIN RELIEF IN A NATIONAL COURT?

[78] The provisions of the convention formed no part of our national law until 2 October 2000. Before that date citizens of this country who believed their convention rights had been violated had to exhaust their opportunities of obtaining a remedy in our courts before they could seek relief in Strasbourg. The 1998 Act changed all that. Now anyone who seeks redress for the violation of a convention right can obtain relief in the courts of this country. Naazish, however, died in September 1999, and there is a difference of opinion in the lower courts as to whether the family of someone who died before 2 October 2000 may rely on their right to enforce the state's obligation under art 2 if that obligation remained unsatisfied when the 1998 Act came into force.

[79] Silber J held that they could not. After mentioning other conflicting judgments at first instance and considering Lord Woolf CJ's judgment in *Amin's* case [2002] 4 All ER 336 at [32], [43] and [81], he concluded that the duty to investigate in art 2 was not an independent duty. It was dependent on whether the main duties expressly stated in that article had arisen. If a death occurred before 2 October 2000, art 2 was not engaged, and as a matter of English law the state's adjectival duty to investigate did not arise, whether by necessary implication or at all.

**[80]** In *R (on the application of Hurst) v HM Coroner for the Northern District of London* [2003] EWHC 1721 (Admin), [2003] All ER (D) 80 (Jul) the Divisional Court disagreed. Rose LJ, with whom Henriques J agreed, accepted that the state's duty to investigate a death was adjectival in the sense that it was ancillary to the main right to life recognised by art 2. But he said (at [19]) that it seemed to him that it was none the less a free-standing right. In *Hurst's* case the coroner had decided in November 2002 and June 2003 not to resume the inquest, and by then the 1998 Act had come into force.

**[81]** In *Amin's* case [2002] 4 All ER 336 this point was never argued, although both the deaths in that case had antedated 2 October 2000. Mr Giffin, however, derived a principle from Lord Woolf CJ's judgment (at [32]) to the effect that the state's procedural duty to investigate existed, and existed only, in order to ensure the effectiveness of the substantive rights conferred by art 2. It had no fixed content in itself: 'It only has life case by case; contingent upon what is required in any individual instance for the substantive right's protection.'

**[82]** We certainly accept that if this case did not have a convention ingredient it might well be legitimate for an English judge to conclude, as Silber J did, that Naazish's right to life could not be relied upon after her death in September 1999. But we do not believe the court at Strasbourg would look on this matter in this way.

**[83]** In *Hurst's* case Rose LJ referred to the judgment of the European Court in *Jordan v UK* (2001) 11 BHRC 1 without expressly citing the passage he had in mind. The relevant passage is at 29–31 (paras 102–109). The court stressed (at para 102) that art 2 ranked as one of the most fundamental values of the convention, enshrining (along with art 3) one of the basic values of the democratic societies making up the Council of Europe. It went on to say:

> 'The object and purpose of the convention as an instrument for the protection of individual human beings also requires that art 2 be interpreted and applied so as to make its safeguards practical and effective …'

**[84]** It is Naazish's right to life that is at the centre of this case, and the fundamental importance of that right obliges the state to investigate her death judicially and publicly in the manner indicated by Strasbourg case law. Her parents simply act as her proxy in requiring this investigation to take place. They are entitled to say after 2 October 2000, just as much as they were entitled to say before she died, that the state must implement the convention obligations it owed to her. In *Jordan v UK* paras 102–109 of the judgment contain none of the precision one would expect of a Chancery judgment. The court does not identify the precise moment when a right vested, or the precise legal status of the persons who are entitled to enforce that right after the death of the deceased. The dead Mr Jordan is spoken of as the 'victim'. But the court accepts without the need for any profound analysis that the victim's family is entitled to stand in his shoes after his death and make his right a real one.

**[85]** In our judgment Naazish had a right to life which the Strasbourg court would have recognised when the 1998 Act came into force, even though by that time her parents had to act as her proxies, and they were limited to a reliance on the state's adjectival duty to investigate her death properly. We do not therefore consider that the fact that Naazish died in September 1999 provides any effective bar to the relief sought by her father in these proceedings. It was in July 2002 that the Secretary of State first denied them the relief they are now seeking, and by

then the 1998 Act had been in force for nearly two years. If this decision causes practical difficulties in other cases, the solution to those difficulties will have to be worked out on a case-by-case basis. The answer to question (4) is therefore Yes.

**[86]** We are therefore giving the following answers to the questions in [46], above. (i) The United Kingdom has not so far discharged its obligation under art 2 of the convention in the present case. (ii) The holding of an inquest will not discharge that obligation if Mr Khan cannot play an effective part in it himself. (iii) The 1998 Act applies, so that Mr Khan is entitled to relief in a national court. We will therefore allow the appeal to this extent at least, and (subject to detailed argument as to their form) make declarations to that effect.

(12) QUESTION (5): WHATEVER THE ANSWER TO THE FIRST FOUR QUESTIONS, DOES THE SECRETARY OF STATE HAVE POWER TO MAKE THE NECESSARY FUNDING AVAILABLE?

**[87]** It appears to us that the next question now is whether there is any way in which the United Kingdom can discharge its obligation to Mr Khan under art 2. It follows from the conclusions that we have reached so far that the United Kingdom owes Mr Khan a duty to set up an inquiry which will discharge that obligation. As we see it, that could be achieved in one of two ways. The first way would be to provide reasonable funding at an inquest in order to ensure that the Khan family is represented, and the second would be to set up some other type of inquiry at which such funding would be possible.

**[88]** It would certainly be open to the Secretary of State (whatever views he has previously expressed on the matter) to set up an inquiry under s 84 of the National Health Service Act 1977 and to make provision for the payment of Mr Khan's reasonable legal costs at such an inquiry. We imagine that there may have been many such inquiries at which the interests of the family have been provided out of public funds without their being granted legal aid. It follows that this is not a case in which the United Kingdom cannot discharge its obligations to Mr Khan under art 2.

**[89]** Mr Havers QC, who appeared for Mr Khan, submitted, on the basis that the Secretary of State has so far declined to hold an inquiry, whether under s 84 or otherwise, that although Parliament has created the Legal Services Commission for the purpose of channelling taxpayers' funds towards the cost of legal representation when circumstances warranted it, the Secretary of State nevertheless has an equivalent power in a case like this pursuant to s 2 of the 1977 Act. This section provides, so far as is material:

> 'Without prejudice to the Secretary of State's powers apart from this section, he has power—(a) to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by this Act; and (b) to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.'

Section 1(1) of the Act prescribes the Secretary of State's duty to continue the promotion of a comprehensive health service in England and Wales, and other sections of the Act identify particular facets of that duty.

**[90]** Silber J did not answer the question whether ss 1(1) and 2 of the Act, read in accordance with the precepts contained in s 3 of the 1998 Act, gave the Secretary of State the requisite power. He cut the Gordian knot by holding that if the effect of art 2 of the convention was that the Secretary of State would be

acting unlawfully if he did not provide for the payment of Mr Khan's legal costs, then he was under an obligation under art 2 to make the necessary payments irrespective of whether the 1977 Act gave him power to do so.

**[91]** This conclusion cannot be right. First principles of parliamentary sovereignty do not permit ministers to make payments out of public funds when Parliament has given them no power to do so, and the courts cannot require ministers to make unlawful payments. Whether the Secretary of State has power to pay a family's costs at an inquest thus depends upon the true construction of s 2 of the 1997 Act in the light of s 3 of 1998 Act.

**[92]** Mr Giffin submitted in relation to the interpretation of s 2 that the legal representation of a family at an inquest is not calculated to facilitate, and is not conducive to, the provision of medical services. Nor is it incidental to the provision of such services. He said that the purpose of an inquest is to establish how the death of the deceased came about. Its purpose is not to deal with the future provision of medical services. He observed in this context that in *R (Wagstaff) v Secretary of State for Health, R (Associated Newspapers Ltd) v Secretary of State for Health* [2001] 1 WLR 292 Kennedy LJ considered that the Secretary of State might only lawfully establish a tribunal of inquiry pursuant to s 2(b) of the 1977 Act if its terms of reference were restricted to the operation of the National Health Service and the way in which the functioning of other agencies impacted on that service.

**[93]** Mr Giffin added that it would be wrong to interpret a general power in a statute in the imaginative way suggested by Mr Havers when Parliament has made a different express provision which is designed to deal comprehensively with public funding of representation at courts and tribunals. In *Crédit Suisse v Waltham Forest London BC* [1996] 4 All ER 176 at 184, [1997] QB 362 at 374 Neill LJ said:

> '... where Parliament has made detailed provisions as to how certain statutory functions are to be carried out, there is no scope for implying the existence of additional powers which lie wholly outside the statutory code.'

**[94]** Although we see the force of Mr Giffin's arguments, we consider that it would be premature for us to reach a final view on the interpretation of s 2 of the 1977 Act (bearing in mind our interpretative obligations under s 3 of the 1998 Act) before we have received fuller argument about the alternative ways in which the state might fulfil its obligations under art 2 in this case. We have in mind the possibility that the Secretary of State might now opt to conduct a statutory inquiry under s 84 (notwithstanding his earlier views on the topic) or that he might identify a lawful non-statutory route to the same end. Alternatively the Lord Chancellor might wish to consider, with the Treasury's consent no doubt, relaxing the provisions of the statutory instrument that denies legal aid funding to the parents of a dead child on an occasion like this.

**[95]** In this context we have been shown how the Lord Chancellor, in the exercise of his powers under s 6(8)(a) and (b) of the Access to Justice Act 1999, has been making more generous provision for legal representation at inquests out of public funds than was open to him before that Act was passed. In particular we have been shown the direction he made in this context pursuant to s 6(8)(a) in November 2001 and the guidance he issued at the same time under s 6(8)(b), with particular reference to representation at inquests.

[96] All the conditions set out in para 7 of the Lord Chancellor's new guidance appear to be satisfied in the present case, save one. The circumstances of Naazish's death certainly seem to be such that funded representation for her family is necessary to assist the coroner to investigate the case effectively and to establish the facts, and this is an inquest which concerns an agency of the state. The one condition that is not satisfied relates to Mr Khan's means. Although he has been unable to take instructions on the matter, because of his client's distressed state, Mr Balen understands that his financial position is marginally above the rigid financial limits prescribed by reg 5(6) of the Community Legal Service (Financial) Regulations 2000, SI 2000/516.

[97] It would be wrong to say very much about these regulations in the absence of a representative of the Lord Chancellor and in the absence of a clearer understanding of Mr Khan's financial position and of his commitments to his family.

[98] If the legal aid route is the state's preferred route towards fulfilling its art 2 obligations in a case like this, it seems to us at present seriously open to question whether a provision which requires someone like Mr Khan to fund the entire cost of his lawyer's appearance at the inquest into his daughter's death entirely out of his own pocket in a case as serious and as complex as this (without any possibility of reimbursement by the state) is compatible with the requirements of the convention. After all, the convention imposes on states the obligation to conduct an effective investigation in a case like this, and without Mr Khan's participation the inquest cannot fulfil that role. With a wife and four other children to support it seems absurd, on the information at present available to the court, that he could reasonably be expected to fund the whole of the cost of his own representation himself in order to enable the state to perform the obligations that rest on it, and not on him.

[99] We must stress that this is an exceptional case, remarkable as it is for the fact that the trust excluded the family completely from the investigations it conducted. But human rights law casts long shadows in exceptional cases. Those who drafted the 2000 regulations do not appear to have appreciated the power of art 2 when they excluded even an exceptional case like this from the category of cases in which legal representation might be made available without a strict and unyielding means test. We were unimpressed by the suggestion made by Mr Giffin that economic exigencies might be called in aid by a state to whittle down its obligations in a case as serious as this.

[100] In these circumstances we propose to hold a further hearing in this appeal on the first open day on or after 27 October in order to give further consideration to the question whether we need to interpret s 2 of the 1977 Act as giving the requisite power by which the state may perform its duties to Mr Khan at the forthcoming inquest, or whether the state suggests some other route to that end. We would benefit greatly on that occasion from the help of counsel instructed by the Lord Chancellor (in relation to his legal aid responsibilities). We would also welcome the assistance of counsel instructed by the Attorney General (representing the government as a whole) so that we may consider the possibilities if it were to be submitted on behalf of both the Secretary of State for Health and the Lord Chancellor that each has no power to fund representation at an inquest in the circumstances of this case. We would then wish to have assistance in order to answer the question how the United Kingdom proposes to discharge the obligation under art 2 which we have held to exist.

[101] It may be, of course, that some satisfactory and lawful means may be found by the government for funding Mr Khan's representation at the forthcoming inquest, so that the difficult issues on which we wish to hear further argument may take place on an occasion uninhibited by external time pressures created by the need not to delay the inquest (which concerns a lot of people other than Mr Khan) any further.

*Appeal allowed. Further hearing ordered into the method by which the Secretary of State's obligation under art 2 of the convention could lawfully be discharged.*

Dilys Tausz Barrister.

# R (on the application of Amin) v Secretary of State for the Home Department

[2003] UKHL 51

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD SLYNN OF HADLEY, LORD STEYN, LORD HOPE OF CRAIGHEAD AND LORD HUTTON

14–16 JULY, 16 OCTOBER 2003

*Human rights – Right to life – State's obligation to investigate death in circumstances where state arguably in breach of substantive obligation under convention right to life – Whether state's investigatory obligation requiring public inquiry with participation of deceased's family – Human Rights Act 1998, Sch 1, Pt I, art 2.*

M, a prisoner serving a sentence in a young offender institution was killed by his cellmate, S, whose institutional behaviour was known to the Prison Service to be dangerous. Following the death the Prison Service carried out an internal inquiry, led by a senior official in the service. The investigation was conducted in private and the report was not published, although parts of it were made available to M's family. The family were not able to play any effective part in the inquiry. The report was made available to the police and the Commission for Racial Equality (CRE). An inquest into the death was opened and adjourned pending S's trial. The police made investigations into the criminal culpability of S and of the Prison Service. An advice report was produced, and based on that report, counsel advised that there was insufficient evidence to provide any realistic prospect of securing any conviction of anyone other than S. M's family were so informed. S was charged with murder and convicted. His trial was directed solely to establishing his mental responsibility for the killing which he had admittedly carried out. There was no exploration of cell allocation procedures or other events before the murder. After conviction the coroner declined to resume the inquest despite representations inviting her to reconsider. Shortly after S's conviction the CRE announced a formal investigation into racial discrimination in the Prison Service, making specific reference to the circumstances leading to the murder of M. Although the CRE report was published, it was necessarily confined to race-related issues. The CRE inquiry was conducted chiefly in private. M's family were unable to play any effective part in it. The respondent Secretary of State for the Home Department refused to establish the independent public inquiry into M's death requested by his family. The claimant, M's uncle, applied for judicial review of the respondent's refusal. The judge granted a declaration that an independent public investigation had to be held in order to satisfy the obligation imposed on the state by art 2[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) to investigate deaths where there had arguably been a breach of the right to life contained in art 2. The Secretary of State appealed. Allowing the appeal, the Court of Appeal held that a flexible

a Article 2, so far as material, is set out at [18], below

approach was to be taken to the state's duty to investigate in each case and that, in the instant case, the duty had already been discharged. The claimant appealed.

**Held** – The state had a duty to take appropriate legislative and administrative steps to protect life. It owed a particular duty to those involuntarily in its custody. When a death occurred in custody the state's duty to investigate was given effect in the United Kingdom by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. Although there was a measure of flexibility in selecting the means of conducting the investigation, to satisfy art 2 of the convention the investigation had to be independent, effective, reasonably prompt, have a sufficient element of public scrutiny, and involve the next of kin to an appropriate extent. In the instant case the investigations conducted had not, either singly or together, met the minimum standards required to satisfy art 2. Accordingly, the appeal would be allowed (see [30]–[38], [49], [53], [54], [66], below).

*R (on the application of Wright) v Secretary of State for the Home Dept* (2001) 62 BMLR 16 applied; *Edwards v UK* (2002) 12 BHRC 190 and *Jordan v UK* (2001) 11 BHRC 1 considered.

Decision of the Court of Appeal [2002] 4 All ER 396 reversed.

**Notes**

For the right to life, see 8(2) *Halsbury's Laws* (4th edn reissue) para 123.

For the Human Rights Act 1998, Sch 1, Pt I, art 2, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 553.

**Cases referred to in opinions**

*Edwards v UK* (2002) 12 BHRC 190, ECt HR.

*Finucane v UK* [2003] All ER (D) 25 (Jul), ECt HR.

*John v Rees* [1969] 2 All ER 274, [1970] Ch 345, [1969] 2 WLR 1294.

*Jordan v UK* (2001) 11 BHRC 1, ECt HR.

*McCann v UK* (1996) 21 EHRR 97, [1995] ECHR 18984/91, ECt HR.

*Menson v UK* [2003] ECHR 47916/99, ECt HR.

*Nilabati Behera v State of Orissa* [1993] 2 SCR 581, India SC.

*Osman v UK* (1998) 5 BHRC 293, ECt HR.

*R (on the application of Wright) v Secretary of State for the Home Dept* [2001] EWHC Admin 520, (2001) 62 BMLR 16.

*Reeves v Comr of Police of the Metropolis* [1999] 3 All ER 897, [2000] 1 AC 360, [1999] 3 WLR 363, HL.

*Salman v Turkey* (2002) 34 EHRR 425, [2000] ECHR 21986/93, ECt HR.

*Yasa v Turkey* (1999) 28 EHRR 408, [1998] ECHR 22495/93, ECt HR.

**Cases referred to in list of authorities**

*A (children) (conjoined twins: surgical separation), Re* [2000] 4 All ER 961, [2001] Fam 147, [2001] 2 WLR 480, CA.

*Airedale NHS Trust v Bland* [1993] 1 All ER 821, [1993] AC 789, [1993] 2 WLR 316, Fam D, CA and HL.

*Basu v State of West Bengal* [1997] 2 LRC 1, India SC.

*Botta v Italy* (1998) 4 BHRC 81, ECt HR.

*Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.

*Çakici v Turkey* (2001) 31 EHRR 133, [1999] ECHR 23657/94, ECt HR.

*East African Asians v UK* (1973) 3 EHRR 76, E Com HR.
*Ergi v Turkey* (2001) 32 EHRR 388, [1998] ECHR 23818/94, ECt HR.
*Ertak v Turkey* App No 20764/92 (9 May 2000, unreported), ECt HR.
*Guerra v Italy* (1998) 4 BHRC 63, ECt HR.
*Gul v Turkey* [2000] ECHR 22676/93, ECt HR.
*Güleç v Turkey* (1999) 28 EHRR 121, [1998] ECHR 21593/93, ECt HR.
*Hilton v UK* (1978) 3 EHRR 104, E Com HR.
*Ilhan v Turkey* [2000] ECHR 22277/93, ECt HR.
*Kaya v Turkey* (1999) 28 EHRR 1, [1998] 22729/93, ECt HR.
*Keenan v UK* (2001) 10 BHRC 319, ECt HR.
*Kelly v UK* [2001] ECHR 30054/96, ECt HR.
*Kurt v Turkey* (1998) 5 BHRC 1, ECt HR.
*McKerr v UK* (2002) 34 EHRR 553, [2001] ECHR 28883/95, ECt HR.
*McShane v UK* [2002] ECHR 43290/98, ECt HR.
*Ogur v Turkey* (2001) 31 EHRR 912, [1999] ECHR 21594/93, ECt HR.
*Plattform 'Ärtze für das Leben' v Austria* (1991) 13 EHRR 204, [1988] ECHR 10126/82, ECt HR.
*Pretty v UK* (2002) 12 BHRC 149, ECt HR.
*R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.
*R (on the application of Anderson) v Secretary of State for the Home Dept* [2001] EWCA Civ 1698, [2003] 1 AC 837, [2002] 2 WLR 1143; *rvsd* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837, [2002] 3 WLR 1800.
*R (on the application of Howard) v Secretary of State for Health* [2002] EWHC 396 (Admin), [2003] QB 830, [2002] 3 WLR 738.
*R (on the application of Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [2003] QB 794, [2002] 3 WLR 704, DC.
*R v Broadcasting Standards Commission, ex p British Broadcasting Corp* [2000] 3 All ER 989, [2000] 3 WLR 1327, CA.
*R v DPP, ex p Manning* [2001] QB 330, [2000] 3 WLR 463, DC.
*R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 4 All ER 15, [2000] 3 WLR 843, HL.
*R v Graham* (1905) 93 LT 371.
*R v Inner London North District Coroner, ex p Linnane* [1989] 2 All ER 254, [1989] 1 WLR 395, DC.
*R v Inner South London Coroner, ex p Douglas-Williams* [1999] 1 All ER 344, CA.
*R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, [2002] 3 WLR 1562.
*R v North Humberside and Scunthorpe Coroner, ex p Jamieson* [1994] 3 All ER 972, [1995] QB 1, [1994] 3 WLR 82, CA.
*R v Secretary of State for Health, ex p Wagstaff* [2001] 1 WLR 292, DC.
*R v Southwark Coroner, ex p Hicks* [1987] 2 All ER 140, [1987] 1 WLR 1624, DC.
*Rapier (decd), Re* [1986] 3 All ER 726, [1988] QB 26, [1986] 3 WLR 830, DC.
*Sacker v West Yorkshire Coroner* [2003] EWCA Civ 217, [2003] 2 All ER 278.
*Shanaghan v UK* [2001] ECHR 37715/97, ECt HR.
*State v Makwanyane* [1995] 1 LRC 269, SA Const Ct.
*Streletz v Germany* (2001) 33 EHRR 751, [2001] ECHR 34044/96, ECt HR.
*Tanrikulu v Turkey* [1999] ECHR 23763/94, ECt HR.
*Timurtas v Turkey* (2001) 33 EHRR 121, [2000] ECHR 23531/94, ECt HR.

*X and Y v Netherlands* (1986) 8 EHRR 235, ECt HR.
*Z v UK* (2001) 10 BHRC 384, ECt HR.

**Appeal**

The claimant, Imtiaz Amin, appealed with leave of the Appeal Committee of the House of Lords given on 14 November 2002, from the order of the Court of Appeal (Lord Woolf CJ, Laws and Dyson LJJ) on 27 March 2002 ([2002] EWCA Civ 390, [2002] 4 All ER 396, [2003] QB 581) allowing the appeal of the respondent, the Secretary of State for the Home Department, from the order of Hooper J on 3 September 2001 ([2001] EWHC Admin 719, [2001] All ER (D) 69 (Oct)) granting the claimant a declaration that an independent public investigation into the death of the claimant's nephew, Zahid Mubarek, with his family legally represented, provided with the relevant material, and able to cross-examine the principal witnesses, had to be held to satisfy the obligations imposed by art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The Northern Ireland Human Rights Commission was granted leave to intervene on 24 June 2003. The facts are set out in the opinion of Lord Bingham of Cornhill.

*Patrick O'Connor QC* and *Martin Soorjoo* (instructed by *Imran Khan & Partners*) for the appellant.

*Jonathan Crow* and *Martin Chamberlain* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*John F Larkin QC* and *Peter Coll* (both of the Northern Ireland Bar) (instructed by *JG O'Hare*, Belfast) for the Northern Ireland Human Rights Commission.

Their Lordships took time for consideration.

16 October 2003. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

[1] My Lords, in March 2000 Zahid Mubarek, a 19-year-old prisoner serving a sentence in Feltham Young Offender Institution, was wantonly murdered by Robert Stewart, with whom he shared a cell. The issue in this appeal is whether the United Kingdom has complied with its duty under art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) to investigate the circumstances in which this crime came to be committed.

THE FACTS

[2] Zahid Mubarek (the deceased) was born on 23 October 1980. He lived in East London. His criminal record was a short one. On 16 January 1997, for an offence of possessing an imitation firearm with intent to cause fear of violence, he was the subject of an attendance centre order. It appears the offence may have been committed in response to provocation and racist abuse. In March 1999 he was cautioned for handling stolen goods. On 17 January 2000 he was sentenced to a total of 90 days' detention in a young offender institution for offences of theft, going equipped for theft and interfering with a motor vehicle. These were offences which he committed, as it seems, to fund a growing heroin addiction. But it seems he had not complied with bail conditions imposed to address his drug problem. He was sent to Feltham, spent his first night there in the induction

wing, and on 22 January 2000 was transferred to Swallow Wing where he was accommodated in cell 38, a double cell which he occupied on his own until the arrival of Stewart on 8 February 2000. The evidence suggests that the deceased was a model prisoner who caused no trouble and appeared to have no enemies.

[3] Robert Stewart was born on 4 August 1980 and lived at Hyde in Greater Manchester. Beginning with a conviction of arson when aged 13, he was convicted of 21 further offences before being sentenced for the first time to detention in a young offender institution in August 1995. Further such sentences followed in January 1996, February 1997 (after the making of community service and supervision orders), November 1997, October 1998 and January 2000. Only two of Stewart's convictions were of offences of personal violence (assault occasioning actual bodily harm and common assault). At the end of 1999 he faced charges under the Protection from Harassment Act 1997 which were due to be heard in London. It appears that these offences, or some of them, may have been thought to be racially motivated. His personal security file suggested that while in custody he had been implicated in violence, damage to prison property, escape attempts, hostage holding, the stabbing of other inmates (one of whom had lost his eye), suspected (but unproved) involvement in the murder of another prisoner, arson, the threatening of other inmates with a metal bar and a wooden table or chair leg and threats of violence against prison staff whose addresses he had ascertained. An intercepted letter suggested that he was in possession of a gun and knew the address of a prison governor. It appears that from about January 1999 his behaviour in custody improved, although he was later diagnosed to be suffering from 'a long-standing deep-seated personality disorder' and 'an untreatable mental condition'.

[4] Stewart's first visit to Feltham was on 10 January 2000 for purposes of a court hearing in London. It was judged that he needed to be watched and he was put in a single cell. An intercepted letter written by him was found to contain a reference to 'Niggers'. An officer who read Stewart's security file at this time formed the opinion that Stewart was 'very dangerous and a threat to both staff and other inmates'. He made a note in Stewart's wing file: 'Staff are advised to see the security file on this inmate (held in security). Very dangerous individual. Be careful.' Having made his court appearance, Stewart returned to Hindley Young Offender Institution (from which he had come) on 12 January.

[5] Stewart returned to Feltham on 24 January for a further court appearance. He was accommodated on a different wing, where staff were warned that he was dangerous. He left again on 26 January.

[6] Stewart was transferred to Feltham on a longer-term basis on 7 February 2000. He spent his first night on a wing where he had not been before. On the following day, 8 February 2000, he was placed in cell 38 on Swallow Wing, with the deceased. It is said that the wing had a maximum capacity of 60 prisoners, that there were already 59 before the arrival of Stewart and that the vacant place in cell 38 was the only place available. The allocation decision was made by an officer who had, according to one source, been warned to 'watch [Stewart] as he was dangerous'. The officer himself does not, it appears, recollect such a warning, and did not consult Stewart's security file, or his wing file which did not reach Feltham until later.

[7] Stewart shared cell 38 with the deceased from 8 February to 21 March 2000. During that time he wrote and sent a letter, not intercepted, couched in violent and racist terms. On 19 March Stewart's sentence expired and he was thereafter

held on remand pending trial of the outstanding charges, but he was not moved. There is no evidence of hostility or discord between the deceased and Stewart during the time they were sharing cell 38, although the deceased may have expressed a wish to share with someone else. There is evidence that other prisoners regarded Stewart as 'strange' and 'weird' and 'aggressive', partly because of his manner and behaviour, partly because of a cross, with the letters RIP, tattooed on his forehead.

[8] On 21 March 2000 at about 3.35 am Stewart battered the deceased into a coma with a wooden table leg. The deceased was due to be released that day. He never recovered, dying in hospital of brain damage a week later. After the attack Stewart pressed the cell alarm button and, when an officer responded, said that his cellmate had had an accident. When moved to a nearby cell he drew a large swastika on the wall with the heel of his rubber shoe; above it he wrote 'Just killed me padmate' and below it 'RIP'. The Director General of HM Prison Service met the parents of the deceased at the hospital on the day of the attack and, on learning of the death, wrote a letter apologising unreservedly for the failure of the Prison Service to look after the deceased and accepting responsibility for his death. He told them of an internal inquiry he had set up under the leadership of Mr Ted Butt, a serving governor and senior investigating officer of the Prison Service (the Butt Inquiry).

[9] Stewart was charged with murder, and his trial started on 24 October 2000. He admitted the killing. The issue was whether he was guilty of murder or of manslaughter by reason of diminished responsibility. He was convicted of murder. Although the court heard evidence of the circumstances immediately surrounding the killing, including the actions of prison officers at that time, there was no exploration at the trial of cell allocation procedures or other events before the murder.

[10] An inquest into the death of the deceased was formally opened on 31 March 2000 and then adjourned pending trial of the murder charge against Stewart. Following the conviction the Coroner for West London declined to resume the inquest, a decision to which she adhered despite representations inviting her to reconsider it. In an affidavit she has given detailed reasons why the constraints to which coroners and inquests are subject make an inquest an unsuitable vehicle for investigating publicly the issues raised by this case.

[11] The police investigated whether the Prison Service or any of its employees should be prosecuted for manslaughter by gross negligence or under s 3 of the Health and Safety at Work etc Act 1974. The advice of counsel was that there was insufficient evidence to provide a realistic prospect of securing any conviction relating to the death of the deceased. His family were so informed in August 2001.

[12] The terms of reference of the Butt Inquiry were to investigate the circumstances surrounding the murder and in particular to consider the issue of shared accommodation both generally and with particular reference to Stewart, in the light of what was known about his criminal history and institutional behaviour. The family of the deceased were consulted about these terms of reference but were not present at any stage of the investigation and although invited to meet Mr Butt did not avail themselves of this opportunity. Mr Butt's report was in two parts, completed at the end of October and November 2000 respectively. Copies of both parts were made available to the family, save for certain confidential annexes relating to individual prisoners, and no restriction

was placed on their use of the report, save for the transcripts of interviews with members of the Prison Service annexed to the first part of the report. The report was made available to the police and the Commission for Racial Equality (the CRE) but was not published. It identified a number of shortcomings at Feltham and made 26 recommendations for change.

**[13]** On 17 November 2000 the CRE announced that it would be conducting a formal investigation into racial discrimination in the Prison Service. Its terms of reference were wide-ranging and general across the Prison Service but made specific reference to the circumstances leading to the murder of the deceased and any contributing act or omission on the part of the Prison Service. The family were involved in the preparation of the terms of reference and expressed views on the procedures proposed. The family wrote to the CRE asking that they be allowed to participate in its inquiry and for its hearings to be in public, but the CRE refused this request. It stated that the inquiry had to be seen to be impartial and that, although there was to be a 'public component' in its proceedings, it could not conduct the whole inquiry in public. In the event, a public hearing was held on 18 September 2001 when certain high-level policy witnesses made statements and were questioned by counsel for the CRE. Before this hearing the family were offered a meeting with counsel at which they could raise topics which they would like to be covered in the cross-examination. They did not take up this offer and did not attend the public hearing. They had no opportunity to question witnesses. The CRE published its report relating to the deceased (*A formal investigation by the Commission for Racial Equality into HM Prison Service of England and Wales. Part 1: The Murder of Zahid Mubarek*) in July 2003, very shortly before the hearing in the House. It made a finding of race discrimination against the Prison Service and identified 20 respects in which the administration of Feltham had failed.

**[14]** Very shortly after the death of the deceased, on 3 April 2000, solicitors for his family wrote to the responsible Minister of State, asking for an independent public inquiry into the death. On 7 and 12 April the minister replied that it was too early to make a decision about a public inquiry pending the police investigation and the Butt Inquiry. At a meeting on 2 November 2000 the minister did not agree to establish a public inquiry. On 31 July 2001 he was asked to reconsider this decision, but he replied that he saw no reason to reverse his earlier decision not to hold such an inquiry.

**[15]** The appellant, an uncle of the deceased, sought judicial review of (a) the decision of the CRE not to allow the family to participate in the proceedings in any meaningful manner or to hold any significant part of its investigation in public, (b) the decision of the coroner not to resume the inquest and (c) the decision of the Home Secretary not to hold an inquiry in public. Hooper J, before whom these applications came, adjourned the applications against the CRE and the coroner but granted permission to pursue the claim against the Home Secretary. This claim he upheld, ruling that the refusal to hold a public inquiry was a breach of art 2 of the convention. He declared ([2001] EWHC Admin 719, [2001] All ER (D) 69 (Oct) at [92]):

> '... an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by art 2 of the European Convention on Human Rights.'

The Home Secretary appealed against this decision. In a judgment of the court (Lord Woolf CJ, Laws and Dyson LJJ ([2002] EWCA Civ 390, [2002] 4 All ER 396, [2003] QB 581)) the appeal was allowed and the judge's order set aside. The appellant challenges the ruling of the Court of Appeal and seeks to restore the judge's order.

DOMESTIC LAW

[16] For many centuries the law of England has required a coroner to investigate the death of one who dies in prison. *Sewell's Law of Coroner* (1843) p 32, referring to the Statute de Officio Coronatoris 1276, put it thus:

> 'It is observable that this statute being wholly directory, and in affirmance of the common law, the Coroner is not thereby restrained from any branch of his power, nor excused from any part of his duty, not mentioned in it, which was incident to his office before; and therefore, though the statute mentions only inquiries of the deaths of persons slain, drowned, or suddenly dead, yet the Coroner ought also to inquire of the death of those who die in prison; to the end that the public may be satisfied whether such persons came to their end by the common cause of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined'.

This duty was recognised by Sir Matthew Hale in *History of the Pleas of the Crown* (1736) vol 2, p 57 and *Blackstone's Commentaries on the Laws of England, Vol 4, Of Public Wrongs* (1769) p 274. It found expression in s 11 of the Gaols etc (England) Act 1823, s 48 of the Prisons Act 1865, s 56 of the General Prisons (Ireland) Act 1877, s 53 of the Prisons (Scotland) Act 1877, s 3 of the Coroners Act 1887, s 13(2)(b) of the Coroners (Amendment) Act 1926 and s 8 of the Administration of Justice (Emergency Provisions) (Northern Ireland) Act 1939. These statutes are not to identical effect. But in all of them deaths in prison are singled out as cases calling for inquiry. All of them require the inquiry to be conducted by an independent judicial officer (in England, Wales, Ireland and Northern Ireland, a coroner, in Scotland, a sheriff or sheriff substitute). Most of them expressly require the inquiry to be before a jury, and some (the Acts of 1823 and 1865 and the Irish Act of 1877) provide that no inmate or officer of the prison where the death occurred shall be a juror. In some it is provided that, if practicable, 'sufficient time shall be allowed before the holding of the inquest to allow the attendance of the nearest relative of the deceased' (see s 56 of the Irish Act of 1877) or that 'sufficient time shall intervene between the day of the death and the day of the holding the inquiry, to allow the attendance of the next of kin of the deceased' (see s 53 of the Scottish Act of 1877).

[17] Section 8(1)(c) of the Coroners Act 1988, applicable in England and Wales, requires a coroner to hold an inquest on being informed that a person has died in prison. Such an inquest must, by s 8(3)(a), be conducted with a jury. By s 8(6), neither a prisoner in the prison where the deceased died nor any person engaged in any sort of trade or dealing with the prison may serve as a juror at the inquest. The inquest must be held in public (see the Coroners Rules 1984, SI 1984/552, r 17). The family may attend and be legally represented (see the 1984 rules, r 20). They or their representative may question witnesses at the hearing. The coroner is however ordinarily required by s 16(1)(a)(i) of the 1988 Act to adjourn the inquest on being informed that a person has been charged with the murder or manslaughter of the deceased and on the conclusion of the criminal

proceedings has a discretionary power (conferred by s 16(3)) to resume the adjourned inquest 'if in his opinion there is sufficient cause to do so'. Section 17A(1)(a) provides for the adjournment of an inquest if the coroner is informed by the Lord Chancellor that a public inquiry conducted or chaired by a judge is being or is to be held into the events surrounding the death.

THE CONVENTION

**[18]** By art 1 of the convention member states bound themselves to secure to everyone within their respective jurisdictions the rights and freedoms defined in s 1 of the convention. The first of those rights, expressed in art 2(1), is the right to life:

> 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

The provisions of art 2(2), relating to the use of necessary force in defence against unlawful violence, to effect an arrest or prevent an escape from lawful detention or to quell a riot or insurrection, have no bearing on this appeal. Article 2(1) has been repeatedly described as 'one of the most fundamental provisions in the Convention' (see *McCann v UK* (1996) 21 EHRR 97 at 160 (para 147); *Salman v Turkey* (2002) 34 EHRR 425 at 481 (para 97); *Jordan v UK* (2001) 11 BHRC 1 at 29 (para 102)). The European Court of Human Rights has made plain that its approach to the interpretation of art 2 must be guided by the fact that the object and purpose of the convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied so as to make its safeguards practical and effective (see *McCann v UK* (1996) 21 EHRR 97 at 160 (para 146); *Salman v Turkey* (2002) 34 EHRR 425 at 481 (para 97); *Jordan v UK* (2001) 11 BHRC 1 at 29 (para 102)).

**[19]** The primary purposes of art 2 were well described by the European Court in *Osman v UK* (1998) 5 BHRC 293 at 321 (para 115) when it said:

> 'The court notes that the first sentence of art 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction ... It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the court that art 2 of the convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'

But the scope of art 2(1) goes beyond the primary purposes thus defined, as the European Commission of Human Rights explained in its opinion in *McCann v UK* (1996) 21 EHRR 97 at 140 (para 193):

> 'Having regard therefore to the necessity of ensuring the effective protection of the rights guaranteed under the Convention, which takes on added importance in the context of the right to life, the Commission finds that the obligation imposed on the State that everyone's right to life shall be

a "protected by law" may include a procedural aspect. This includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny. The nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission's view, depend on the circumstances of the particular case. There may be cases where the facts b surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally, there may be other cases, where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the Convention.'

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**[20]** Most of the recent European cases to which reference was made in argument before the House concerned killings deliberately carried out, or allegedly carried out, by agents of the state. Naturally, therefore, such deliberate killings by state agents were the primary, although not the exclusive, subject of the d European Court's attention. The cases clearly establish a number of important propositions.

(1) It is established by *McCann v UK*, *Yasa v Turkey* (1999) 28 EHRR 408 at 447–448 (para 98), *Salman v Turkey* (2002) 34 EHRR 425 at 483 (para 104) and *Jordan v UK* (2001) 11 BHRC at 39 (para 105) that (as it was put in *McCann v UK* (1996) 21 EHRR 97 at 163 (para 161))—

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'The obligation to protect the right to life under [art 2(1)], read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been f killed as a result of the use of force by, *inter alios*, agents of the State.'

(2) Where agents of the state have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely, if not wholly, within the knowledge of the state, and it is essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to g the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight (see the opinion of the Commission at 139–140 (para 192)).

(3) As it was put in *Salman v Turkey* (2002) 34 EHRR 425 at 482 (para 99):

h 'Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused [footnote omitted]. The obligation on the authorities j to account for the treatment of an individual in custody is particularly stringent where that individual dies.'

Where the facts are largely or wholly within the knowledge of the state authorities there is an onus on the state to provide a satisfactory and convincing explanation of how the death or injury occurred (at 482 (para 100); *Jordan v UK* (2001) 11 BHRC 1 at 30 (para 103)).

(4) The obligation to ensure that there is some form of effective official investigation when individuals have been killed as a result of the use of force is not confined to cases where it is apparent that the killing was caused by an agent of the state (see *Salman v Turkey* (2002) 34 EHRR 425 at 483 (para 105)).

(5) The essential purpose of the investigation was defined by the European Court in *Jordan v UK* (2001) 11 BHRC 1 at 30 (para 105):

> '... to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures ...'

(6) The investigation must be effective in the sense that (at 31 (para 107))—

> 'it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible ... This is not an obligation of result, but of means.'

(7) For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary (at 30 (para 106))—

> 'for the persons responsible for and carrying out the investigation to be independent from those implicated in the events ... This means not only a lack of hierarchical or institutional connection but also a practical independence ...'

(8) While public scrutiny of police investigations cannot be regarded as an automatic requirement under art 2 (at 34 (para 121)), there must (at 31 (para 109))—

> 'be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.'

(9) 'In all cases', as the European Court stipulated, 'the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'.

(10) The European Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure (at 39 (para 143)). But it is 'indispensable' (at 39 (para 144)) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force.

**[21]** As pointed out above, the propositions I have sought to summarise were, in the main, laid down in cases involving deliberate killing or alleged killing by agents of the state. *Edwards v UK* (2002) 12 BHRC 190 is of central importance in

this appeal because it was not such a case. Factually it bore strong similarities to the present case. Christopher Edwards, who had shown marked signs of mental illness, was remanded in custody and placed in a prison cell with another man, Richard Linford, who was suffering from acute mental illness. During their first night in the shared cell Richard Linford kicked and stamped Christopher Edwards to death. There were factual differences between that case and this. The period for which the two men shared a cell was much shorter. Richard Linford's plea of guilty to manslaughter on grounds of diminished responsibility was accepted by the prosecution, and a hospital order was made, so there was no contested trial. There was no acceptance of responsibility by the Prison Service. There was in that case a long and thorough inquiry conducted by independent Queen's Counsel. But the case is important because, although addressing a case in which there had been no killing or alleged killing by state agents and the responsibility of the state (if any) could only rest on its negligent failure to protect the life of Christopher Edwards, a prisoner in its custody, the European Court applied essentially the same principles as in the cases already considered. In my respectful opinion, the European Court was fully justified in doing so, for while any deliberate killing by state agents is bound to arouse very grave disquiet, such an event is likely to be rare and the state's main task is to establish the facts and prosecute the culprits; a systemic failure to protect the lives of persons detained may well call for even more anxious consideration and raise even more intractable problems.

**[22]** In its judgment in *Edwards v UK* (2002) 12 BHRC 190 at 206 (para 54) the European Court repeated the passage in *Osman v UK* (1998) 5 BHRC 293 at 321 (para 115) quoted at [19], above, and it found a breach of the obligation there defined ((2002) 12 BHRC 190 at 208 (para 64)). It then turned to consider the procedural obligation to carry out effective investigations. Having summarised the parties' competing submissions the European Court made its assessment (at 210–211) which it is necessary to quote:

> '69. The obligation to protect the right to life under art 2 of the convention, read in conjunction with the state's general duty under art 1 of the convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force ... The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures ...
>
> 70. For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events ... This means not only a lack of hierarchical or institutional connection but also a practical independence ...

71. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible ... This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard ...

72. A requirement of promptness and reasonable expedition is implicit in this context ... While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts ...

73. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests ...'

**[23]** No light is shed on the present problem by two cases decided since *Edwards v UK*. *Menson v UK* [2003] ECHR 47916/99 concerned a racist attack on a victim who was set on fire and killed in the street by assailants who were not agents of the state and who were duly prosecuted, convicted and sentenced. No blame attached to state authorities for the killing and no breach of the state's investigative duty was found. While certain familiar principles were rehearsed, the complaint was held to be manifestly ill-founded. *Finucane v UK* [2003] All ER (D) 25 (Jul) was a much more difficult and complex case, but it laid down no principles which had not been laid down before.

THE JUDGE'S DECISION

**[24]** In approaching the present case Hooper J ([2001] All ER (D) 69 (Oct)) had the benefit of a recent judgment of Jackson J in *R (on the application of Wright) v Secretary of State for the Home Dept* [2001] EWHC Admin 520, (2001) 62 BMLR 16. That case concerned a serving prisoner who suffered a severe asthmatic attack in his cell and died. An inquest was held at which the family of the deceased were present, but unrepresented for want of legal aid. There was no inquiry into the quality of the medical treatment the deceased had received in prison. It later emerged that the responsible medical officer had been suspended from duty and had previously been found guilty of serious professional misconduct. In a civil action against the Home Secretary liability was admitted, thus precluding forensic investigation of the case. The family sought judicial review on the grounds, among others, of a failure to protect the life of the deceased and a failure of the procedural obligation arising under art 2 of the convention to investigate the circumstances of the death.

**[25]** In a succinct and accurate judgment Jackson J reviewed (at [41]) the domestic and Strasbourg case law, deriving from *Jordan v UK* the requirement that an investigation, to satisfy art 2, must have certain features:

> '(1) the investigation must be independent; (2) the investigation must be effective; (3) the investigation must be reasonably prompt; (4) there must be a sufficient element of public scrutiny; (5) the next of kin must be involved to an appropriate extent.'

From the recent case law Jackson J derived five propositions of which the fourth was (at [43]):

> 'Where the victim has died and it is arguable that there has been a breach of art 2, the investigation should have the general features identified by the court in *Jordan v UK* ((2001) 11 BHRC 1 at paras 106–109).'

The judge concluded on the facts that there had not been an effective official investigation into the death of the deceased and held that there should be an independent investigation, to be held in public, at which the family should be represented.

**[26]** Hooper J examined the facts of the present case, so far as they are known, in some detail, reviewed the relevant case law, adopted Jackson J's summary of the features identified in *Jordan v UK* as necessary if an investigation were to comply with art 2 and accepted the fourth proposition put forward by Jackson J and quoted above. He concluded that the inquiries and investigations which had been conducted did not, singly or cumulatively, satisfy the investigative duty of the United Kingdom under art 2. He said ([2001] All ER (D) 69 (Oct) at [91]):

> 'Zahid Mubarek was murdered in Feltham by a racist cellmate with "an alarming and violent criminal record, both in and out of custody". It is accepted that Zahid Mubarek was put in the same cell as his killer because of "systemic failures". Established procedures were not followed and there is an appalling history at Feltham of failure to comply with earlier recommendations. It seems likely (and it is certainly arguable) that there were serious human failings both at the wing level and at higher levels which have not been publicly identified. On the facts of this case the obligation to hold an effective and thorough investigation can, in my judgment, only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses. Against the background of the material which I have set out at some length, the family and the public are entitled to such an investigation.'

He accordingly made the declaration quoted at [15], above. Neither Jackson J nor Hooper J had the benefit of the European Court's judgment in *Edwards v UK*.

THE COURT OF APPEAL DECISION

**[27]** The Court of Appeal outlined its general approach to the investigative duty arising under art 2 ([2002] 4 All ER 396 at [32], [2003] QB 581 at [32]):

> 'Against this framework of obligations created by art 2, it is useful—and here is our third preliminary—to make some general observations about the nature of the procedural duty to investigate. Plainly there is *no* duty on the face of the convention to investigate a death. It is clear that such a duty has

been constructed or developed by the court at Strasbourg out of a perception that, without it, the substantive rights conferred by art 2 would or might in some cases be rendered nugatory or ineffective. Thus the duty to investigate is adjectival to the duty to protect the right to life, and to the prohibition of the taking of life. It follows that by its nature it cannot be a duty defined by reference to fixed rules. It only has life case by case; contingent upon what is required in any individual instance for the substantive right's protection. Across the spectrum of possible art 2 violations, there are classes of case which can readily be distinguished. One class is that of allegations of deliberate killing—murder—by servants of the state. A second is that of allegations of killing by gross negligence—manslaughter—by servants of the state. A third is that of plain negligence by servants of the state, leading to a death or allowing it to happen. In the context of any of these classes, there exists the lamentable possibility that the state has concealed or is concealing its responsibility for the death. That possibility gives rise to the paradigm case of the duty to investigate. The duty is in every instance fashioned to support and make good the substantive art 2 rights. We shall see, as we go through the movements of the argument, that this approach sits with the Strasbourg jurisprudence, whose character has always been essentially pragmatic.'

After addressing other matters not now relevant, the court considered the scope of the duty to investigate and said (at [45]):

'In the terms in which it was articulated by Mr Crow [for the Home Secretary] at the hearing, the focus of this part of the case appeared to be relatively narrow. Building on Jackson J's judgment in *Wright*'s case (2001) 62 BMLR 16 at [41], which we need not set out, Hooper J ([2001] All ER (D) 69 at [81]–[86]) held that for an investigation to satisfy the procedural requirements of art 2 a number of conditions must be met, including these two: (a) there must be a sufficient element of public scrutiny, and (b) the next of kin must be involved to the appropriate extent. Mr Crow submitted that that is a wrong approach. There are not discrete and cumulative requirements of publicity and family participation. Depending on the particular facts, participation by the next of kin may itself satisfy applicable standards of openness without any additional requirement of public hearings. Now, while these two elements are plainly of great potential importance, it seems to us that this part of the case raises a deeper, or at any rate a more general question. How far may the nature and quality of any investigation embarked upon in satisfaction of the art 2 adjectival duty vary according to the context and subject matter of the case? Are such requirements as publicity and family participation, and other virtuous procedures, *constant*? It was broadly the claimant's position that they are: the duty is essentially a uniform one, whether the death is due to unlawful violence by state servants, or to recklessness or to negligence. In so submitting Mr O'Connor built especially on *Jordan v UK* (2002) 11 BHRC 1, and now also on *Edwards v UK*.'

The court then considered the relevant cases, citing passages from the decisions in *Jordan v UK*, *Wright*'s case and *Edwards v UK* and expressed clear conclusions:

'[60] In our view *Edwards v UK* case represents no fresh departure in the Strasbourg jurisprudence, which in this area, as it is generally, is essentially

pragmatic. The *Jordan* requirements are by no means set in stone. Particular considerations—the absent witnesses, the relative exclusion of the family—coloured the court's decision in *Edwards v UK*, just as they might colour the decision of a common law court.

[61] In light of the arguments on *Edwards v UK* it is right to draw special attention to two matters in particular. The first is that the procedural duty to investigate does not appear on the convention's face: it is no more nor less than an adjectival duty, imposed as a corollary of the substantive right guaranteed by art 2. Secondly, the task of our courts is to develop a domestic jurisprudence of fundamental rights, drawing on the Strasbourg cases of which by s 2 of the 1998 Act we are enjoined to take account, but by which we are not bound. In this present context, these two features march together. The reason is that the nature and scope of an adjectival duty, which by definition is not expressly provided for in the convention, must especially be fashioned by the judgment of the domestic courts as to what in their jurisdiction is sensibly required to support and vindicate the substantive convention rights.

[62] Accordingly, this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts. Just as, in our view, on question (2) Mr Crow originally adopted too rigid an approach to the European Court of Human Rights' jurisprudence in submitting that the duty to investigate was only triggered in cases of the use of unlawful force by state agents, so also on question (3) Mr O'Connor makes the same error in submitting that there are fixed requirements of publicity and family participation, uniformly applicable to every investigation. What is required will vary with the circumstances. A credible accusation of murder or manslaughter by state agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the state had laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including *Edwards v UK* are perfectly consistent with this. And it is an approach which embraces what we will say in *Middleton*'s appeal about the coroner's jurisdiction and inquest verdicts of neglect.

[63] In all these circumstances we agree with Mr Crow that publicity and family participation are not necessarily discrete compulsory requirements which must be distinctly and separately fulfilled in every case where the procedural duty to investigate is engaged. Further, and somewhat more broadly, we consider that Jackson J's fourth proposition in his judgment in *R (on the application of Wright) v Secretary of State for the Home Dept* (2001) 62 BMLR 16 at [43] cannot be accepted at face value. For convenience we set it out again: "Where the victim has died and it is arguable that there has been a breach of art 2, the investigation should have the general features identified by the court in *Jordan v UK* ((2002) 11 BHRC 1 at paras 106–109)." This might seem to suggest something of a universal formula for all investigations undertaken in fulfilment of art 2, and to that extent we disagree with it. In

fairness the judge had just indicated, in proposition (3), that "there is no universal set of rules for the form which an effective official investigation must take", and in our judgment that is entirely correct.'

The Court of Appeal accepted the submission, made on behalf of the Home Secretary, that the judge should have held, on the facts of the case, that the procedural obligation of the United Kingdom had been discharged.

**[28]** In argument before the House Mr O'Connor QC, for the appellant, sought to restore the order of the judge for very much the reasons the judge had given and contended that the Court of Appeal, in departing from the judge's reasoning, had erred. He accepted that it was for member states to decide how the investigative duty arising under art 2 should be discharged and accepted that some cases would call for more intense scrutiny than others. But he argued that *Jordan v UK* and *Edwards v UK* specified an irreducible, minimum standard of review, however achieved, and whether by a single means of investigation or several. That irreducible minimum could be met only by an appropriate level of publicity and an appropriate level of participation by the next of kin. In this case there had been neither. The appellant's legal argument was broadly supported by the Northern Ireland Human Rights Commission, which was granted leave to intervene.

**[29]** Mr Crow, for the Secretary of State, supported the reasoning and the decision of the Court of Appeal. The Strasbourg jurisprudence had laid down principles but not rules which could never be departed from. A member state's duty to investigate was shaped by the facts and circumstances of the particular case. There was no single model of investigation which must be applied in all cases. It was for the state to decide what form of investigation would be appropriate in a given case. Public scrutiny and family participation were not separate requirements. Here, the Prison Service had accepted responsibility for the death. A civil action could be begun with an assured prospect of success. The criminal culpability of Stewart and prison staff had been investigated by the police. There had been a contested criminal trial. There had been a detailed investigation by Mr Butt, leading to a full report, severe criticism of the régime at Feltham and many recommendations. There had been a full report by the CRE, which had been published. The family of the deceased had not taken advantage of the opportunities offered to them to participate. There was no reason to think that any further inquiry would uncover any facts not already known or lead to any improvements not already in train.

CONCLUSIONS

**[30]** A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under arts 1 and 2 of the convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v State of Orissa* [1993] 2 SCR 581 at 607: 'There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.' Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm (see *Reeves v Comr of Police of the Metropolis* [1999] 3 All ER 897, [2000] 1 AC 360). Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.

[31] The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred (see *Menson v UK* [2003] ECHR 47916/99). It can fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted at [16], above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

[32] Mr Crow was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must, as he submitted, be a measure of flexibility in selecting the means of conducting the investigation. But Mr O'Connor was right to insist that the European Court, particularly in *Jordan v UK*and *Edwards v UK*, has laid down minimum standards which must be met, whatever form the investigation takes. Hooper J loyally applied those standards. The Court of Appeal, in my respectful opinion, did not. It diluted them so as to sanction a process of inquiry inconsistent with domestic and convention standards.

[33] There was in this case no inquest. The coroner's decision not to resume the inquest is not the subject of review, and may well have been justified for the reasons she has given. But it is very unfortunate that there was no inquest, since a properly conducted inquest can discharge the state's investigative obligation, as established by *McCann v UK*. It would overcome the problems exposed by this appeal if effect were given to the recommendations made in *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003* (June 2003) (Cm 5831), and no doubt that report is receiving urgent official attention.

[34] The police investigations into the criminal culpability of Stewart and the Prison Service were, very properly, conducted in private and without participation by the family. The advice report on which counsel based his advice not to prosecute the Prison Service or any of its members was produced in evidence during these proceedings but not before. It is written in an objective and independent spirit, but it raises many unanswered questions and cannot discharge the state's investigative duty.

[35] The trial of Stewart for murder was directed solely to establishing his mental responsibility for the killing which he had admittedly carried out. It involved little exploration, such as would occur in some murder trials, of wider issues concerning the death.

[36] There is no reason to doubt that Mr Butt set about his task in a conscientious and professional way. He explored the facts, exposed weaknesses in the Feltham regime and recommended changes which, it is understood, have been and are being implemented. It is however plain that as a serving official in the Prison Service he did not enjoy institutional or hierarchical independence. His investigation was conducted in private. His report was not published. The

family were not able to play any effective part in his investigation and would not have been able to do so even if they had accepted the limited offer made to them.

**[37]** The CRE report, which was not before the judge or the Court of Appeal, brings additional facts to light (although some of these, such as the discovery of a handmade wooden dagger under Stewart's pillow after the murder, raise many further questions). The report has been published. But the CRE inquiry, conducted under the Race Relations Act 1976, was necessarily confined to race-related issues and this case raises other issues also (as did *Edwards v UK*, where there was no race issue). Save for a single day devoted to policy issues, the inquiry was conducted in private. The family were not able to play any effective part in it and would not have been able to do so even if they had taken advantage of the limited opportunity they were offered. Whether assessed singly or together, the investigations conducted in this case are much less satisfactory than the long and thorough investigation conducted by independent Queen's Counsel in *Edwards v UK*, but even that was held inadequate to satisfy art 2(1) because it was held in private, with no opportunity for the family to attend save when giving evidence themselves and without the power to obtain all relevant evidence.

**[38]** I consider that the judge was right to reach the conclusion and make the order which he did. For the foregoing reasons, and those given by my noble and learned friends Lord Slynn of Hadley, Lord Steyn and Lord Hope of Craighead, I would accordingly allow the appeal and restore his order.

**[39]** I cannot accept the submission of Mr Crow that any further inquiry is unlikely to unearth new and significant facts. The papers before the House raise questions which any legal representative of the family would properly wish to pursue and the discovery of further new facts of significance may well be probable. But it is true that there are factual areas—for example, the killing itself, and the cause of death—which have already been fully explored and of which little or no further examination is required. Many of the factual findings made by Mr Butt and the CRE can no doubt be taken as read. It will be very important for the investigator to take a firm grip on the inquiry so as to concentrate the evidence and focus the cross-examination on issues justifying further exploration. Reliance should be placed on written statements and submissions so far as may properly be done at a hearing required to be held in public. All those professionally engaged, for any party, should bear in mind their professional duty to ensure that the investigation of this tragic and unnecessary death is conducted in a focused and disciplined way.

**LORD SLYNN OF HADLEY.**

**[40]** My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. He has set out in detail the facts and the relevant passages of the opinions of the European Commission of Human Rights and the judgments of the European Court of Human Rights in Strasbourg. These judgments clearly recognise that art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) is to be read as including not only a duty not to take life, but in some circumstances to take steps to prevent life being taken and as part of that duty an obligation to investigate the circumstances surrounding the death.

[41] The duty to investigate is partly one owed to the next of kin of the deceased as representing the deceased: it is partly to others who may in similar circumstances be vulnerable and whose lives may need to be protected. The significance of this duty to those detained in prison, not least where prisons are crowded and prisoners often dangerous, is obvious. It does not seem to me to be possible to say that there is a clear dividing line between those cases where an agent of the state kills and those cases where an agent of the state or the system is such that a killing may take place. The result of 'an incident waiting to happen' may just as much as an actual killing require detailed and profound investigation, though in some cases the procedure to be adopted may be justifiably different.

[42] The European Court and the Commission have clearly recognised (*McCann v UK* (1996) 21 EHRR 97 at 140 (para 193)) that—

> 'The nature and degree of scrutiny which satisfies [the] minimum threshold [of a public and independent scrutiny] must, in the Commission's view, depend on the circumstances of the particular case.'

'What form of investigation will achieve those purposes may vary in different circumstances' (see *Jordan v UK* (2001) 11 BHRC 1 at 30 (para 105). See also *Edwards v UK* (2002) 12 BHRC 190 at 210 (para 69)).

[43] Such investigation must however be by an independent person, and be 'effective' to satisfy the relevant duty (see *Edwards v UK* at 210–211 (paras 69–73)). There must be a sufficient element of public scrutiny and the next of kin or the family must be involved to an appropriate extent (see *Jordan v UK* (2001) 11 BHRC 1 at 31 (para 109)).

[44] Even though there may be room for flexibility in the procedures adopted by different member states, the European Court has insisted on a minimum threshold. In my opinion, even if the United Kingdom courts are only to take account of the Strasbourg court decisions and are not strictly bound by them (see s 2 of the 1998 Act), where the court has laid down principles and, as here, a minimum threshold requirement, United Kingdom courts should follow what the Strasbourg court has said. If they do not do so without good reason the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed.

[45] It seems to me that in the present case the judge ([2001] EWHC Admin 719, [2001] All ER (D) 69 (Oct)) did, but the Court of Appeal ([2002] EWCA Civ 390, [2002] 4 All ER 396, [2003] QB 581) did not, give sufficient effect to the judgments of the Strasbourg court.

[46] There were here a number of inquiries of different kinds which went some way to fulfil the minimum threshold duty but for the reasons given by Lord Bingham of Cornhill there were features of each stage of the inquiry which did not achieve the minimum threshold.

[47] I do not for my part criticise those who held the inquiries, such as Mr Butt, since they were carrying out specific tasks no doubt in the way they were intended to do. Nor is it necessarily wrong to show that, if not in one compendious inquiry, through different inquiries, the overall test has been satisfied. But here in my opinion, even looking at all the inquiries, the test overall has not been satisfied either as to the degree of public scrutiny or as to the participation of the next of kin and the relatives.

[48] One is left with a profound sense of unease that this investigation did not adequately investigate the matter in an acceptable way. For example, although

it may be accepted that on 8 February 2000 Stewart was placed in cell 38 with the deceased because there was no other place available, there is no real explanation as to why it was necessary to keep him there from 8 February to 21 March 2000 in view of all the circumstances.

**[49]** I would therefore allow the appeal for the reasons given by Lord Bingham of Cornhill as briefly supplemented in this speech.

**LORD STEYN.**

**[50]** My Lords, in my view the Court of Appeal approached the Strasbourg jurisprudence, and in particular the decision in *Edwards v UK* (2002) 12 BHRC 190, in the wrong way. The Court of Appeal observed ([2002] EWCA Civ 390 at [62], [2002] 4 All ER 396 at [62], [2003] QB 581):

> '... this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts ... What is required will vary with the circumstances. A credible accusation of murder or manslaughter by state agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the state has laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including *Edwards v UK* are perfectly consistent with this.'

The Court of Appeal plainly thought that in the case of acts by state agents causing death in custody there is a more exacting and rigorous duty to investigate than in cases of negligent omissions leading to death in custody. That cases in the former category may be a greater affront to the public conscience than cases in the latter category can readily be accepted. But the investigation of cases of negligence resulting in the death of prisoners may often be more complex and may require more elaborate investigation. Systemic failures also affect more prisoners. The European Court of Human Rights has interpreted art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) as imposing minimum standards which must be met in all cases. And in the decision in *Edwards v UK* the European Court applied the same minimum standards to a case of omissions as it had previously applied in *Jordan v UK* (2001) 11 BHRC 1 to acts by state agents. The distinction drawn by the Court of Appeal infected its analysis of the Strasbourg decisions. Relying on this distinction the Court of Appeal in effect departed from the requirements as explained in *Edwards v UK*. Given the crucial public importance of investigating all deaths in custody properly, I consider that full effect must be given to the Strasbourg jurisprudence. I prefer the decisions of Jackson J in *R (on the application of Wright) v Secretary of State for the Home Dept* [2001] EWHC Admin 520, (2001) 62 BMLR 16 and Hooper J ([2001] EWHC Admin 719, [2001] All ER (D) 69 (Oct)) in the instant case to the judgment of the Court of Appeal.

[51] If the Court of Appeal had applied the Strasbourg jurisprudence correctly, I consider it unlikely that the Court of Appeal would have concluded (contrary to the view of the trial judge) that the procedural obligation to investigate was in any event discharged in this case. The Butt Inquiry does not have the quality of institutional or hierarchical independence. The CRE inquiry, the report of which (*A formal investigation by the Commission for Racial Equality into HM Prison Service of England and Wales. Part 1: The Murder of Zahid Mubarek* (2003)) has now become available, was largely conducted in private and the focus was on race-related issues. That leaves only the police investigation and the criminal trial. On that basis it is obvious, and conceded, that there was no adequate inquiry.

[52] The Court of Appeal posed the question: what would be the benefit of a further inquiry? The investigations conducted so far do not, either singly or together, meet the minimum standards required to satisfy art 2. But, in any event, it is vital that procedure and the merits should be kept strictly apart otherwise the merits may be judged unfairly (see Wade and Forsyth *Administrative Law* (8th edn, 2000) pp 501–503). In *John v Rees* [1969] 2 All ER 274 at 309, [1970] Ch 345 at 402, Megarry J observed about the argument that 'it will make no difference':

> 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

This observation is apposite to the assumption that, although there has not been an adequate inquiry, it may be refused because nothing useful is likely to turn up. That judgment cannot fairly be made until there has been an inquiry.

[53] For the reasons given by Lord Bingham of Cornhill, as well as my brief reasons, I would also allow the appeal and restore the order of Hooper J.

**LORD HOPE OF CRAIGHEAD.**

[54] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I agree with them, and for the reasons which they have given I too would allow the appeal and restore the order of Hooper J. I should like however to add a few words by way of a supplement to Lord Bingham's review of the domestic law on the investigation of deaths in prison.

[55] There is no coroner in Scotland. The system in Scotland for the investigation of sudden deaths depends instead on the sheriff and the public prosecutor. To a large extent the question whether an investigation is needed is left to the discretion of the procurator fiscal of the area where the death occurred. In the performance of that function he is answerable to the Lord Advocate. But in some cases the holding of a public inquiry is mandatory, and it has for a long time been recognised in Scotland that it is in the public interest for a public inquiry to be held into the death of a person who at the time of the death was being held in legal custody. Section 53 of the Prisons (Scotland) Act 1877, to which Lord Bingham of Cornhill has referred, was replaced by s 25 of the Prisons (Scotland) Act 1952. In the event of the death of a prisoner it was the duty of the governor under that section to give immediate notice to the procurator fiscal in whose area the prison was situated and, where practicable, to the prisoner's

nearest relative. It was the duty of the procurator fiscal then to hold a public inquiry into the death before the sheriff and, where practicable, to allow sufficient time for the prisoner's next of kin to attend the inquiry.

**[56]** The legislation on this subject was consolidated and amended by the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. It comprised the Fatal Accidents Inquiry (Scotland) Act 1895, which provided for a compulsory inquiry into any death resulting from an accident sustained during industrial employment or occupation, the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1906, which gave the Lord Advocate discretion to order an inquiry into any sudden or suspicious death where he considered this to be expedient in the public interest, and s 25 of the 1952 Act. The system which was introduced by the 1895 Act was for an investigation to be held in public by a sheriff and jury, whose verdict set forth when and where the accident and the death took place and the cause of death (see s 4(7)). Section 2 of the 1906 Act required the jury's verdict to deal also with the cause of the accident, the person if any who was responsible for it, the precautions if any by which it might have been avoided and any other facts disclosed by the evidence which in the opinion of the jury were relevant to the inquiry. In practice, the verdict of the jury was usually dictated by the sheriff and in many cases the jury simply returned a formal verdict.

**[57]** As the law in Scotland now stands, following the amendments introduced by the 1976 Act, juries are no longer used for these inquiries. The system instead is for the procurator fiscal to investigate the circumstances of the death, and for the inquiry (known as a fatal accident inquiry or, more colloquially, an FAI) to be held in public by the sheriff. It is held at a time and place which has been intimated to the nearest known relative and of which public notice has also been given. It is the duty of the procurator fiscal to adduce evidence at the inquiry as to the circumstances, and it is the sheriff's task to make a determination setting out the circumstances so far as they have been established to his satisfaction by the evidence.

**[58]** The statute provides that the circumstances which are to be set out in the sheriff's determination must include (a) where and when the death and any accident resulting in the death took place, (b) the cause or causes of the death and any such accident, (c) the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided, (d) the defects, if any, in any system of working which contributed to the death or any accident resulting in the death and (e) any other facts which are relevant to the circumstances of the death. The holding of an FAI in the case of the death of a person who, at the time of his death, was in legal custody is mandatory (see 1976 Act, s 1(1)(a)(ii)). For the purposes of that provision he is in legal custody if he is detained in a prison, remand centre or young offenders institution, in a police station, police cell or other similar place or is being taken to or from any such place (see s 1(4)). The procurator has power to compel witnesses to give him information which is within his knowledge regarding any matter relevant to the investigation (see s 2(2)). The inquiry is open to the public (see s 4(3)). The rules of evidence, the procedure and the powers of the sheriff to deal with contempt of court and to enforce the attendance of witnesses at the inquiry are as nearly as possible the same as those which he has when he is sitting in an ordinary civil cause (see s 4(7)).

**[59]** An example of the flexibility of this system and its ability to deal with complex and difficult issues is provided by the fatal accident inquiry which was held in 1996 by Sheriff Sir Stephen Young in the sheriff court at Paisley into the crash of the RAF Chinook helicopter into the Mull of Kintyre on 2 June 1994 which killed all those who were on board the aircraft. The evidence for the Crown was presented by counsel. The families of the two pilots were separately represented, as were the families of all the deceased other than the pilots and the manufacturer of the helicopter. The inquiry involved the hearing of evidence and submissions over some 16 days, and the sheriff's determination which extended to 123 pages contained a detailed and careful analysis of the evidence (see *Report from the Select Committee on Chinook ZD 576* (HL Paper 25(iii) (2001–2002)) paras 19–21).

**[60]** I mention these details because there is no doubt that the procedure which would have had to have been followed under the 1976 Act if at the time of his death the deceased had been in legal custody in Scotland satisfies the procedural obligation to carry out an effective investigation which is imposed on the United Kingdom by art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). In *Edwards v UK* (2002) 12 BHRC 190 at 212–213 (para 83) the European Court of Human Rights said:

> 'The government argued that the publication of the report secured the requisite degree of public scrutiny. The court has indicated that publicity of proceedings or the results may satisfy the requirements of art 2, provided that in the circumstances of the case the degree of publicity secures the accountability in practice as well as theory of the state agents implicated in events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible.'

The circumstances which have resulted in the death of a prisoner while he is in custody are capable of being given the widest exposure by this system, which is conducted in the public interest by the public prosecutor. The fact that it involves a public hearing in which the prisoner's next of kin are entitled to participate provides an ample opportunity for the circumstances to be subjected to public scrutiny, and the sheriff's determination is an effective vehicle for ensuring that those whom the evidence shows are responsible for deaths occurring under their responsibility are made accountable.

**[61]** The Court of Appeal ([2002] EWCA Civ 390 at [61], [2002] 4 All ER 396 at [61], [2003] QB 581) described the procedural duty to investigate as no more or less than an adjectival duty. They observed that, as this duty was by definition not expressly provided for in the convention, it must be fashioned by the judgment of the domestic courts as to what in their jurisdiction is sensibly required to support and vindicate the substantive convention rights. They added (at [62]) that this issue could not be satisfactorily resolved by a process of reasoning which stuck like glue to the Strasbourg texts. What was needed was a flexible approach, responsive to the dictates of the facts case by case. I would not quarrel with these propositions. But I disagree with the conclusion which the court drew from them. This was that an allegation of negligence leading to death

in custody bears a different quality from a case where it is said that the prisoner's death resulted from the laying of lethal hands on him by the state.

**[62]** In my opinion failures by the Prison Service which lead to a prisoner's death at the hands of another prisoner are no less demanding of investigation, and of 'the widest exposure possible', than lethal acts which state agents have deliberately perpetrated. Indeed there is a strong case for saying that an even more rigorous investigation is needed if those who are responsible for such failures are to be identified and made accountable and the right to life is to be protected by subjecting the system itself to effective public scrutiny. Some form of effective investigation is, of course, needed when prisoners have been killed as a result of force by, inter alios, agents of the state (see *McCann v UK* (1996) 21 EHRR 97 at 163 (para 161)). But, as the words 'inter alios' indicate, the obligation to safeguard the lives of prisoners is not confined to those who are at risk from the acts of state agents. It extends with equal force to all those whose lives are at risk from the criminal acts of another individual (see *Osman v UK* (1998) 5 BHRC 293 at 321 (para 115)).

**[63]** The court has made it clear that a fatal accident inquiry according to the Scottish model is not the only option. The choice of method is essentially a matter for decision by each contracting state within its own domestic legal order. The court also accepts that the form of investigation which will achieve the purposes of the convention may vary in different circumstances (see *Edwards v UK* (2002) 12 BHRC 190 at 210 (para 69)). Mr O'Connor QC said that in principle a coroner's inquest would satisfy the requirements of art 2. But he submitted that there must at best be a considerable doubt as to whether it would do so in this case in the light of its unusual facts and circumstances.

**[64]** For reasons which she has explained in her affidavit the, Coroner for West London, in the exercise of her discretion, declined to reconvene the inquest into Zahid Mubarek's death which was formally opened and then adjourned to await the prosecution of Robert Stewart for murder. As she pointed out, a number of practical problems are posed by the workload and availability of the coroner which would have made it very difficult for her to commit the time and resources that would have been needed to conduct the investigation that is required in this case. She accepts that the conditions of the office would be no answer if it was plain that the holding of an inquest was the appropriate remedy. But there are other, more fundamental, reasons for not taking this course. These are to be found in the legal restraints which are provided by the Coroners Act 1988 and the Coroners Rules 1984, SI 1984/552. The coroner is restricted to a simple short verdict. She cannot make recommendations, and many of the issues which still need to be investigated in public as indicated in Hooper J's judgment ([2001] EWHC Admin 719, [2001] All ER (D) 69 (Oct)) would be beyond the scope of her inquest.

**[65]** I agree that the various investigatory processes into Mr Mubarek's killing which have been conducted so far fall well short of providing the effective public scrutiny that is needed in a case of this kind. Substantial changes in the existing system for the investigation of deaths by coroners have been proposed (see *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003* (June 2003) (Cm 5831)). But they will require legislation, and it must be assumed that these changes will not be applied retrospectively to deaths which have already occurred. The only alternative in these circumstances is for the Secretary of State to order the holding of an

independent public inquiry into the circumstances which led to Mr Mubarek's death. Subject to the observations at the end of Lord Bingham of Cornhill's speech with which I am in full agreement and to the fact that the person who conducts it will lack the powers which could only be given by statute, I suggest that the conduct and scope of this inquiry should be as close to the Scottish model as possible.

**LORD HUTTON.**

[66] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the reasons which he gives I too would allow this appeal.

*Appeal allowed.*

Dilys Tausz Barrister.

# Football Association Premier League Ltd and others v Panini UK Ltd

[2003] EWCA Civ 995

COURT OF APPEAL, CIVIL DIVISION

BROOKE, MUMMERY AND CHADWICK LJJ

30 APRIL, 11 JULY 2003

*Copyright – Infringement – Defence – Incidental inclusion of copyright material – Test to be applied – Copyright, Designs and Patents Act 1988, s 31(1).*

The defendant company distributed for sale within the United Kingdom collectible stickers depicting well-known football players. Each sticker had, on its face, a photographic image of one player and his name. For the most part the players were shown wearing their club 'strip' which bore the individual club badge and the premier league emblem. The first claimant (FAPL) licensed the production of an official sticker and album collection. By that licence FAPL, acting on behalf of the premier league clubs, granted the licensee exclusive rights to use and reproduce official team crests and logos in the production of stickers and albums. Proceedings were brought by FAPL, the licensee and certain of the premier league clubs seeking an injunction restraining the infringement of their copyright by the inclusion of copies on stickers and in the album published and distributed by the defendant. The defendant argued that it could rely on the provisions in s 31[a] of the Copyright, Designs and Patents Act 1988 which provided that copyright in a work was not infringed by its incidental inclusion in an artistic work. The judge ruled that the word 'incidental' in s 31 bore the meaning as something casual or of secondary importance. He granted the injunction having held that the inclusion of the badge was self-evidently not incidental as it was an integral part of the artistic work which comprised the photograph of the professional footballer in his kit. That was what the defendant intended and without the badge, it would not have the complete picture which it wished to produce. The defendant appealed.

**Held** – The relevant question for the purposes of testing 'incidentality' in the context of s 31(1) of the 1988 Act was why had the work in relation to which copyright was said to be infringed (work 'A') been included in the photograph (work 'B'), which was said to constitute the infringement. That question had to be answered by making an objective assessment of the circumstances in which work 'B' was created. It did not depend on any inquiry into the subjective intent of the individual employee who created the image or of the photographer who took the picture from which the image was derived. However, in addressing that question there was no reason why consideration could not be given to the commercial reason why work 'A' had been included in work 'B' as well as to any aesthetic reason. It was obvious, when subsections (1) and (3) of s 31 were read together, that 'incidental', in the context of subsection (1), was not confined to unintentional, or non-deliberate, inclusion. If it were, subsection (3), which dealt with the particular case of incidental, or background, music in a film or broadcast,

a Section 31 is set out, so far as material, at [18], below

for example, would be unnecessary. But in the instant case since the objective, when creating the image of the player as it appeared on the sticker or in the album was to produce something which would be attractive to a collector, namely an image of a player appearing in his authentic club strip, and the authenticity of that image depended on the inclusion in that image of the individual club badge and FAPL emblem in which copyright subsisted, it was impossible to say that the inclusion was incidental. Accordingly the appeal would be dismissed (see [24], [26]–[28], [39], [40], below).

**Notes**

For incidental inclusion of copyright material, see 9(2) *Halsbury's Laws* (4th edn reissue) para 340.

For the Copyright, Designs and Patents Act 1988, s 31(1), see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 446.

**Case referred to in judgments**

*IPC Magazines Ltd v MGN Ltd* [1998] FSR 431.

**Appeal**

The defendant, Panini UK Ltd, appealed with permission of Arden LJ granted on 31 December 2002, from the order of Peter Smith J given on 13 December 2002 ([2002] EWHC 2779 (Ch), [2003] FSR 698) whereby he granted an interim injunction to the claimants, the Football Association Premier League Ltd, Topps Europe Ltd and 14 of the 20 clubs that were members of the premier league, restraining the defendant from infringing the claimants' copyright by the inclusion of copies on stickers and in the album published and distributed by the defendant bearing any copy of the whole or any part of the premier league logo or of any club badges of 11 of the clubs listed in the schedule to the order. The facts are set out in the judgment of Chadwick LJ.

*Mark Platts-Mills QC* and *James St Ville* (instructed by *McCormicks*, Leeds) for the defendant.

*Martin Howe QC* and *Iona Berkeley* (instructed by *Dechert*) for the claimants.

*Cur adv vult*

11 July 2003. The following judgments were delivered.

**CHADWICK LJ.**

[1] This is an appeal from an order made on 13 December 2002 by Peter Smith J ([2002] EWHC 2779 (Ch), [2003] FSR 698) in copyright proceedings brought against the appellant, Panini UK Ltd. The principal issue raised in the proceedings was whether the appellant could rely on the provisions in s 31 of the Copyright, Designs and Patents Act 1988 which relate to the incidental inclusion in an artistic work of other work in which copyright subsists. The judge held, on facts as to which there was no material dispute, that the appellant could not do so. The question on this appeal is whether the judge was right to reach that conclusion.

THE UNDERLYING FACTS

[2] Panini UK Ltd distributes for sale within the United Kingdom collectible stickers depicting well-known football players. The stickers are sold in

conjunction with an album, also distributed for sale by Panini. The album provides a designated space for each sticker in the collection; so that, when the album is full, the collection is complete. Stickers are sold in packets of five. They are packaged in such a way that the stickers within each packet are not identifiable at the point of sale; thereby introducing an element of chance which—it must be assumed—adds interest to the task of completing the collection. It is clear from the evidence before the judge that there is a well-established and active market for product of this nature, particularly amongst the young. The evidence shows, also, that (as might be expected) a secondary market in 'swaps' has developed amongst collectors.

[3] The sticker collections for which Panini is distributor include 'Panini's Football 2003 Sticker Collection', which was launched at the end of last year. The album comprises 64 pages, within covers. Ten of those pages are devoted to 'World Superstars', one to 'Hotshots' and there is one introductory page. The remaining 52 pages are for the 20 clubs which play in the Barclaycard Premiership competition (the 'premier league'). The majority of those clubs are given a double page spread; but there are six (Arsenal, Chelsea, Leeds, Liverpool, Manchester United and Newcastle United) which are given two double pages. Each double page spread provides spaces for the insertion of 12 stickers; and includes, in addition, photographic images of two of the club's players.

[4] The sticker collection (excluding World Superstars and Hotshots) comprises 312 club players. If World Superstars (78) and Hotshots (6) are included, the number rises to 396. Each sticker is about 2·5 inches by 2 inches in size and has, on its face, a photographic image of one player and his name. On the reverse there is a distinctive number, corresponding to a numbered space in the album. For the most part the players are shown in action and in club 'strip'. There are exceptions to that general rule—for example, two of the Aston Villa players are shown in their international strip—but those exceptions are few. It is plain that the stickers have been produced on the basis that one of the attractions to the collector will be that players are pictured in the appropriate club strip. That is emphasised by the fact that the club strip—or 'colours'—is described in each of the relevant sections of the album; and that the photographs in the album itself are also of players in their club strip.

[5] Each of the premier league clubs has a distinctive strip—shirt, shorts and socks—in its own colours. Typically the shirts include the name or logo of the manufacturer and the team sponsor—for example, the Chelsea strip includes the well-known 'Umbro' logo and the words 'Fly Emirates'. Those are likely to be trade marks, but no complaint is made about that. The probability is that the owners of the marks are content that their name or logo should be displayed in the context in which it appears in the Panini sticker collection and album. Nor is any complaint made, in this action, as to infringement of copyright or design right in the strip as a whole. The complaint is based on two particular features of the strip: the individual club badge and the premier league emblem.

[6] Each premier league club has its own distinctive badge or crest. These range from the club's initials in the form of a logo (Chelsea, Fulham), to quasi-heraldic devices (Liverpool, Manchester City, Newcastle United). Typically the badge appears on the shirt over the left breast; but there are cases (Bolton Wanderers, Charlton Athletic, Liverpool) where it appears in the centre of the chest. A photographic image of a player in action in club strip will almost invariably include the club badge. It must do so unless the badge is obscured (say, by the player's hand or arm) or the angle of the photograph is such that it does

not show a clear front view of the player. The overwhelming majority of the stickers in the Panini 2003 collection do show the club badge; as do almost all the photographs in the album itself.

[7] The premier league emblem is an heraldic lion passant with one foot or paw on a football. A number of the premier league clubs include that emblem on their strip, in addition to the individual club badge. It can be seen plainly on both sleeves of the Everton, Liverpool, Manchester City and West Ham shirts. It appears also on the captains' armbands. In those cases where the premier league emblem is a part of the club strip, it is as likely as not that a photographic image of a player in action in club strip will include that emblem as well as the individual club badge. Whether it does turns on the angle from which the photograph has been taken.

[8] The premier league was instituted in 1992. The league is organised by the Football Association Premier League Ltd (FAPL) under agreements with the participating clubs. In each season since the inception of the league FAPL has licensed the production of an official sticker and album collection. In a witness statement made by the company secretary of FAPL it is explained that the licensed product is aimed mainly at children, and that it is important that the players appear in authentic club strip:

> 'The purpose is to set up a situation where children buy and swap stickers with a view to completing the album ... I believe that the product is rendered very much more attractive to its customers because the players are depicted in the authentic strip of the Clubs they represent, including the Club crest and other images marked on the strip.'

As I have said, that may fairly be taken to be Panini's view also.

[9] In each year since 1994 the licensee has been Topps Europe Ltd (formerly known as Merlin Publishing International Ltd). When these proceedings were commenced the current licence was that granted on 28 February 2001, following a competitive tendering process in which Panini (amongst others) had taken part. By that licence FAPL, acting on behalf of the premier league clubs, granted Topps exclusive rights 'to use and reproduce official team crests and logos' in the production of stickers and albums. That was a licence for which Topps paid a substantial sum. Panini's participation in the tender process indicates that it took the view that an exclusive licence was of value. Nevertheless, Panini now claims to be entitled to distribute stickers and an album without having obtained a licence from FAPL or the premier league clubs. Panini is careful to describe its album as 'Unofficial': that word appears on the cover of the album. By contrast, the Topps product is described as 'The Official F.A. Premier League Sticker Collection 2003'.

THESE PROCEEDINGS

[10] These proceedings were brought by FAPL, Topps and 14 of the 20 clubs that are members of the premier league. FAPL and the clubs claimed to be owners of the copyright in the FAPL emblem and the individual club badges; Topps claimed as exclusive licensee. The relief sought in the proceedings was an injunction restraining infringement of the claimants' copyright by the inclusion of copies on stickers and in the album published and distributed by Panini, an inquiry as to damages or an account of profits and interest, and delivery up of the infringing material. Application was made, under CPR Pt 23, for an interim injunction until after the trial of the action.

**[11]** That application came before Peter Smith J on 12 December 2002. He took the view that the issue raised by the application could be resolved, under the provisions of CPR Pt 24, without the need for a trial; and he approached the application on that basis. It is clear from the judgment which he gave on the following day ([2003] FSR 698) that he did not see this as a case for an interim remedy—to be granted or withheld by reference to considerations of uncompensatable disadvantage or, as it is commonly put, on the balance of convenience. He thought that this was a case in which the appropriate remedy was a final order.

**[12]** Nevertheless, the order which he made on 13 December 2002 was an interim order restraining the appellant 'until after judgment in this action' from offering for sale, selling, distributing or issuing to the public any album, sticker collection or stickers bearing any copy of the whole or any part of the premier league logo or of any club badges of the 11 clubs listed in the schedule to that order. He accepted that, in respect of the other three clubs, ownership of copyright in the individual club badges had not been made out on the material before him and raised issues which should go to trial. The judge gave liberty to the parties to apply for substitution of a final order. He refused permission to appeal to this court.

**[13]** Permission to appeal was granted by this court (Arden LJ) on 31 December 2002. When granting that permission she ordered a stay on the substitution of a final order for the interim order which the judge had made. So it is that the appeal now before this court is, in form, an appeal against an interim order. None the less, the appeal has been argued on the basis that the court can and should decide the issue whether s 31 of the 1988 Act provides a defence to the claims to infringement of copyright in this case as if the order under appeal were a final order.

**[14]** The probability must be that, with the passage of time, there is now little or no market for the Panini 2003 collection. But the issue raised by this appeal (if not determined by the court) is likely to arise, again, in relation to a 2004 collection in the autumn of this year. The point is not academic; and this court can properly be asked to decide it.

THE 1988 ACT

**[15]** The 1988 Act was enacted for the purpose, amongst others, of amending and restating the law of copyright, formerly set out in the Copyright Act 1956. Section 1(1) provides that copyright is a property right, subsisting in accordance with the provisions in Pt I of the Act in work within the following descriptions (so far as material): (a) original literary, dramatic, musical or artistic works, and (b) sound recordings, films, broadcasts or cable programmes. In that context 'literary work' means any work, other than a dramatic or musical work, which is written, spoken or sung (and, in particular, includes a table or compilation) (see s 3(1)(a)) and 'artistic work' includes 'a graphic work, photograph ... irrespective of artistic quality' (see s 4(1)(a)). The author of a literary or artistic work is the first owner of any copyright in it—save that, where the work is made by an employee in the course of his employment, his employer is the first owner, subject to any agreement to the contrary (see s 11). Ownership of copyright may, of course, be transferred to another by the first owner, or by any succeeding owner.

**[16]** Part I, Ch II of the 1988 Act sets out the rights of the copyright owner. In particular, s 16(1) gives to the owner of the copyright in a work the exclusive right

to copy the work and to issue copies of the work to the public. Those acts (and others, not material in the present case) are 'acts restricted by the copyright'. Subject to the following provisions in Pt I, Ch II copyright in a work is infringed by a person who, without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright. 'Copying', in relation to a literary or artistic work, means reproducing the work in any material form (see s 17(2)). An article is 'an infringing copy' if its making constituted an infringement of the copyright in the work in question (see s 27(2)) or if it has been or is proposed to be imported into the United Kingdom and its making in the United Kingdom would have constituted an infringement of the copyright in the work in question (see s 27(3)).

**[17]** Sections 22–26 are directed to what is described as 'secondary infringement'. Copyright in a work is infringed by a person who, without the licence of the copyright owner, imports into the United Kingdom (otherwise than for his private and domestic use) an article which is, and which he knows or has reason to believe is, an infringing copy of the work (see s 22). Copyright is also infringed by a person who, without the licence of the copyright owner, (a) possesses in the course of business, (b) sells or offers for sale, or (c) in the course of a business distributes, an article which is, and which he knows or has reason to believe is, an infringing copy of the work (see s 23).

**[18]** Part I, Ch III of the 1988 Act contains provisions which 'specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright' (see s 28(1)). Those provisions include s 31, which (so far as material) is in these terms:

> '(1) Copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme.
>
> (2) Nor is the copyright infringed by the issue to the public of copies ... of anything whose making was, by virtue of subsection (1), not an infringement of the copyright.
>
> (3) A musical work ... or so much of a sound recording, broadcast or cable programme as includes a musical work ... shall not be regarded as incidentally included in another work if it is deliberately included.'

**[19]** The provisions now found in Pt I, Ch III of the 1988 Act were previously contained (in part and in a different form) in s 9 of the 1956 Act. Section 9(5) of the 1956 Act was in these terms:

> '... the copyright in an artistic work is not infringed by the inclusion of the work in a cinematograph film or in a television broadcast, if its inclusion therein is only by way of background or is otherwise only incidental to the principal matters represented in the film or broadcast.'

There are obvious differences between s 9(5) of the 1956 Act and s 31 of the 1988 Act. First, s 9(5) provided a defence only in cases where the copyright which would otherwise have been infringed was 'copyright in an artistic work'. Section 31 is not so restricted. Second, s 9(5) provided a defence only where what would otherwise have been an infringement of copyright was the inclusion of the work in 'a cinematograph film or in a television broadcast'. Section 31 extends to the inclusion in 'an artistic work, sound recording, film, broadcast or cable programme'. But the two sections have in common the requirement that the inclusion of work A (the work in which copyright subsists and, but for the section,

would be infringed) in work B (the work which, but for the section, would give rise to the infringement) must be 'incidental'. a

**[20]** That common feature is relied upon both in support of a submission that the concept of 'incidental inclusion', for the purposes of s 31 of the 1988 Act, is essentially the same as the concept described by the rather fuller expression in s 9(5) of the 1956 Act—'by way of background or ... otherwise only incidental to the principal matters represented in ...'; and in support of a submission that the b change in language should lead to the conclusion that, in the context of s 31 of the 1988 Act, the concept of 'incidental inclusion' is wider than merely 'by way of background'. For my part, I doubt whether the difference in language would lead to a difference of result in a case (which is not this case) in which the two sections would, successively, have been in point. In that context it would be pertinent to have in mind s 172(2) of the 1988 Act: c

> 'A provision of this Part [I] which corresponds to a provision of the previous law shall not be construed as departing from the previous law merely because of a change of expression.'

Be that as it may, I am not persuaded that the result in the present appeal turns d upon an analysis of the linguistic differences between s 9(5) of the earlier Act and s 31 of the 1988 Act.

THE JUDGMENT BELOW

**[21]** The judge directed himself, correctly, that the issue before him turned on whether the inclusion of the FAPL emblem and the individual club badges in the e photographic images on the Panini stickers and in the Panini album was 'incidental' within the meaning to be given to that word in s 31(1) of the 1988 Act. He reminded himself of the definition of the word in the *Shorter Oxford English Dictionary* as: '(2) occurring as something casual or of secondary importance; not directly relevant to; following as a subordinate circumstance.' He referred to a f passage in *Copinger and Skone James on Copyright* (14th edn, 1999) vol 1, p 508 (para 9–26) which, in effect, adopts the dictionary definition: '"Incidental" is not further defined, but presumably it bares its ordinary meaning of "something casual or of secondary importance".' The passage appears in the same terms in the 15th edition, 2003. The judge referred, also, to the other leading textbook—Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* g (3rd edn, 2000) vol 1, p 758 (para 20.17):

> 'The Act contains no definition of "incidental" but this is an ordinary English word with connotations of what is casual, not essential, subordinate, merely background, etc. It is submitted that while what is "incidental" is a question of fact and degree, an important consideration would appear to be whether h the taking [*semble*, what has been copied] enables the work to compete with or act as a substitute for the work that is included.'

The judge noted that Mr Richard McCombe QC, sitting as a deputy judge of the High Court in *IPC Magazines Ltd v MGN Ltd* [1998] FSR 431, had adopted (at 441) the approach in *Laddie, Prescott and Vitoria*, treating 'incidental' as meaning j 'casual, inessential, subordinate or merely background'.

**[22]** The judge said ([2003] FSR 698 at [19]):

> 'It seems to me that the word "incidental" in the section [s 31] (and nobody has suggested to the contrary) has the meaning attributed to it in the *Oxford English Dictionary*, which was adopted by McCombe J. I have to decide

whether or not the inclusion of the badge is incidental. To my mind, it is self-evidently not incidental. It is an integral part of the artistic work comprised of the photograph of the professional footballer in his present-day kit. That is the intent behind the reproduction of the photograph. That is what the defendant intended, and without the badge they would not have the complete picture which they wish to produce, which is, as I say, the footballer as he plays now.'

Accordingly, he held that the reproduction of the FAPL emblem and the individual club badges on the stickers and in the album distributed by Panini infringed copyright in those works.

THE APPELLANT'S CONTENTIONS ON THIS APPEAL

**[23]** The appellant submits that the judge was wrong in the conclusion which he reached for one or more of the following reasons: (i) that there is no true dichotomy between 'integral' and 'incidental'—the emblem and badges could be 'an integral part of the artistic work', as the judge held, and yet be incidental to that work; (ii) that the test whether the inclusion of the emblems and badges is incidental must be answered in the light of the circumstances at the time when the 'photograph in issue is made'—the judge should not have taken into account the characteristics of a notional customer of Panini's product; (iii) that the 'incidentality' of the inclusion must be judged (or judged primarily) with regard to artistic considerations—again, the judge should not have taken into account the characteristics of a notional customer; and (iv) that the legislative policy to which s 31 of the 1988 Act was intended to give effect is revealed by a consideration of the debates in Parliament—the judge should have informed himself of that policy by reference to the extracts from Hansard put before him.

**[24]** The fourth of those grounds can be disposed of shortly. The Copyright, Designs and Patents Bill was introduced in the House of Lords. We were taken to the debate on the second reading in that House. It is plain that the decision to leave the word 'incidental' undefined was intentional. As the minister responsible for the progress of the Bill (Lord Beaverbrook) put it (491 HL Official Report (5th series) col 123 (8 December 1987)): 'What is incidental will depend on all the circumstances of each case and it would be impossible to provide a satisfactory definition for all circumstances.' It is plain, also, that 'incidental' was not intended to mean 'unintentional'. That is clear, not only from the debate in the House of Lords but also from the explanation which was given to the House of Commons (HC Official Report SC E (Copyright, Designs and Patents Bill), 19 May 1988, col 218) in respect of the provision which has become s 31(3) of the 1988 Act. But it is unnecessary to have resort to proceedings in Parliament in order to reach that conclusion. It is obvious, when sub-ss (1) and (3) of s 31 of the Act are read together, that 'incidental', in the context of sub-s (1), is not confined to unintentional, or non-deliberate, inclusion. If it were, sub-s (3)—which deals with the particular case of incidental, or background, music in (say) a film or broadcast—would be unnecessary. There is, in my view, nothing else in the material which we were shown which throws light upon what Parliament meant by the word 'incidental'; and, for my part, I doubt whether there was any proper basis upon which that material could have been put before the judge. Be that as it may, we may, perhaps, take some comfort from the evident intention of the promoter of the Bill that 'What is incidental will depend on all the circumstances of each case ...'; and his recognition that 'it would be impossible to provide a satisfactory definition for all circumstances'. The relevant question, as the judge

pointed out, is whether, in the circumstances of this case, the inclusion on the stickers and in the album of the FAPL emblem and the individual club badges is or is not incidental. a

[25] Nor, as it seems to me, is there any substance in the submission that the test whether the inclusion of the emblems and badges is incidental must be answered in the light of the circumstances at the time when the 'photograph in issue is made'—if, by that, it is intended to refer to the time at which the image is b impressed upon the photographic film or plate, or (in the case of a digital camera) encoded. The work, or 'thing', of which copies are issued to the public, for the purposes of s 31(2) of the 1988 Act, is the image of the player as it appears on the sticker or in the album. On the basis that the image of the player as it appears on the sticker is an 'artistic work' for the purposes of the 1988 Act (which is not, I think, contentious)—and assuming, but without deciding, that the fact that the c album, taken as a whole, is a compilation (and so a literary work) does not lead to the conclusion that the image of the player as it appears in the album is not, itself, also an artistic work—the effect of s 31(2) is that the issue of copies of that image to the public—by the distribution of stickers and the album—does not infringe copyright in the FAPL emblem or the individual club badges if, but only d if, the making of the image, as it appears on the sticker or in the album, was not itself an infringement of that copyright. The relevant question is whether the making of the image as it appears on the sticker or in the album was, by virtue of s 31(1) of the Act, no infringement of the copyright in the FAPL emblem or the individual club badge. That question is not to be answered by considering what e might have been in the mind of the photographer at the time when he took the photograph from which the image of the player, as it appears on the sticker or in the album, has been derived. It is to be answered by considering the circumstances in which the relevant artistic work—the image of the player as it appears on the sticker or in the album—was created.

[26] I would accept that, in principle, there is no necessary dichotomy f between 'integral' and 'incidental'. Where an artistic work in which copyright subsists appears in a photograph because it is part of the setting in which the photographer finds his subject it can properly be said to be an integral part of the photograph: if it is part of the setting in which the photographer finds his subject, it will, necessarily, appear in the photograph unless edited out. In that sense the g work in relation to which copyright is said to be infringed (work A) is integral to the photograph (work B) which is said to constitute the infringement. But that does not lead to the conclusion that the inclusion of work A in work B is, or is not, 'incidental' for the purposes of s 31(1) of the Act. That, as it seems to me, turns on the question: why—having regard to the circumstances in which work B was created—has work A been included in work B? And, in addressing that question, h I can see no reason why, if the circumstances so require, consideration should not be given as well to the commercial reason why work A has been included in work B as to any aesthetic reason. In particular, in a case (such as the present) where work B is created, primarily if not exclusively, to serve a commercial purpose, it seems to me wholly artificial to test the 'incidentality' of the inclusion j of work A by reference (or primarily by reference) to artistic considerations—if, by that is meant aesthetic considerations. It is, I think, pertinent to keep in mind that, for the purposes of the 1988 Act, 'artistic works' are not confined to works of artistic quality (see s 4(1)(a) of the Act).

[27] If, as I would hold, the relevant question, for the purposes of testing 'incidentality' in the context of s 31(1) of the 1988 Act, is why has work A been

included in work B, the answer, in the present case, is indeed (as the judge thought) self-evident. The objective, when creating the image of the player as it appears on the sticker or in the album, was to produce something which would be attractive to a collector. That conclusion does not depend on any inquiry into the subjective intent of the individual employee who created the image—or (as I have said) of the photographer who took the photograph from which that image was derived. It depends on an objective assessment of the circumstances in which the image was created. It is not, I think, a matter about which there can be any doubt. Nor can there be any doubt that it was of importance, in order to achieve that objective, that the player should appear in the appropriate club strip; and that the club strip be authentic. An image of a player in strip which an informed collector would recognise as not authentic would not achieve that objective. But if the strip were to be authentic it must include the club badge and (where appropriate) the FAPL emblem. That, as it seems to me, is what the judge had in mind when he described the inclusion of the badge as 'an integral part of the artistic work comprised of the photograph of the professional footballer in his present-day kit'. The authenticity of the image of the player as it appears on the sticker or in the album (work B) depends on the inclusion in work B of the individual badge and the FAPL emblem (work A) in which copyright subsists. It is impossible to say that the inclusion of the individual badge and the FAPL emblem is 'incidental'. The inclusion of the individual badge and the FAPL emblem is essential to the object for which the image of the player as it appears on the sticker or in the album was created.

CONCLUSION

**[28]** I would dismiss this appeal.

**MUMMERY LJ.**

**[29]** I agree with Chadwick LJ that this appeal should be dismissed. I wish to add a few comments on a point of construction, which arose in the course of the hearing.

**[30]** I questioned whether the incidental inclusion defence could apply to the albums, in respect of which an injunction is claimed. The unlicensed and unofficial 'Panini's Football 2003 Sticker Collection' albums are probably not within the categories of work specified in s 31(1) (ie artistic works, sound recordings, films, broadcasts and cable programmes), in which the incidental inclusion of copyright material is a permitted act. The albums appear to be 'compilations' within s 3(1)(a) of the Copyright, Designs and Patents Act 1988. A compilation is a 'literary work'. The s 31(1) defence does not apply in any circumstances to the inclusion of copyright material in literary works.

**[31]** Each football sticker album consists of 64 pages. Each page contains photographic action shots of players in their club strips, as well as the blank spaces to which the appropriate individual photographic stickers are to be affixed by the collectors. Each page of the albums also contains a considerable amount of printed tabulated information about the different football clubs and individual players.

**[32]** The claim for infringement of artistic copyright in the club crests and the premier league badge appearing on the playing kit worn by the football players is made in respect of the sticker albums themselves, not just in respect of each individual sticker. My provisional view is that, although each individual sticker is a distinct artistic work, being a photograph within s 4(1)(a), the albums, into

which the stickers are to be affixed, are compilations of material and are properly treated as literary works for the purposes of the 1988 Act. If that is correct, inclusion of copies of the club crests and the premier league badge in the albums falls outside the acts permitted by s 31(1). I should explain that works are properly treated as compilations and therefore as literary works, even though the material compiled is largely artistic in character. Atlases, books of street maps, catalogues and art gallery and exhibition guides are obvious examples of artistic materials assembled in the material form of a compilation.

**[33]** In the court below and in the skeleton arguments submitted to this court the submissions on both sides assumed that all the relevant works in which the club crests and premier league badge have been reproduced are artistic works. The argument has focused on the question whether the inclusion of the copyright club crests and the badge in the stickers was incidental or not. If, however, the albums, which include many instances of infringing artistic material quite apart from the stickers, are literary works, the only defence to liability for infringement raised by Panini would not apply. Panini would be infringing the artistic copyright by committing acts of indirect infringement, with the requisite knowledge and without the appropriate consents ie by importing into the United Kingdom and supplying, or offering to supply, to distributors infringing copies for them to issue to the public, and by authorising the distributors to commit infringing acts. It should be noted that the claims against Panini are not for acts of direct infringement by (a) photographing the football players wearing their club strips or (b) reproducing and editing the action photographs on the stickers.

**[34]** My views on this point must remain provisional for two reasons: first, the court has not had the benefit of any detailed legal argument on the point from either side; and, secondly, it is possible to dispose of the appeal without deciding the point, as the defence under s 31(1) fails in any event. The inclusion of the infringing material in the stickers and the albums is not 'incidental' for the reasons given by Chadwick LJ.

**[35]** When invited by the court to make submissions on the 'literary work' point Mr Mark Platts-Mills QC, who appeared on behalf of the Football Association Premier League Ltd (FAPL), said that he was instructed not to run that point, adding that it was, in any event, a bad point. Without venturing into detail, which might violate his instructions, he indicated that the suggested construction was incorrect, because it would produce the startling result that a defence available under s 31(1) in respect of the making of the individual photographic stickers would cease to be available when they were affixed in the album.

**[36]** Mr Martin Howe QC, who appeared for Panini UK, simply said that the point had not been raised by the FAPL below or in this court. Naturally he agreed with Mr Platts-Mills's adverse reaction to it.

**[37]** The position is far from satisfactory. The only substantial point raised for decision in the proceedings is a question of law on the scope of s 31(1). In the absence of full argument to assist it, the court cannot confidently offer a full opinion on the scope of the section. For their own undisclosed reasons the parties wish to limit the scope of the court's decision.

**[38]** In my judgment, it is right to identify the point of construction, even though it must be left unresolved in this case, in order to bring it to the attention of the profession and of the courts, which may have to decide it on a future occasion. I would add that I am by no means satisfied that the response of Mr Platts-Mills to the literary work point is correct. In considering any defence

raised to an allegation of copyright infringement it is always necessary to identify the particular infringing act in respect of which the defence is raised and the circumstances in which the infringing act was committed. Even if s 31(1) were available in respect of the individual photographic stickers made in Italy, so that they were not infringing copies when imported into the United Kingdom for distribution here, it by no means follows that the defence would also be available in respect of the distribution of the albums, which contain on each page photographic action shots of the players wearing their club strips.

[39] As to the 'incidental inclusion' point I agree with Chadwick LJ's full judgment on it. The question whether the inclusion of copyright material in an artistic work is 'incidental' is not answered by rushing to dictionaries or by searching the Internet for substitute words and expressions; or by inquiring into the subjective intentions, motives, views or states of mind of the makers, distributors or collectors of the stickers and albums; or by the use of a non-statutory check list of possible indicators; or by recourse to s 9(5) of the Copyright Act 1956 or to Hansard reports of the parliamentary debates preceding the enactment of the 1988 legislation; or by working conscientiously through the range of hypothetical situations ingeniously devised by Mr Howe. 'Incidental' is an ordinary descriptive English word. Parliament chose not to give it any special meaning. There is no need for the courts to define it. The range of circumstances in which the word 'incidental' is commonly used to describe a state of affairs is sufficiently clear to enable the courts to apply it to the ascertainable objective context of the particular infringing act in question. For the reasons given by Chadwick LJ the circumstances of this case (in particular, the commercial context and purpose of the marketing of the stickers and the albums reproducing the club crests and the premier league badge and the relationship between those copyright works and the subject matter of the stickers and albums) justify the overall assessment of the judge that it was self-evident that the inclusion of them in the stickers and in the albums is not incidental. I see no reason to differ from his conclusion.

**BROOKE LJ.**

[40] I agree that this appeal should be dismissed for the reasons given by Chadwick LJ.

*Appeal dismissed.*

Dilys Tausz Barrister.

# SmithKline Beecham plc v Generics (UK) Ltd
# BASF AG v SmithKline Beecham plc

[2003] EWCA Civ 1109

COURT OF APPEAL, CIVIL DIVISION
ALDOUS, CHADWICK AND LATHAM LJJ
8, 24 JULY 2003

*Discovery – Collateral use of information obtained – Undertaking not to use disclosed documents for collateral or ulterior purpose – Different proceedings – Restriction or prohibition on use of disclosed documents – Litigant applying to use documents subject to restriction order in different proceedings – Whether documents 'disclosed' voluntarily – Approach to lifting of restriction order – CPR 31.22(2).*

SB was the proprietor of a United Kingdom patent. It commenced proceedings against G for infringement of the patent. G denied infringement and alleged that the patent was invalid. Around the same time, B commenced proceedings against SB to revoke the patent upon similar grounds to those raised by G in its attack on validity. The two sets of proceedings were not consolidated, but were heard at the same time. On the first day of the trial, SB settled its claim against G. SB thereafter sought permission to use certain documents (the documents), which had been disclosed by G in the proceedings which had been settled, in the proceedings brought by B. The documents were technical protocols originating from third parties which had been referred to in an expert's report. The judge admitted the documents on terms that they would be dealt with in private, by making an order over trial under CPR 31.22(2)[a], which gave the power to make an order restricting or prohibiting the use of a document which had been disclosed. In CPR Pt 31, 'disclosure' was defined as meaning that a party disclosed a document by stating that the document existed or had existed. Shortly after the judgment in the proceedings brought by B, G sought an order under CPR 31.22(2) that further use of the documents should be permanently prohibited. Meanwhile, SB had started proceedings against A, alleging infringement of the patent. A, like B, contended that the patent was invalid. Before the judge had given judgment on G's application, SB applied for an order permitting it to use the documents in the proceedings against A. However, before the hearing of that application the judge gave judgment on G's application, continuing the order made under CPR 31.22(2) indefinitely. The judge subsequently dismissed SB's application to use the documents in the proceedings against A. SB appealed against both orders. In the first appeal, it argued that as the documents had been produced voluntarily and had been referred to in the report of an expert witness instructed by G, they were not documents which had been 'disclosed', so that the court had not possessed the power to restrict their use under CPR 31.22(2) and they were available for use in all proceedings. In the second appeal, it sought to use the documents under conditions of confidence in the proceedings against A.

a CPR Pt 31, so far as material, is set out at [27], below

**Held** – (1) The definition of disclosure in CPR Pt 31 drew no distinction between documents obtained from third parties and other documents and placed no limitation on the way that the statement of their existence was made. A reference by a party to a document in a witness statement was therefore a statement that the document existed. It followed, in the first appeal, that the documents had been disclosed, and that the court had had the power to restrict their use under CPR 31.22(2). The judge had, moreover, been right to have at the forefront of his consideration the interests of both the public and the third parties from whom the documents originated, and the requirements to do justice, and thereafter to have concluded that it was not necessary that the documents should be disclosed. Accordingly, the first appeal would be dismissed (see [29], [30], [33], [45], [46], below); *Lilly Icos LLC v Pfizer Ltd (No 2)* [2002] 1 All ER 842 applied.

(2) When considering whether to lift an order made under CPR 31.22, it was important to have in mind the overriding principles of the CPR. The most important consideration was the interest of justice, which involved considering the interest of the party seeking to use the documents and that of the party protected by the order. Each case would depend upon its own facts, but a material consideration was whether the documents could have been obtained under CPR 31.17, which enabled the court to order disclosure from third parties if the documents were likely to support the applicant's case and disclosure was necessary in order to dispose fairly of the claim. In the second appeal there was a a real argument that the documents would be discoverable under CPR 31.17 and that refusal of use could reflect adversely on the administration of justice. The interests of the owners of the documents could be protected by an appropriate order. Accordingly, the second appeal would be allowed and the documents would be released from the CPR 31.22(2) order for use in the proceedings against A with an order on terms that they be dealt with in private (see [37], [40], [43]–[46], below).

**Notes**

For subsequent use of disclosed documents, see 37 *Halsbury's Laws* (4th edn reissue) para 565.

**Cases referred to in judgments**

*Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910, [2000] 1 WLR 2353, CA.

*Bonzel v Intervention Ltd (No 2)* [1991] RPC 231.

*Cobra Golf Inc v Rata, Taylor Made Golf Co Inc v Rata & Rata (a firm)* [1996] FSR 819.

*Crest Homes plc v Marks* [1987] 2 All ER 1074, [1987] AC 829, [1987] 3 WLR 293, HL.

*Derby & Co Ltd v Weldon* (1988) Times, 20 October.

*Eagle Star Insurance Co Ltd v Arab Bank plc* (unreported, 25 February 1991).

*Halcon International Inc v Shell Transport and Trading Co* [1979] RPC 97, CA.

*Home Office v Harman* [1982] 1 All ER 532, [1983] 1 AC 280, [1982] 2 WLR 338, HL.

*Lilly Icos LLC v Pfizer Ltd (No 2)* [2002] EWCA Civ 02, [2002] 1 All ER 842, [2002] 1 WLR 2253.

*Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878, [1991] 1 WLR 756.

*Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, HL.

*SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, CA.

*Sybron Corp v Barclays Bank plc* [1985] Ch 299, [1984] 3 WLR 1055.

**Appeals**

The appellant SmithKline Beecham plc (SB), appealed against the orders of Pumfrey J of 27 June 2003 and 30 June 2003, made upon applications in two sets of patent proceedings against the respondents Generics (UK) Ltd, and BASF AG respectively, whereby the judge (1) allowed an application by Generics Ltd for an order under CPR 31.22(2) that further use of certain documents should be permanently prohibited (the first appeal) and (2) dismissed the appellant's application to use those documents in proceedings against another party (the second appeal). The facts are set out in the judgment of Aldous LJ.

*Justin Turner* and *Geoffrey Pritchard* (instructed by *Simmons & Simmons*) for SB.
*Simon Thorley QC* and *Thomas Hinchliffe* (instructed by *SJ Berwin*) for Generics.
BASF AG was not represented.

*Cur adv vult*

24 July 2003. The following judgments were delivered.

**ALDOUS LJ.**

[1] There are before the court two appeals against orders of Pumfrey J which had the effect of preventing SmithKline Beecham plc (SB) from using certain documents in their case against Apotex which is currently before the judge. Before coming to the issues raised in the appeals it is necessary to set out the background.

[2] SB are the patentees of UK patent no 2247550 relating to a process for producing paroxetine hydrochloride anhydrate (PHA). That is a pharmaceutical sold in large quantities by SB.

[3] Back in 2001 SB started proceedings against Generics (UK) Ltd for infringement of the patent. Generics denied infringement and alleged that the patent was invalid. Around the same time BASF AG commenced proceedings to revoke the patent upon similar grounds to those raised by Generics in their attack upon validity.

[4] One of the main contentions of BASF and Generics was that the patent lacked novelty and was obvious having regard to the disclosure in the SB application no 85-26407 (407). Example 1 of 407 contained details of how to produce PHA and it was contended that that example made available to the public the invention claimed in claim 11 of the patent or made available a process of production which, if altered in an obvious way, would result in PHA. SB contended that if you carried out example 1 of 407, PHA was not obtained and that the alteration needed to produce PHA was not obvious.

[5] Example 1 of 407 set out a recipe for obtaining PHA. It included the instruction that the 'acetate salt was dissolved in isopropanol (2·4 litres) and treated with a mixture of hydrochloric acid (75 ml) and more isopropanol'. The main dispute between the parties revolved around how much 'more isopropanol' the skilled person would add if he sought to carry out example 1. BASF and Generics, for reasons that I need not go into, submitted that about 2 litres of isopropanol would be added. SB's case was that the amount would be well below 1 litre.

[6] In his judgment ([2002] EWHC 1373 (Ch), [2002] All ER (D) 205 (Jul)), the judge accepted the submission of SB and held that if the notional skilled person

carried out example 1 of 407 he would not obtain PHA and therefore example 1 of 407 did not make available to the public claim 11 of the patent. Thus claim 11 did not lack novelty. He also held that claim 11 was not obvious having regard to the disclosure in 407. This court upheld those decisions of the judge (see [2003] EWCA Civ 872, [2003] All ER (D) 327 (Jun)).

[7] The proceedings against Generics and by BASF were not consolidated, but they came on for hearing at the same time. On the first day of the trial, SB and Generics settled their differences and the case was adjourned to enable the papers to be rearranged. On the second day SB sought permission to use two sets of documents which had been disclosed by Generics in the BASF proceedings. I will refer to those documents as the Sumika and Darmstadt documents respectively. I will come later to the relevance of those documents and the decision of the judge to allow the documents to be used, but first must explain how they came to be produced by Generics.

[8] The Darmstadt documents had initially been referred to in certain emails that had been disclosed in Generics's list of documents. They were requested by SB's solicitors by letter dated 20 December 2001. Production was resisted because they were not in the possession of Generics. They were however obtained from an associated company of Generics and then produced on about 21 January 2002. They were produced under a cloak of confidence to those in the 'confidentiality club'. They were also referred to in the expert report of Professor Mullin who was to be called as a witness by Generics. He said:

> '96. Finally I have been asked to comment on certain experimental runs performed, I understand, in a laboratory in Darmstadt in Germany. I attach a translation of the experiment's notebooks as exhibit JWM 4.'

[9] He went on to make a general comment upon the disclosure in the documents and expressed an opinion on one point.

[10] The Sumika documents were also referred to in Professor Mullin's report. In para 65 of his witness statement he said that the exact manner in which an addressee might perform example 1 of 407 was not possible to predict. There were many minor variations in techniques that different skilled addressees, applying their ordinary general knowledge, might apply. It was his view that it was not feasible to say what the skilled addressee would have done, but only what he might have performed. In para 66 he recounted how he had been asked initially to suggest a reasonable starting point for putting example 1 of 407 into practice. His view was set out in an annex to his report. He said that it represented his opinion as to the likely way that the skilled addressee at the relevant date might have started seeking to produce PHA in accordance with example 1 of 407. He said his view represented but one logical starting point and it would not have surprised him if his protocol did not produce PHA in significant quantities or, possibly, at all. He said that the development of protocols of this type was part of the routine work of the skilled addressee, but it took time. He continued:

> 'I was therefore shown a draft protocol which I was told by SJ Berwin [Generic's solicitors] had already been worked up to the produce the anhydrate. This is in substance the protocol contained in GUK's notice of experiments (the GUK protocol). I was asked to consider the differences between it and my protocol. Because of the brief nature of example 1, it would have been very unlikely if I had chosen precisely the same protocol as

GUK. However for reasons which I set out below, I believe the GUK protocol represents the type of routine development from my protocol which the addressee might have devised to perform example 1 if initial experiments had resulted (wholly or partially) in the production of the hemihydrate.'

**[11]** Upon receipt of the witness statement of Professor Mullin, SB's solicitors wrote seeking under CPR 31.14 the documents referred to by Professor Mullin. They were provided in February 2002 and were in substance the Sumika documents. To make them complete certain emails were supplied as requested. Those documents were also provided by Generics under a cloak of confidence and were therefore only available to those in the 'confidentiality club'.

**[12]** The judge heard SB's application to be able to rely upon the documents in the BASF action. It was resisted. In his judgment he said that his decision depended upon a number of factors. First, whether they would have been obtainable on an application for discovery against a third party; second, the materiality of the documents; third the strength of the case of confidentiality and fourth, fairness on the party whose documents they were. He concluded that the interests of the owners of the documents could be preserved by ensuring the documents were kept confidential. As to materiality he said:

'To rebut the inference which superficially arises on such facts may require a large number of small bricks. I do not know—and it would not be right to speculate any further than that at this stage. I would therefore be unwilling to exclude a priori any use of these documents provided I was satisfied that the interests of the owners of those documents were adequately protected. I believe that I can adequately protect the interests of the owners of these documents in the way I have indicated and therefore I am going to give leave for them to be used.'

**[13]** He therefore admitted SB's documents on terms that they would be dealt with in private. He made an order over trial under CPR 31.22(2). They were subsequently used in cross-examination which took place in private. He referred to them in of his judgment handed down after trial. He said:

'[61] SB also relied on certain experiments which had been put in by Generics before the action between them and SB settled. These also, Mr Waugh QC said, had been carefully "worked up" so as not to represent a fair repetition. The clear evidence is that the experimenter responsible for working up these experiments had found that he had obtained the hemihydrate if concentrated hydrochloric acid was used. He appears to have started by using comparatively small quantities for "more isopropanol". There was also evidence of experiments conducted in Germany by associates of Generics which had the same result.'

**[14]** Shortly after the judgment in the BASF action, Generics sought on 17 July 2002 an order that further use of the Sumika and Darmstadt documents should be permanently prohibited by an order under CPR 31.22(2) and also that copies should be delivered up to Generics. That application came before the judge on 25 July 2002 when SB submitted that no such order should be made. Despite a letter to him reminding him of the need to give judgment, no judgment was delivered in 2002.

[15] Whilst the proceedings against BASF were proceeding, SB started proceedings against Apotex Ltd alleging infringement of the patent. Apotex denied infringement and alleged that the patent was invalid. Like BASF they contended that the patent lacked novelty and was obvious having regard to the disclosure in 407. SB say that when they saw the witness statements provided by Apotex on 23 May 2003 they realised the importance of the Sumika and Darmstadt documents to the issues in the Apotex proceedings. That prompted them to write again to the judge on 30 May 2003 explaining the position and that they considered that it might be necessary for them to make an application in the Apotex proceedings to allow them to admit the Sumika and Darmstadt documents. The judge was away when the letter was received and therefore SB decided it was necessary to make an application for an order that they should be allowed to use the documents in the Apotex proceedings. That application was adjourned to come on for hearing on Monday 30 June 2003. However on 27 June 2003 the judge delivered his judgment on the Generics application to permanently prevent use of those documents.

[16] In his judgment of 27 June 2003 the judge concluded that it was not necessary that the documents should be disclosed and in the circumstances he continued the order made under CPR 31.22(2) indefinitely. There followed a hearing on SB's application to be allowed to use the documents in the Apotex proceedings. Judgment was given on 30 June 2003 giving reasons as to why they should not be used. He then dismissed the application.

[17] Although both appeals are concerned with the ability of SB to use the documents, different considerations apply. In the first appeal SB contend that restrictions on use imposed by the judge under CPR 31.22(2) should not have been made. If they are right, the documents are available for use in proceedings in all countries. In the second appeal use is only sought under conditions of confidence for use in the Apotex proceedings.

THE FIRST APPEAL

[18] The judge in his judgment of 27 June referred to the provisions of CPR Pt 31 and then stated, 'I prefer to deal with the question of the use of these documents as an exercise of my discretion under CPR 31.22(2) on the principles enunciated by the Court of Appeal in *Lilly Icos LLC v Pfizer Ltd (No 2)* [2002] EWCA Civ 2 at [25], [2002] 1 All ER 842 at [25], [2002] 1 WLR 2253'.

[19] In the *Lilly Icos* case the patentee had disclosed to the defendants material in documents designated as confidential and in consequence it was by agreement between the parties kept confidential and only seen by those in the confidentiality club. The disclosed material included a two page schedule showing on its first page the sales figures for the patentee's product and on the second page the patentee's advertising expenditure since the product was launched. The documents were intended to be used to support the patentee's claim that the invention had been a commercial success. After the trial, all of which had been in public, the patentee made an unopposed application for an order under CPR 31.22(2) to maintain confidentiality in respect of the second page of the schedule.

[20] The judge concluded that since the issue of the validity of the patent was of general public importance, the party seeking to withhold material from disclosure had to make out a case that there was a necessity for such an order. He concluded that no such case had been made out and he refused to make the order. The patentee appealed. This court concluded that the test applied by the judge

was not appropriate. At the outset this court made these general observations (see [2002] 1 All ER 842):

'[7] Although the principle of the orality of the English trial remains untouched, practice has moved greatly in the direction of the presentation of evidence and arguments in writing; the use of documents by reference to them in those writings rather than by their being read out in open court; and the consideration by the judge of a large part of that material before the trial opens, so that it is not necessary to make specific reference to it during the trial itself. In *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 this court pointed out that the intent of (as it was then) RSC Ord 24, r 14A would be substantially frustrated if the rule were literally restricted to what had physically happened in open court. The rule was passed in the interests of the publicity properly attaching to the administration of justice, and of the interests of the recipient of the document under art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (see [1999] 4 All ER 498 at 510). To achieve those ends under modern practice it was necessary to take as falling under CPR 31.22(1)(a) any document pre-read by the judge, or referred to in for instance witness statements taken to stand as evidence, even if the document or the witness statement was not actually read out in court. Some further details of that regime may be mentioned, and then some comments offered.

[8] First, there are taken to fall under the rule certain categories of document, in particular those coming within the pre-reading of the judge. It does not have to be established that the judge has actually read the documents: once the category is established, it is for a party alleging that they have not in fact been read to establish that fact, something that has to be achieved without inquiry of the judge (see *Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910 at 922, [2000] 1 WLR 2353 at 2367). Second, it therefore follows that not everything that is disclosed or copied in court bundles falls under this rule: the *Connaught* approach is restricted to documents to which the judge has been specifically alerted, whether by reference in a skeleton argument or by mention in the "reading guide" with which judges are now provided at least in patent cases. Third, since the *Connaught* approach is based upon the assumed orality of a trial, documents, however much pre-read by the judge, remain confidential if no trial takes place, but the application is, for instance, dismissed by consent, albeit by a decision announced in open court (see the *Connaught* case [1999] 4 All ER 498 at 509).

[9] The central theme of these rules is the importance of the principle that justice is to be done in public, and within that principle the importance of those attending a public court understanding the case. They cannot do that if the contents of documents used in that process are concealed from them: hence the release of confidence once the document has been read or used in court. As this court recognised in the *Connaught* case, there may be some artificiality about that approach. That is because full access to documents deemed to have been read or used in court may give third parties at least the possibility of much more fully studying and understanding the case and the issues in it than if they merely heard the documents read aloud. Nevertheless, that paradox helps to underline this court's concern that

economical means of using and referring to the documents, understood amongst the lawyers, should not exclude the spectators from comprehension of the case.'

[21] This court went on to note (at [12]) that the particular document had been disclosed to a confidentiality club, but that when making its decision under CPR 31.22(2) at the end of the proceedings, the court, '... will not be constrained by, any such confidentiality agreement (see the *Connaught* case [1999] 4 All ER 498 at 511)'. The court's approach was set out at [25]:

'It may be convenient to set out a number of considerations that have guided us. (i) The court should start from the principle that very good reasons are required for departing from the normal rule of publicity. That is the normal rule because, as Lord Diplock put it in *Home Office v Harman* [1983] 1 AC 280 at 303, [1982] 1 All ER 532 at 537 citing both Jeremy Bentham and Lord Shaw of Dunfermline in *Scott v Scott*: "'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'" The already very strong English jurisprudence to this effect has only been reinforced by the addition to it of this country's obligations under arts 6 and 10 of the Convention. (ii) When considering an application in respect of a particular document, the court should take into account the role that the document has played or will play in the trial, and thus its relevance to the process of scrutiny referred to by Lord Diplock. The court should start from the assumption that all documents in the case are necessary and relevant for that purpose, and should not accede to general arguments that it would be possible, or substantially possible, to understand the trial and judge the judge without access to a particular document. However, in particular cases the centrality of the document to the trial is a factor to be placed in the balance. (iii) In dealing with issues of confidentiality between the parties, the court must have in mind any "chilling" effect of an order upon the interests of third parties (see [5] above). (iv) Simple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document. Those reasons will in appropriate cases be weighed in the light of the considerations referred to in sub-para (ii) above. (v) It is highly desirable, both in the general public interest and for simple convenience, to avoid the holding of trials in private, or partially in private. In the present case, the manner in which the documents were handled, together with the confidentiality agreement during trial, enabled the whole of the trial to be held in public, even though the judge regarded it as justified to retain confidentiality in respect of a significant number of those documents after the trial was over. The court should bear in mind that if too demanding a standard is imposed under CPR 31.22(2) in respect of documents that have been referred to inferentially or in short at the trial, it may be necessary, in order to protect genuine interests of the parties, for more trials or parts of trials to be held in private, or for instance for parts of witness statements or skeletons to be in closed form. (vi) Patent cases are subject to the same general rules as any other cases, but they do present some particular problems and are subject to some particular considerations. As this court pointed out in *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, patent litigation

> is of peculiar public importance, as the present case itself shows. That means that the public must be properly informed; but it means at the same time that the issues must be properly explored, in the sense that parties should not feel constrained to hold back from relevant or potentially relevant issues because of (legitimate) fears of the effect of publicity. We venture in that connection to repeat some words of one of our number in *Bonzel v Intervention Ltd (No 2)* [1991] RPC 231 at 234: "... the duty placed upon the patentee to make full disclosure of all relevant documents (which is required in amendment proceedings) is one which should not be fettered by any action of the courts. Reluctance of this court to go into camera to hear evidence in relation to documents which are privileged which could be used in other jurisdictions, would tend to make patentees reluctant to disclose the full position. That of course would not be in the interest of the public." In our view, the same considerations can legitimately be in the court's mind when deciding whether to withdraw confidentiality from documents that are regarded by a party as damaging to his interests if used outside the confines of the litigation in which they were disclosed.'

**[22]** The judge in his judgment looked at the considerations referred to in the *Lilly Icos* case and concluded, as I have said, that the balance came down in favour of permanent restriction upon their use.

**[23]** Mr Turner, who appeared for SB, submitted that CPR 31.22(2) did not apply to the documents as they had been produced voluntarily and were referred to in the report of Professor Mullin. The judge had failed to appreciate that documents produced in that way were not disclosed documents within CPR 31.22(2). The position under the CPR was the same as existed under the RSC as explained in *Derby & Co Ltd v Weldon* (1988) Times, 20 October, *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878, [1991] 1 WLR 756 and *Eagle Star Insurance Co Ltd v Arab Bank plc* (unreported, 25 February 1991). Mr Turner also submitted that the judge had made material errors in the way that he had applied the considerations referred to in the *Lilly Icos* case.

**[24]** Mr Turner's first submission starts from the regime that applied pre-CPR. It was settled law that documents produced on discovery were subject to an implied undertaking that they would only be used for the purposes of the proceedings in which they were disclosed. A rationale was that discovery was an interference with the right of privacy and therefore the invasion of that right should be limited to use of the documents in the proceedings.

**[25]** The cases referred to in [23], above established that voluntary disclosure in the course of proceedings did not come within the rationale for applying the implied undertaking. Documents included in affidavits and documents produced pursuant to an order made under RSC Ord 24 rr 10 and 11 were not subject to the implied undertaking. Further although there was a restriction upon the use of witness statements of witnesses of fact not called, there was no such restriction under Ord 38 in respect of experts' reports.

**[26]** It followed, Mr Turner submitted, that pre-CPR, the expert report of Professor Mullin and the documents referred to in it were not subject to the implied undertaking and therefore were in the public domain. Further the Darmstadt documents had been obtained by Generics from a third party and in consequence had been produced voluntarily with the consequence that the implied undertaking did not apply.

[27] Mr Turner then took us to the CPR. He submitted that CPR Pt 31 expressed the old law in modern terms. His submission involved an analysis of the relevant parts of CPR Pt 31 which are as follows:

'**31.2 Meaning of disclosure**

A party discloses a document by stating that the document exists or has existed.

**31.3 Right of inspection of a disclosed document**

(1) A party to whom a document has been disclosed has a right to inspect that document except where—(a) the document is no longer in the control of the party who disclosed it; (b) the party disclosing the document has a right or a duty to withhold inspection of it; or (c) paragraph (2) applies ...

**31.4 Meaning of document**

In this Part—"document" means anything in which information of any description is recorded; and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

**31.5 Disclosure limited to standard disclosure**

(1) An order to give disclosure is an order to give standard disclosure unless the court directs otherwise.

(2) The court may dispense with or limit standard disclosure.

(3) The parties may agree in writing to dispense with or to limit standard disclosure.

(The court may make an order requiring standard disclosure under rule 28.3 which deals with directions in relation to cases on the fast track and under rule 29.2 which deals with case management in relation to cases on the multi-track)

**31.6 Standard disclosure—what documents are to be disclosed**

Standard disclosure requires a party to disclose only—(a) the documents on which he relies; and (b) the documents which—(i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction ...

**31.14 Documents referred to in statements of case etc**

(1) A party may inspect a document mentioned in—(a) a statement of case; (b) a witness statement; (c) a witness summary; or (d) an affidavit.

[At time of application the rule included at (e) experts' reports. This was revoked and (2) inserted.]

(2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings.

**31.15 Inspection and copying of documents**

Where a party has a right to inspect a document—(a) that party must give the party who disclosed the document written notice of his wish to inspect it; (b) the party who disclosed the document must permit inspection not more than 7 days after the date on which he received the notice; and (c) that party may request a copy of the document and, if he also undertakes to pay reasonable copying costs, the party who disclosed the document must supply him with a copy not more than 7 days after the date on which he received the request. (Rule 31.3 and 31.14 deal with the right of a party to inspect a document) ...

**31.17 Orders for disclosure against a person not a party**

(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

(4) An order under this rule must—(a) specify the documents or the classes of documents which the respondent must disclose; and (b) require the respondent, when making disclosure, to specify any of those documents—(i) which are no longer in his control; or (ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may—(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and (b) specify the time and place for disclosure and inspection ...

**31.22 Subsequent use of disclosed documents**

(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public; (b) the court gives permission; or (c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made—(a) by a party; or (b) by any person to whom the document belongs.'

**[28]** Mr Turner accepted that CPR 31.22 was a complete code. The first 25 words were a substitute for the implied undertaking that applied pre-CPR. CPR 31.22(1)(a), (b) and (c) contained exceptions which also applied pre-CPR. CPR 31.22(2) enabled the court to make a restriction or prohibition order in respect of a document 'which has been disclosed ...'. Such documents are those produced pursuant to the obligation of disclosure under such rules as CPR 31.5 and 31.6. There was a difference between a document which had been disclosed and one which a party had a right to inspect. CPR 31.14 gave a right to inspect documents. At the date of the application the rule included a right to inspect documents referred to in experts' reports. That difference between documents disclosed and those which could be inspected perpetuated the difference which existed under the RSC between documents produced on discovery which were subject to the implied undertaking and those which had to be produced or were produced voluntarily and those which were not. It followed that documents which were produced voluntarily or in experts' reports were not documents 'which have been disclosed' and therefore the court did not have power to restrict their use under CPR 31.22(2).

**[29]** I agree with Mr Turner that CPR Pt 31 is a complete code, but I reject his submission that that code perpetuated in all respects the distinction between documents disclosed in a list of documents and those that might be disclosed in

another way. The obligation to disclose and the ability to inspect are dealt with separately as is the ability to use a document after disclosure. CPR 31.3 is concerned with disclosed documents but reserves an ability to refuse inspection. CPR 31.14 adds to CPR 31.3. In any case the wide definition in CPR 31.2 must be determinative. That states that: 'A party discloses a document by stating that the document exists or has existed.' No distinction is sought to be drawn between documents obtained from third parties and no limitation is placed on the way that the statement is made. In my view a reference by a party to a document in a witness statement is a statement that the document exists. I therefore reject Mr Turner's submission. It follows that the judge was right to consider the application by Generics as an application under CPR 31.22(2). He was also right to conclude that the *Lilly Icos* case gave guidance as to the considerations he should have in mind.

**[30]** The basis of the judge's judgment of 27 June was in the last two paragraphs.

> '[27] In carrying out the balancing exercise identified by Buxton LJ in the passage to which I have referred, I take the following into account. First, the subject matter of the documents is confidential. Second, they originate with third parties. Third, they are of peripheral relevance at best to explain the issues in the action. Fourthly, they are not part of the material which is needed to explain the judgment. Fifthly, they are not needed to explain the judgment of the Court of Appeal which does not refer to them. Sixthly, they cannot be explained without considerable context or speculation exposing their makers or the employers of their makers to further requests for further information.
>
> [28] I keep at the forefront of my considerations the interests of public justice. Nevertheless, it seems to me that these documents do not require to be disclosed and in the circumstances I propose to continue the order made under CPR 31.22 indefinitely accordingly.'

**[31]** Mr Turner criticised each of those considerations. He took us to the documents for the purpose of showing us that the documents did not contain any information which would be of assistance to a third party except in litigation. He may be right, but the documents have the quality of confidence such that a court would restrict disclosure of them.

**[32]** Mr Turner challenged the judge's conclusion that the documents were of peripheral relevance at best to the issues and were not part of the material needed to explain the judgment. In my view the judge's description of the documents may be apt. However that does not mean that they could not be one element that supported the case of SB. As the judge said in his judgment given on 15 March 2002 when allowing the documents to be used in the BASF proceedings—'To resist the inference which superficially arises on such facts [the facts stated in example 1 of 407] may require a large number of bricks' (see [12], above).

**[33]** In my view the judge (at [28]) was right in to have in the forefront of his consideration the interests of both the public and the third parties and the requirements to do justice and thereafter to conclude that it was not necessary that they should be disclosed. I believe he was right to make the order under CPR 31.22 that he did.

THE SECOND APPEAL

[34] The parties agree that despite the order made by the judge pursuant to his judgment of 27 June 2003, it was open to him to release them for use in the Apotex proceedings.

[35] Mr Thorley QC who appeared for Generics supported the conclusion and reasoning of the judge. As the judge recorded Mr Thorley put at the forefront of his argument this passage from the judgment of Whitford J in *Halcon International Inc v Shell Transport and Trading Co* [1979] RPC 97 at 109–110:

> 'However, these authorities to my mind, lead to this conclusion, that the use of a document disclosed in a proceeding in some other context, or even in another proceeding between the same parties in the same jurisdiction, is an abuse of process unless there are very strong grounds for making an exception to the general rule. It does, I think, emerge that some overriding public interest might be a good example, but not the mere furtherance of some private interest even where that private interest arises directly out of or is brought to light as a result of the discovery made.'

[36] At [22] the judge said that the dictum of Whitford J had not, so far as the researches of counsel had been able to reveal, ever been doubted or disapproved. However that statement was not followed by the House of Lords in *Crest Homes plc v Marks* Lord Oliver of Aylmerton said [1987] 2 All ER 1074 at 1082–1083, ([1987] AC 829 at 860):

> 'Your Lordships have been referred to a number of reported cases in which application has been made for the use of documents obtained under Anton Piller orders or on general discovery for the purpose of proceedings other than those in which the order was made. Examples were *Halcon International Inc v Shell Transport and Trading Co* [1979] RPC 97 and *Sybron Corp v Barclays Bank plc* [1985] Ch 299. I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse LJ observed in the course of his judgment in the instant case, each case must turn on its own individual facts.'

[37] The *Halcon* case was considered by Laddie J together with the other relevant authorities in *Cobra Golf Inc v Rata, Taylor Made Golf Co Inc v Rata & Rata (a firm)* [1996] FSR 819. The guidance he gave as to the matters the court will include in its considerations is useful. However it is important under the CPR to have in mind the overriding principles when considering whether to lift an order made under CPR 31.22. The most important consideration must be the interest of justice which involves considering the interest of the party seeking to use the documents and that of the party protected by the CPR 31.22 order. As Lord Oliver said each case will depend upon its own facts. But a material consideration must be whether the documents could have been obtained under CPR 31.17. That rule enables the court to order disclosure from the third parties if the documents were likely to support SB's case and disclosure was necessary in order to dispose fairly of the claim.

[38] SB are clear that the documents support their case in rebutting the attack by Apotex on their patent. They pointed to the fact that they were considered by

the judge to be of some relevance to SB's case as he referred to them in his judgment (see [13], above). However in a later judgment he said that they were at best of peripheral importance. He went on to say:

> 'I would feel extremely diffident about placing any great reliance upon those documents and the experiments they report without having heard, as witnesses, the people who were responsible for them. The documents are potentially embarrassing and their probative value is limited for that reason.'

[39] In that passage the judge seems to accept that some reliance could be placed on the documents as a support even though their probative value was limited. That was consistent with the view that he had already expressed. It is also consistent with [61] of his judgment in the BASF action (see [13], above). I am not sure why the judge concluded that the documents were potentially embarrassing. He did not make that point in his judgment in the BASF proceedings. I suspect that their usefulness could be in cross-examination and perhaps as a small brick to support the views expressed by SB's witnesses. That being so, there is a basis for the submission that the requirements of CPR 31.17(3)(a) could be satisfied.

[40] The judge in his judgment allowing use of the documents in the BASF proceedings made it clear that an appropriate order could protect the interests of the owners of the documents. It seems that he was right. Despite the evidence which suggests prejudice, there is no reason to think that their interests could not be protected by a similar order in the Apotex proceedings to that made in the BASF proceedings.

[41] The present case is peculiar in that the judge who heard the BASF proceedings and considered the documents is hearing the Apotex proceedings. That presents particular difficulties as he considered the documents in the BASF case and mentioned them in his judgment. However his recent judgments suggest that he believed that they were at best of little relevance to the issues in the Apotex proceedings. That of course must be a provisional view as the case is still proceeding.

[42] Even so, the knowledge of the judge presents a problem. Can the judge both put out of his mind and be seen to put out of his mind the documents? If the judge finds in favour of SB, Apotex could be left with a real suspicion that the documents had been a brick in the reasoning, perhaps unconscious reasoning, of the judge.

[43] The interests of justice are paramount. In the present case, the interests of the owners of the documents can be protected by an order under CPR 31.22. The interests of SB favours modification of the order made in the Generics proceedings to allow the documents to be deployed in the Apotex proceedings. There is a real argument that they would be discoverable under CPR 31.17 and refusal of use could reflect adversely on the administration of justice. In those circumstances I conclude that the documents should be released from the CPR 31.22(2) order for use in the Apotex proceedings with an order protecting the interests of the owners of the documents in the way that the judge did in the BASF proceedings.

[44] I would allow the appeal and make an order similar to that made by the judge in the BASF proceedings.

**CHADWICK LJ.**

[45] I agree that the first appeal should be dismissed, for the reasons given by Aldous LJ. I agree, also, that the second appeal should be allowed, on the basis that the interests of the owners in preserving the confidentiality of their documents can adequately be protected by the order which he has proposed. Like him, I take the view that, in the unusual circumstances that the judge has already considered the documents in the BASF proceedings, confidence in the administration of justice requires that they should be available to be deployed in the present proceedings.

**LATHAM LJ.**

[46] I agree.

*First appeal dismissed, second appeal allowed.*

Kate O'Hanlon Barrister.

# A v Head Teacher and Governors of Lord Grey School

[2003] EWHC 1533 (QB)

QUEEN'S BENCH DIVISION

STANLEY BURNTON J

12–15 MAY, 27 JUNE 2003

*Education – Pupil – Exclusion – Permanent exclusion of child of compulsory school age from school – Whether breach of right to education – Human Rights Act 1998, Sch 1, Pt II, art 2.*

On 8 March 2001 there was a fire at the defendant school. The claimant, who was a child of compulsory school age, and two other boys were suspected of starting the fire and were later charged with arson. The claimant was excluded from the school for a period intended to cover the resolution of the police investigation. That period was extended several times as the investigation continued. The school sent work home for the claimant and he took required examinations at the school in May. Criminal proceedings against the claimant were formally ended on 19 June. The school wrote to the claimant's parents setting up a 'reintegration meeting' on 13 July to discuss the details of the claimant's return to the school. Neither the claimant nor his parents attended that meeting. The school subsequently removed the claimant from its roll. Neither the exclusions nor the removal from the roll complied with the requirements imposed on the school by the School Standards and Framework Act 1998 nor the relevant Department of Education circular. A general responsibility for the education of children of compulsory school age was placed on local education authorities by s 13[a] of the Education Act 1996, while s 19[b] imposed a particular duty to make arrangements for the provision of suitable education for those children of compulsory school age who, inter alia, by reason of exclusion from school or otherwise, would not receive such education. The local education authority offered the claimant tuition and his family declined the offer. In proceedings against the school the claimant sought damages for breach of his right to education under art 2[c] of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

**Held** – Expulsion from a school of a pupil who had no access to alternative educational facilities could cause a breach of art 2 of the First Protocol to the convention, and if so, the school authority could be liable for damages. However, if the cause of the unavailability of alternative efficient education was the action or inaction of the local education authority, on whom duties were imposed by ss 13 and 19 of the 1996 Act, it would be the education authority that had caused the infringements of the pupil's art 2 rights. That was the position whether the expulsion was lawful or unlawful. In the instant case, although unlawful, the school's decisions to exclude the claimant until the termination of

a Section 13, so far as material, is set out at [54], below

b Section 19, so far as material, is set out at [56], below

c Article 2, so far as material, provides: 'No person shall be denied the right to education …'

the prosecution, and then until a reintegration meeting could be held, were sensible and reasonable and did not give rise to liability for breach of art 2. And while the exclusion of the claimant from school after 13 July and his removal from the register had been both unlawful and unreasonable, the education authority, as a result of the claimant's exclusion, had, under s 19(1) of the 1996 Act, undertaken its responsibility for his education. Therefore, although the school's decisions to exclude the claimant after 13 July and to remove him from the roll were unlawful and could have been challenged by judicial review, they did not give rise to a liability in damages for breach of his rights under art 2 of the First Protocol. Accordingly, the claim would be dismissed (see [83], [84], [93]–[95], [105]–[114], below).

*Yanasik v Turkey* (1993) 74 DR 14 considered.

**Notes**

For the right to education, see 8(2) *Halsbury's Laws* (4th edn reissue) para 166.

For the Human Rights Act 1998, Sch 1, Pt II, art 2, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 536.

**Cases referred to in judgment**

*Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR.

*Campbell and Cosans v UK* (1982) 4 EHRR 293, [1982] ECHR 7511/76, ECt HR.

*Kjeldsen v Denmark* (1976) 1 EHRR 711, [1976] ECHR 5095/71, ECt HR.

*R (on the application of B) v Head Teacher of Alperton Community School* [2001] EWHC Admin 229, [2001] ELR 359.

*R (on the application of Holub) v Secretary of State for the Home Dept* [2001] 1 WLR 1359, CA.

*R (on the application of M) v Barking and Dagenham London BC* [2002] EWHC 2483 Admin, [2002] All ER (D) 64 (Aug).

*R v Head Teacher and Independent Appeal Committee of Dunraven School, ex p B* [2000] ELR 156, CA.

*R v Independent Appeal Panel of Sheffield City Council, ex p N* [2000] ELR 700.

*Runa Begum v Tower Hamlets London BC* [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 AC 430, [2003] 2 WLR 388.

*S v Brent London BC* [2002] EWCA Civ 693, [2002] ELR 556.

*Sulak v Turkey* (1996) 84-A DR 98, E Com HR.

*Whitman v UK* App No 13477/87 (4 October 1989, unreported), E Com HR.

*Yanasik v Turkey* (1993) 74 DR 14, E Com HR.

**Claim**

The claimant, A, a child of compulsory school age, claimed damages for breach of his right to education under art 2 of Pt II of Sch 1 to the Human Rights Act 1998 against the defendant, the head teacher and governors of the Lord Grey School, Milton Keynes, arising from his exclusion from the school following a fire at the school on 8 March 2001. The facts are set out in the judgment.

*Carolyn Hamilton* (instructed by the *Children's Legal Centre*) and *Yvonne Spencer* of the *Children's Legal Centre* for the claimant.

*Jonathan Moffett* (instructed by *Alex Jack*) for the school.

*Cur adv vult*

27 June 2003. The following judgment was delivered.

**STANLEY BURNTON J.**

INTRODUCTION

[1] In these proceedings, the claimant, A, claims damages against the Head Teacher and Governing Body of the Lord Grey School in Milton Keynes on account of his exclusion from the school following a fire on 8 March 2001. This is my judgment on the issues of liability, which were ordered to be tried separately from the question of the amount of any damages to which the claimant might be entitled.

THE PARTIES

[2] The Lord Grey School is a maintained secondary (foundation) school. The local education authority is Milton Keynes council (the local education authority). Its head teacher is Ms Despina Pavlou. The local education authority, Ms Pavlou and the school governors all have powers and duties under the Education Act 1996 and other statutes and statutory instruments, and they are all unquestionably public authorities for the purposes of the Human Rights Act 1998. I shall sometimes refer below to 'the school', by which I mean the person responsible for the decisions made on its behalf, which in virtually all cases was Ms Pavlou.

[3] The claimant is aged 16. On and before 8 March 2001 he was a pupil enrolled at the school. On that date he was aged, almost, 14, and therefore of compulsory school age.

RELEVANT EVENTS

[4] On 8 March 2001, during the lunch hour, a fire was discovered in a room at the school. The fire brigade were called. The fire officer formed the view that the fire had been started deliberately, and the police were informed. Three boys, the claimant and two others, had been seen leaving the room, which was out of bounds so far as they were concerned, when the fire started. They had not raised any alarm. The police cautioned the boys, searched them and took them to the police station.

[5] On the date of the fire, the head teacher was away. The deputy head teacher, Mrs Sue Telfer, took the view that the three boys who were suspected of involvement in the fire should remain at home on the following day, a Friday, and on Monday 12 March 2001, until the school knew what was going to happen in relation to criminal proceedings. She explained that to the families of the three boys. In the case of the claimant, that was to his older brother B, since his parents were away on their pilgrimage to Mecca. There is an issue as to the effect of their conversation, which I address below.

[6] The claimant and the other two boys were released on police bail. On 29 March 2001, they were charged with arson. The claimant's case was that he had no involvement in the arson, that the fire had been started by one of the other two boys, and that he, the claimant, had not known what that boy was going to do.

[7] The head teacher, Ms Pavlou, returned to the school on Friday 9 March 2001. She discussed the situation with Ms Marilyn Barby, the head of student services of the local education authority. Ms Pavlou thought it appropriate for the boys not to return to school. Ms Barby agreed.

[8] Ms Pavlou thought that the fire had been a student prank that had got out of hand. She expected the police investigation to be completed speedily, and to result in a reprimand of the three boys. She expected that to happen by the end of March 2001, and she thought that the boys could then return to school. However, according to her witness statement, on about 20 March 2001 Ms Pavlou was informed that two of the boys had failed to report to the police station as they had been required to do. It appeared, therefore, there would not be a speedy resolution of the police investigation. As a result, she wrote to the claimant's parents on 21 March 2001, stating that, having spoken to the police and the local education authority, 'your son remains excluded from school until the end of the term'. The spring term ended on 5 April 2001. The school had been sending work home for the claimant. Ms Pavlou's letter stated: 'Should you require further work for A during the period of his exclusion please contact the school and it will be arranged.' The letter gave as the reason for the claimant's exclusion his alleged involvement in the fire. Finally, Ms Pavlou stated:

> 'Under the terms of the 1986 [sic] Education Act I must inform you that you may, if you wish, write to the Chairman of Governors of The Lord Grey School to discuss any aspect of this matter with him.'

The claimant's family did not contact the school for further work for A; nor did they write to the governors.

[9] The school continued to send work home to the claimant until 14 May 2001, the date of the last of the standard assessment tests (SATs). The work, in english, maths and science, was largely revision-based and self-assessing. It did not require to be returned to the school for marking: the answers were provided, enabling the claimant to check the correctness of his answers himself. The claimant spoke to Ms Amanda Rutherford, his form teacher, about this work on a number of occasions. She was concerned that he had enough work.

[10] Mrs Telfer wrote to the claimant's parents on 25 April 2001. She stated:

> 'I am now in a position to write to you concerning A's attendance at school following exclusion. I have been made fully aware of the progress being made into the investigation regarding the recent fire at Lord Grey and understand that the boys are to return to the police station on 14th May. Having taken advice I am therefore further excluding A until 15th May when I will contact you again. A should not return to school until an appointment has been made for you and him to come into school to discuss re-admittance with Ms Pavlou. As A is to sit SAT's examinations shortly I have arranged for Mathematics, Science and English work to be sent home and have agreed with staff that he be allowed into school to sit his exams. He should report to me on the date and time of his exams and I will take him to the appropriate room. Under the terms of the 1986 [sic] Education Act I must inform you that you may, if you wish, write to The Chairman of Governors at The Lord Grey School, to discuss any aspect of this matter with him.'

[11] The SATs took place between 8 and 14 May 2001. According to the claimant, he did not know the date and time of the first examination, and was telephoned by his head of year on 8 May to be told that the examination had started, and that he should come immediately to the school. He did so, and was given additional time to make up for that lost at the beginning. His results in the examinations were slightly better than had been predicted before the incident of 8 March.

[12] By 25 May 2001, the prosecution of the three boys had not been resolved. Mrs Telfer wrote again to the claimant's parents on 25 May:

> 'It is regrettable that I have again to write to you with regard to your son's education at Lord Grey. We understand from the police that your son has now been charged with the offence of Arson against Lord Grey and that he has entered a not guilty plea. As we are in a situation where some of the witnesses in the case are students at Lord Grey we feel that we cannot allow the boys to return until the court case has been heard. Obviously when the proceedings are over we would welcome the opportunity to discuss the way forward. Until then I am making a referral to the access panel for alternative provision for A so that his education may continue. If you wish to discuss the matter further you may contact me at school. Your son is now being excluded for a further 20 school days from 14th May. We will continue to set work as appropriate and would ask that you make contact with school to arrange to collect it. Under the terms of the 1986 [sic] Education Act I must inform you that you may, if you wish, write to The Chairman of Governors at The Lord Grey School, to discuss any aspect of this matter with him.'

[13] On 4 May 2001, Mrs Telfer signed a referral form in relation to the claimant. Most of it was completed by the head of the lower school, Ms Waring. It gave the date and duration of exclusions as '9 March 2001 to present'. In the box headed 'What has precipitated this referral?' was written:

> 'A is excluded pending a court appearance for suspected arson at Lord Grey School. Referral to Access Panel is requested as the Headteacher is not willing to negotiate transfer to another school at this stage given the circumstances and severity of the incident. If A is deemed to be innocent then the Headteacher will be willing to negotiate re-integration at that stage.'

The form stated that the parents had been consulted about the referral, and had voiced no opinions about it. In the box headed 'What support do you feel would be appropriate for this pupil?' was written: 'Appropriate support would be to provide materials/supervision/advice etc pending A's court appearance. A is an able student.' The comments on the claimant as a student were very positive: 'A is an able and motivated student. He is usually pleasant and cooperative. Behaviour issues were not relevant before the incident.'

[14] The personnel/resourcing committee of the governors of the school met on 8 May 2001, and were informed that the three boys involved in the fire had been excluded.

[15] The referral form was not immediately sent to the local education authority. Although she signed it on 4 May 2001, Mrs Telfer wrote on it as the date of referral 25 May 2001. She was unable to recall the reason for the delay. There is an issue as to when the form was sent to the local education authority. According to Mrs Telfer, it was sent on the stated date of referral. However, Ms Barby's letter to Ms Pavlou of 12 June 2001 states that it was received on 8 June 2001, which suggests that it was enclosed with Mrs Telfer's letter to Ms Barby of 6 June 2001. In that letter, Mrs Telfer stated that Ms Pavlou would prefer the boys to be referred to the access panel rather than negotiate other schools, and that the school would be happy to discuss reintegration following the outcome of the court case. In her letter to Ms Pavlou of 12 June, Ms Barby stated that the referrals would be considered by the access panel on 19 June 2001,

and stated: 'Until you are advised of the outcome of the referrals you should continue to provide the boys with work.' Ms Pavlou wrote a note to Mrs Telfer on the letter: 'Sue—Please ensure that this is happening.' a

[16] On 18 June 2001, the Crown Prosecution Service wrote to the solicitor acting for the claimant in the criminal proceedings, Mr Lovegrove of Lovegrove & Co, to inform him that the proceedings had been discontinued on the ground that there was insufficient evidence for there to be a realistic prospect of conviction. b

[17] On 19 June 2001, the claimant went to court and the criminal proceedings were formally ended. He and his brother, B, went to the school. B told Ms Pavlou that his brother had been to court and been found innocent and should return to school immediately. Ms Pavlou told him that she would act to arrange the claimant's re-entry to school as soon as she received written confirmation of the court's decision. c

[18] When the local education authority's access panel met on that day, 19 June, they did not know that the criminal proceedings against the claimant had been discontinued. The panel recommended that the claimant be provided with tuition by the pupil referral unit at their Manor Road Centre whilst the police concluded their inquiries and a decision was taken by the school as to A's future there. d

[19] Mr Tim Read, the flexible learning co-ordinator of the local education authority, sent a letter dated 27 June 2001 to Ms Pauline Clark, the head of the Manor Road Centre, informing her of the access panel's decision. He stated that tuition was to be provided by the pupil referral unit until the end of term in the first instance, ie until 20 July 2001. Mr Read also wrote to the claimant's parents on 27 June, informing them of the access panel's decision that the pupil referral unit would provide tuition until the end of term whilst the exclusion issues were resolved with the Lord Grey School, and stating that Ms Clark would contact them shortly to arrange a meeting with them and A. He gave them Ms Clark's telephone number. The letter was copied to Mrs Telfer at the school and to Ms Clark. As a result of the decision of the access panel, Ms Rutherford was told by Mrs Telfer that it had assumed responsibility for the claimant's education. She had probably already ceased to have contact with him, following the SATs (see her witness statement). She did not resume contact with him or hear from him again. e f g

[20] On 22 June 2001, Milton Keynes magistrates' court sent a fax to Mrs Telfer informing her that the criminal proceedings against the claimant had been discontinued. Ms Pavlou wrote on the fax: 'Please chase—setup re-entry meetings. School disciplinary review?'

[21] By letter to the claimant dated 28 June 2001, Mr Lovegrove, the claimant's solicitor, confirmed the discontinuance of the prosecution, and stated that that 'brings this matter to an end'. h

[22] Ms Pavlou received official notification of the discontinuance of the criminal proceedings against the claimant by the Thames Valley Police's letter of 29 June 2001. She wrote to the claimants' parents on 3 July 2001 stating that she was aware that the prosecution had been dropped and— j

> 'A meeting now needs to take place between you the parents and the school to discuss the way forward. A meeting has therefore been arranged at 10.30 am on Friday 13th July. Please confirm you will be able to attend the meeting.'

She wrote to them again on the following day, as follows:

> 'I am writing with regard to the fire incident at The Lord Grey School. We have now been informed that the Crown Prosecution Service has decided to discontinue proceedings against A. A reason has not been given, though the school has been asked to consider a civil action. Should you wish A to return to school, we will need to meet to discuss a way forward. I am mindful of the fact that A has been out of school for some considerable time and am therefore keen that he should return as soon as possible. However, the room (T37) is still out of action. It is up to A and his two friends to repair the damage, either through physically painting the room or paying for it to be repaired. I have arranged a meeting for Friday 13th July at 10.30 am. Please confirm with my P.A. Carole Horton, that you will be able to attend.'

[23] The meeting was arranged for 13 July 2001 in order to give the claimant and his family adequate notice of the meeting, but also because Ms Pavlou wanted all of the members of staff who would be involved in his reintegration to be present. Those included Mrs Telfer, Ms Waring as head of the lower school, his form tutor, Ms Rutherford, and the business manager, Mr Jason Falkner. According to Ms Pavlou, Friday 13 July was the earliest date when all of them could be available.

[24] The school made arrangements for the reintegration meeting. A draft 'school contract' was prepared, to be signed by the claimant, accepting normal disciplinary obligations, with the school agreeing to support his reintegration. It was envisaged that the boys would redecorate the fire-damaged room under the supervision of a painter and decorator as part of the school's citizenship programme on 16 and 17 July 2001.

[25] There is a conflict of evidence as to the communications between the school and the claimant's family preceding 13 July. Neither the claimant nor his family attended the meeting. Nor did one of the other boys, whose name also included 'A'. One of the boys did attend and was accepted back into the school. From what he said, Ms Pavlou got the impression that the absent boys had stayed away because they were not prepared to help restore the room. Ms Pavlou concluded that the claimant and his family were not interested in reintegrating into the school. She sent to the claimant's family a letter dated 13 July 2001 in which she stated:

> 'Following your failure to appear at the meeting organised this morning at The Lord Grey School, I am removing A from our school roll and am writing to confirm to the Access Panel that other provision should now be made for A's educational provision. I will not be pursuing a civil action against you regarding the arson offence, but your failure to attend the meeting confirms to me that it would be entirely unsuitable for A to continue further at this school. If you would like further clarification of this matter or wish to discuss future educational provision you should contact either Tim Read ... or Jennifer Gurney ... both of whom are based at Manor Road.'

The letter was copied to the chair of the governors of the school, among others.

[26] Neither the claimant nor his family replied to Ms Pavlou's letter until November 2001.

[27] Despite the letter of 13 July the school took no step internally to remove the claimant from its roll until the autumn of that year.

[28] There is a conflict of evidence as to the family's contact with Mr Read and Manor House, to which I refer below.

[29] After the summer holidays, the claimant did not return to the school.

[30] On 28 September 2001, the local education authority's education welfare service completed a notification of absentee form relating to the claimant. As to his school, it stated: 'None/Ex-Lord Grey'. In the body of the document, it stated: 'A—phoned N/R (no response). 01st October—N/R. 02nd—N/R. 03rd—Poss gone to Bangladesh? Advised Jenny of the above. Case closed.'

[31] Ms Pavlou received a letter dated 5 October 2001 from Ms Barby, who stated: 'We understand that (the claimant) is still in Bangladesh so a place is not required for him at present.'

[32] Mr Read met the claimant's father on 18 October 2001. In his letter to him dated 22 October 2001, Mr Read stated:

> '1. I will ask Marilyn Barby, Team Leader—Pupil Support, to provide tuition for A as soon after 29 October as possible.
>
> 2. In your search for a school place, be it The Lord Grey or another school, the following contact numbers may be useful to you for advice and support ...
>
> I would advise you to decide quickly whether you wish A to return to The Lord Grey School and arrange an interview there or at another school as soon as possible so that he can resume his education on a full-time basis.'

[33] Mr Read wrote to Ms Barby on the same date, stating:

> 'We need to provide tuition for A as he has been out of school for a considerable time. This should be for a short period whilst he is supported back into school. The family are considering Lord Grey but, after legal advice did not attend the meeting offered because of the conditions set out in the letter. The Education Welfare Officer failed to make contact with the family to mediate a return to Lord Grey and the PRU did not provide tuition at the end of last term. I have advised the family that we will try to provide tuition as soon as possible after half term ...'

[34] The local education authority's education welfare service completed a second notification of absentee form on 1 November 2001. It stated that Mr Read had been in touch with A's brother, B, and had asked the writer to contact the family to inquire what they wanted for the claimant. Below that it stated:

> '02nd phoned Marilyn to ask what I am to offer. She is going to phone back. B rang. We spoke at length. I said I would phone him back on Monday. They want him back at Lord Grey. 05th spoke to Marilyn—to advise them to write formally to Lord Grey. Spoke to Mrs Das (CAB) who enquired what is happening, why etc. Phoned and spoke to B. Advised to write to Lord Grey ...'

[35] The following notes were made on a local education authority notification of absentee form dated 5 November 2001: '06th phoned B—Ans Mach left message for him to call. 08th spoke to Lord Grey. They believe they have been approached by A's family (letter).'

[36] On 6 November 2001, the claimant's father wrote to Ms Pavlou, formally requesting the claimant's reinstatement. He stated:

'We did not attend the meeting on 13.7.01 as we had an appointment with a solicitor at the same time. My eldest son, B, explained the matter on 13.7.01 when we cancelled the appointment and requested an alternative appointment but none was given to us. This is a very important year for A and he has already missed ten months of schooling. He has already attended the SATs tests but missed the revision period.'

[37] Ms Pavlou wrote a note on the letter, intended for the deputy head teacher: 'No! Sue—I will write a letter if necessary, or "speak" to Marilyn. But there is no way he is coming back.'

[38] Mrs Telfer replied to the claimant's father by letter dated 14 November 2001:

'Your letter to Ms Pavlou has been passed to me for response. As you rightly state you were offered a meeting to discuss A's return to Lord Grey in July. Ms Pavlou's PA confirmed your attendance prior to the date and we were disappointed that you did not arrive. On return to school in September we tried to contact you and were told that A was out of the country. As we heard nothing for at least six weeks his name was removed from the roll and his place allocated to a student on the waiting list. We are now oversubscribed in the year group and unable to take A back onto the school roll. You would be advised to contact your nearest secondary school or the Local Education Authority for a school place.'

[39] The Lord Grey School removed the claimant from its roll some time after 7 September 2001. He never returned to the school. Since 21 January 2002, the claimant has attended Leon School, where he is due to take ten or eleven GCSE subjects.

[40] It follows that the claimant was without schooling between 8 March 2001 and 21 January 2002.

THE EVIDENCE CONCERNING 13 JULY 2001

[41] According to B's witness statement, his parents had a meeting with their solicitor that day; he telephoned the school and told Ms Carole Horton that his parents could not attend the meeting; she called back and said that no alternative meeting could be offered. His parents saw their solicitor, Mr Lovegrove, who advised them not to go to the meeting. His sister (who did not give evidence) called the school to request an alternative date 'in the light of that advice'; the school said they would call back, and never did.

[42] According to Ms Pavlou, on 4 July 2001 she was told that B had telephoned and said that the family could not attend the planned meeting because his parents had gone to Mecca. She asked Ms Horton, her personal assistant, to telephone back and tell B that his parents' attendance was not essential, provided the claimant attended the meeting. Ms Horton later told her that B had said that his parents had been advised by their solicitor not to attend the meeting. This led Ms Pavlou to cause the message to be passed to B that it was she and not the family's solicitor, who ran the school, and that if the claimant wanted to return he should make every effort to come to the meeting. This bout of telephone calls led to the second letter of 4 July. Ms Pavlou asked Ms Horton to telephone the family for confirmation that they would attend, and she said that they would do so. On the morning of 13 July itself Ms Pavlou was informed that the claimant's parents had telephoned to say that they did not have transport. Ms Pavlou offered to send the school minibus. She was then informed that they

had again telephoned, to say that they would make their own arrangements to get to the school. Ms Pavlou concluded from the claimant's failure to attend that he and his family had no interest in his reintegration into the school.

**[43]** The evidence of Ms Horton, Ms Pavlou's personal assistant, who was not cross-examined, only partially supports Ms Pavlou's. She confirms that B telephoned to say that the family had difficulty in attending the meeting because they were due to meet their solicitor on 17 July and did not want to attend the meeting until they had done so. She was instructed by Ms Pavlou to telephone back to say that Ms Pavlou, and not their solicitor, was responsible for the management of the school. She did so; but she had no recollection of the response. Her notebook records a telephone conversation on 6 July with B, referring to difficulty, presumably in attending on 13 July, his telephone number, and the words 'solicitor Tuesday 17th'. Her note also includes 'only time available' and 'no decisions will be made on that day', which I suspect were her notes of what Ms Pavlou asked her to convey to B or his parents. Her notebook records a telephone call on 13 July noted as follows: 'cancelled appointment re: another appointment—no transport today. A—fire—late evening.' Ms Horton had no recollection of this conversation.

THE WITNESSES

**[44]** The claimant gave evidence, as did his brother, B. Neither of his parents nor his sister was called.

**[45]** The claimant is an obviously intelligent and articulate boy, and generally a good witness. His recollection was however unreliable in a number of respects, such as the number of meetings between his family and Mr Read: his evidence was that there were two such meetings; I accept Mr Read's evidence that there was only one. The claimant complained that he had not received enough schoolwork during the period between 8 March 2001 and the SATs. However, in cross-examination he accepted that he had spoken to Ms Rutherford regularly during that period, and had not told her that he did not have enough work.

**[46]** His brother, B, was a hopelessly confused and unreliable witness. His English is reasonably good and I am unable to attribute his confusion to any language difficulty. He confirmed that his parents, on the other hand, speak very little English indeed. B was in the process of opening a new business during the spring of 2001, and for that reason did not want to get involved with the school. From March 2001 he had both a day job and his business of an Indian take-away. He said that the family had decided not to contact the governors of the school following Ms Pavlou's letters of 21 March, 25 April and 25 May 2001.

**[47]** The most egregious example of his confusion was in his evidence relating to the family's meetings with Mr Lovegrove, the claimant's solicitor, in the period around 13 July. Ms Horton's note indicated that there was to be a meeting with Mr Lovegrove on 17 July. B's witness statement indicated that there had been a meeting on 13 July (presumably before the time fixed for the school meeting), at which the family were advised that they should not attend the meeting. Mr Read's letter of 22 October also indicates that he was told that the family did not attend the meeting because they had received legal advice, and because of the conditions set out in the letter of 3 July 2001. On the other hand, the letter of 6 November states that there was a meeting with Mr Lovegrove on 13 July, which was the reason for the family's non-attendance at the school. B seemed to suggest at different times that there were one, two or three meetings with Mr Lovegrove, eventually stating that there were meetings before 13 July, on

13 July itself and on 17 July. None of these meetings is documented in any way: I infer that Mr Lovegrove wrote no letter to the claimant or his family (since none has been produced, though privilege has been waived), no attendance note has been produced and he wrote no letter to the school. Mr Lovegrove's own letter of 28 June 2001 indicates that there were no ongoing instructions from the claimant or his family. It is improbable that there was time for a meeting with Mr Lovegrove before 10.30 am on 13 July.

[48] It is improbable that, if he was consulted over the meeting and advised the family to decline to attend, he would not have written to the school or to the claimant's family. It is particularly improbable that he would not have written to the school on the claimant's behalf if there had been a meeting with him after the family had received Ms Pavlou's letter of 13 July. I am driven to the conclusion that there was no such meeting with Mr Lovegrove on any date, and that he was not consulted about the school meeting. That is not to say that there was no meeting arranged for 17 July; but if it was arranged, the family did not go to it, presumably having decided to cancel it.

[49] B's evidence in relation to his attempts to contact Mr Read and his conversation or conversations with Ms Clark was also difficult to accept. He initially said that he did not contact Ms Clark; when reminded of his witness statement, he said that he had. He denied refusing an offer of tuition made by Ms Clark. According to his witness statement, when he spoke to Ms Clark, she said that she knew nothing about the referral. Mr Read's unchallenged evidence was that Ms Clark told him at the beginning of July 2001 that she had contacted the claimant's family and that they had declined the offer of tuition. B denied this. A civil evidence notice was given in respect of that evidence of Mr Read, on account of Ms Clark's inability to attend through illness. While it is unsatisfactory to decide an important issue of fact on the basis of hearsay, I do prefer it to B's evidence. It is improbable that Ms Clark, who had received a copy of the letter of 27 June 2001 from Mr Read to the claimant's parents and a memorandum from him to her of the same date, would have said that she knew nothing about the referral, and likely that, if she had, B would have referred her to that letter; if he did not, it is more likely that she would have undertaken to look into the matter and to revert to him.

[50] According to B's witness statement, he tried getting in touch with Mr Read from 13 July on, but kept getting his voicemail. In cross-examination, he was unsure about the voicemail. He could not explain why he did not get in touch with Ms Jennifer Gurney, as suggested in Ms Pavlou's letter of 13 July. It is difficult to reconcile B's evidence on this with that of Mr Read, which I accept, to the effect that he did not have a voicemail system at that time; secretaries were available between 9 am and 4 pm to take a message, which would be passed on to him. An answering machine was sometimes used, but only out of working hours. I accept his evidence that it was not until the middle of October 2001 that he first heard from the claimant's family, asking him how to get the claimant into school. As a result of that contact he met the claimant's father on 18 October 2001.

[51] Ms Pavlou was a careful witness, who was trying to give me her recollection of events. In certain respects, however, it is difficult to reconcile her evidence with the contemporaneous documents, and some caution is required in considering what she had to say.

[52] Mrs Telfer was an impressive witness, whose evidence I accept without reservation. She was willing to admit a failure of recollection, even though the

matter in question might be seen as reflecting negatively on her, and an excuse might have been suggested: I refer to her delay in sending out the referral form.

**[53]** Mr Read too was an impressive witness. His evidence was that he met the claimant's family on one occasion, on 18 October, and advised them as to their options. At that time, the family were unsure whether they wanted the claimant to return to the Lord Grey School: they were concerned that he might be victimised or be the centre of attention. I prefer Mr Read's evidence, which is consistent with the documents, to that of B and of the claimant on the issue whether there was one meeting with him (Mr Read) or two. I also reject the evidence of B that when the family met with Mr Read they wanted the claimant readmitted to the Lord Grey School. It is evident from Mr Read's letter of 22 October 2001 to the claimant's father that they were undecided at their meeting whether they wished the claimant to return there.

THE RELEVANT STATUTORY PROVISIONS

**[54]** The Education Act 1996 places responsibility for education of children of compulsory school age on parents and on local education authorities. A general responsibility for education is placed on local education authorities by s 13:

> '(1) A local education authority shall (so far as their powers enable them to do so) contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education, secondary education and further education are available to meet the needs of the population of their area.'

**[55]** Their functions in respect of the provision of primary and secondary schools are set out in s 14.

> '(1) A local education authority shall secure that sufficient schools for providing—(a) primary education, and (b) education that is secondary education by virtue of section 2(2)(a), are available for their area.'

**[56]** Section 19(1) imposes a particular duty on local education authorities:

> 'Each local education authority shall make arrangements for the provision of suitable ... education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.'

**[57]** Parents of children of compulsory school age are under a duty to secure their suitable and efficient full-time education either by regular attendance at school or otherwise (see s 7). If he is a registered pupil at a school, it is their duty to cause him to attend regularly (see s 444(1)). However, by s 444(3), a child shall not be taken to have failed to attend regularly by reason of his absence from the school '(a) with leave, (b) at any time when he was prevented from attending by reason of sickness or any unavoidable cause ...'

**[58]** Leave of absence is the subject of the Education (Pupil Registration) Regulations 1995, SI 1995/2089. Regulation 7 relates to the keeping of an attendance register, in which must be recorded the presence or absence of every pupil, and in the case of an absence, whether or not it is authorised. In the case of a pupil who is not a boarder, reg 7(3) provides that an absence is to be treated as authorised for the purposes of that regulation if '(a) he has been granted leave

of absence in accordance with regulation 8; (b) he is unable to attend—(i) by reason of sickness or any unavoidable cause …'

**[59]** Regulation 8 provides that leave of absence may only be granted by a person authorised on their behalf by the proprietor of the school. In the present case, the proprietors were the school governors; the person who was authorised to give leave of absence was the head teacher. There are restrictions on the granting of leave of absence for the purposes of enabling a pupil to undertake employment, or to go away on holiday, but otherwise the purpose of leave of absence is unspecified.

**[60]** Removal from the school roll (ie deletion from the admission register of the school) is the subject of reg 9. It prescribes the grounds on which the name of a pupil of compulsory school age must be deleted from the admission register. The only relevant sub-paragraph of reg 9(1) is (g):

> 'that [the pupil] has been continuously absent from school for a period of not less than four weeks and both the proprietor of the school and the local education authority have failed, after reasonable enquiry, to locate the pupil …'

In addition, sub-para (k) requires the deletion of a pupil from the admission register 'where the pupil is registered at a maintained school, that he has been permanently excluded from the school …' However, sub-para (k) is subject to reg 9(4)(d):

> 'the permanent exclusion of a pupil does not take effect until the governing body have discharged their duties under section 66 of the (Schools Standards and Framework Act 1998), and—(i) the relevant person has stated in writing that he or she does not intend to bring an appeal under section 67 of the 1998 Act; (ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or (iii) an appeal brought within that time has been determined or abandoned.'

**[61]** Regulation 13 requires the proprietor of every school maintained by a local education authority to make a return to the local education authority of pupil absences other than absences due to sickness or leave of absence granted by the school in accordance with reg 8. Lastly, reg 14 requires entries on an admission register or attendance register to be written in ink and so that any corrections are apparent.

**[62]** The division of responsibility between the governors of a school and the head teacher is the subject of the Education (School Government) (Terms of Reference) (England) Regulations 2000, SI 2000/2122. As might be expected, they prescribe: '**4.**—(1) The governing body shall exercise their functions with a view to fulfilling a largely strategic role in the running of the school.' On the other hand:

> '**5.**—(1) The head teacher shall be responsible for the internal organisation, management and control of the school, and the implementation of the strategic framework established by the governing body.'

**[63]** The exclusion of pupils is the subject of ss 64–68 of the Schools Standards and Framework Act 1998:

'**64.** *Power of head teacher to exclude pupils.*—(1) The head teacher of a maintained school may exclude a pupil from the school for a fixed period or permanently.

(2) The head teacher may not exercise the power to exclude a pupil from the school for one or more fixed periods such that the pupil is so excluded for more than 45 school days in any one school year.

(3) A pupil may not be excluded from a maintained school (whether by suspension, expulsion or otherwise) except by the head teacher in accordance with this section.

(4) In this Act "exclude", in relation to the exclusion of a child from a school, means exclude on disciplinary grounds (and "exclusion" shall be construed accordingly).

**65.** *Exclusion of pupils: duty to inform parents, etc.*—(1) Where the head teacher of a maintained school excludes any pupil, the head teacher shall (without delay) take reasonable steps to inform the relevant person of the following matters—(a) the period of the exclusion (or, if the pupil is being permanently excluded, that he is being so excluded); (b) the reasons for the exclusion; (c) that he may make representations about the exclusion to the governing body, and (d) the means by which such representations may be made.

(2) Where the head teacher decides that any exclusion of a pupil for a fixed period should be made permanent, he shall (without delay) take reasonable steps to inform the relevant person of—(a) his decision, and (b) the matters specified in paragraphs (b) to (d) of subsection (1).

(3) Subsection (4) applies where the head teacher—(a) excludes any pupil in circumstances where the pupil would, as a result of the exclusion—(i) be excluded from the school for a total of more than five school days in any one term, or (ii) lose an opportunity to take any public examination, (b) excludes a pupil permanently, or (c) decides that any exclusion of a pupil should be made permanent.

(4) Where this subsection applies, the head teacher shall (without delay) inform the local education authority and the governing body of the following matters—(a) the period of the exclusion (or, if the pupil is being permanently excluded, that he is being so excluded), or (b) his decision that any exclusion of a pupil for a fixed period should be made permanent, and (in either case) of the reasons for it.

(5) In this section and in sections 66 and 67 "the relevant person" means—(a) in relation to a pupil under the age of 18, a parent of his; (b) in relation to a pupil who has attained that age, the pupil himself.

(6) Where regulations under paragraph 4 of Schedule 11 require the governing body of a maintained school to establish a discipline committee, references in this section and sections 66 to 68 to the governing body of such a school shall be construed as references to their discipline committee.

**66.** *Functions of governing body in relation to excluded pupils.*—(1) Subsections (2) to (6) apply where the governing body of a maintained school are informed under section 65(4) of any exclusion or decision to which that provision applies.

(2) The governing body shall in any such case—(a) consider the circumstances in which the pupil was excluded; (b) consider any representations about the exclusion made to the governing body—(i) by the relevant person in pursuance of section 65(1)(c) or (2)(b), or (ii) by the local

education authority: (c) allow each of the following, namely—(i) the relevant person, and (ii) an officer of the local education authority nominated by the authority, to attend a meeting of the governing body and to make oral representations about the exclusion; and (d) consider any oral representations so made.

(3) In a case where it would be practical for the governing body to give a direction to the head teacher requiring the reinstatement of a pupil, they shall in addition consider whether he should be reinstated immediately, reinstated by a particular date or not reinstated.

(4) If the governing body decide that the pupil should be reinstated, they shall forthwith—(a) give the appropriate direction to the head teacher, and (b) inform the relevant person and the local education authority of their decision.

(5) The head teacher shall comply with any direction of the governing body for the reinstatement of a pupil who has been excluded from the school.

(6) If the governing body decide that the pupil should not be reinstated, they shall forthwith—(a) inform the relevant person, the head teacher and the local education authority of their decision, and (b) in addition in the case of a pupil who is permanently excluded, give the relevant person notice in writing referring to that decision and stating the following matters—(i) the reasons for the decision, (ii) his right to appeal against the decision, (iii) the person to whom he should give any notice of appeal, (iv) that any notice of appeal must contain the grounds of appeal, and (v) the last date on which an appeal may be made.

(7) Where—(a) the head teacher of a maintained school excludes a pupil otherwise than as mentioned in section 65(3), and (b) the governing body receive any representations made in pursuance of section 65(1)(c) or (2)(b) by the relevant person about the exclusion, they shall consider those representations.

(8) Regulations may provide that, where a governing body of a maintained school are required under this section to take any step, the duty must, subject to such exceptions as may be prescribed, be performed within the prescribed period; but such a provision shall not relieve the governing body of the duty to take any step which has not been taken within that period.

**67.** *Appeals against exclusion of pupils.*—(1) A local education authority shall make arrangements for enabling the relevant person to appeal against any decision of the governing body under section 66 not to reinstate a pupil who has been permanently excluded from a school maintained by the authority.

(2) Schedule 18 has effect in relation to the making and hearing of appeals pursuant to arrangements made under subsection (1); and in subsections (3) and (4) "appeal panel" means an appeal panel constituted in accordance with paragraph 2 of that Schedule.

(3) The decision of an appeal panel on an appeal pursuant to arrangements made under subsection (1) shall be binding on the relevant person, the governing body, the head teacher and the local education authority.

(4) Where on such an appeal the appeal panel determines that the pupil in question should be reinstated, the panel shall either—(a) direct that he is to

be reinstated immediately, or (b) direct that he is to be reinstated by a date specified in the direction.

**68.** *Exclusion of pupils: guidance.*—(1) This section applies to any functions of—(a) the head teacher or the governing body of a maintained school, (b) a local education authority, or (c) an appeal panel constituted in accordance with paragraph 2 of Schedule 18, conferred by or under any of sections 64 to 67 and Schedule 18.

(2) In discharging any such function, such a person or body shall have regard to any guidance given from time to time by the Secretary of State.'

**[64]** The Secretary of State gave guidance in Department for Education and Employment Circular 10/99 ('Social Inclusion: Pupil Support') (the circular). It has been amended since the times material to these proceedings. Paragraph 6.3 of the circular stated:

'Before reaching a decision, the head teacher should:

- consider all the relevant facts and firm evidence to support the allegations made, and take into account the school's policy on equal opportunities. If there is doubt that the pupil actually did what is alleged, the head teacher should not exclude the pupil;
- allow the pupil to give their version of events;
- check whether an incident appeared to be provoked by racial or sexual harassment;
- if necessary consult others, being careful not to involve anyone who may later take part in the statutory review of their decision, eg a member of the Discipline Committee.'

**[65]** Paragraph 6.4 stated that exclusion should not be used for, among other matters, 'punishing pupils for the behaviour of the parents, for example, by extending a fixed period exclusion until the parents agree to attend a meeting'.

**[66]** Paragraph 6.5 was as follows:

'The law allows head teachers to exclude a pupil for up to **45 days in a school year**. However, individual exclusions should be for the shortest time necessary, bearing in mind that exclusions of more than a day or two make it more difficult for the pupil to re-integrate into the school. In all cases of more than a day's exclusion, work should be set and marked.'

**[67]** It is also necessary to refer to paras 6.6 and 6.7:

'6.6 **A decision to exclude a child permanently is a serious one. It is a final step in the process for dealing with disciplinary offences when a wide range of other strategies have been tried and have failed, including the use of a Pastoral Support Programme. It is also an acknowledgement by the school that it can no longer cope with the child. The Secretary of State does not expect a head teacher normally to exclude permanently a pupil for a "one-off" or first offence.**

6.7 A head teacher considering excluding a pupil for a single block of more than **15 school days in a term** must plan:

- to enable the pupil to continue their education;
- how to use the time to address the pupil's problems; and
- with the LEA, what educational arrangements will best help the pupil to re-integrate into the school at the end of the exclusion. The school will

usually be expected to meet some of the costs for this but the exact arrangements will need to be agreed with the LEA.'

[68] Annexe D to the circular dealt with procedures for excluding a pupil. Under the heading 'Responsibilities of the head teacher' and 'Informing parents about the exclusion', it stated:

'1. A head teacher who excludes a pupil should make sure the parent is notified immediately, ideally by telephone, and that the telephone call is followed by a letter within one school day. An exclusion should normally begin on the next school day.

2. Letters about fixed period and permanent exclusions should explain:

• why the head teacher decided to exclude the pupil and the steps taken to try and avoid exclusion:

• the arrangements for enabling the pupil to continue their education, including setting and marking the pupil's work;

• the parent's right to state their case to the Governing Body's Discipline Committee;

• who the parents should contact if they wish to state their case (usually the Clerk to the Committee);

• the latest date the parent can put a written statement to the Discipline Committee;

• the parent's right to see their child's school record;

• if the exclusion is for a **fixed period**, the length of the exclusion and the date and time the pupil should return to school;

• if the exclusion is for lunchtimes only, the length of the exclusion (normally no more than five school days) and the arrangements for providing a meal for any pupil entitled to free school meals;

• if the exclusion is **permanent**, the date the permanent exclusion takes effect, and details of any relevant previous warnings, fixed period exclusions or other disciplinary measures taken before the present incident;

• the name and telephone number of a contact at the LEA who can provide advice on the exclusions process and the telephone number for the Advisory Centre for Education (ACE) helpline ...

All correspondence should be in plain English and avoid unnecessary jargon. Exclusion cases should be treated in the strictest confidence.

3. A head teacher who extends a fixed period exclusion or, exceptionally, converts a fixed period exclusion into a permanent exclusion, should again write to the parent explaining the reasons and making the other points above. Where an exclusion is extended there is a new right for the parent to state their case to the Discipline Committee.'

[69] Paragraphs 4 and 5 of Annexe D were as follows:

'4. The head teacher should inform the Governing Body's Discipline Committee and the LEA immediately of:

• all permanent exclusions;

• all exclusions which result, separately or in total, in the pupil missing more than five school days in any one term, or which deny pupils the chance to take a public examination.

Short fixed period exclusions of one to five school days should be reported termly, unless the LEA asks for more frequent reports.

5. For each exclusion reported the school should give:

- the name of the pupil;
- the length of the exclusion;
- the reason(s) for the exclusion;
- the pupil's age, gender, ethnicity, and whether they are on the SEN Code of Practice or have a statement of special educational needs;
- whether the pupil is looked after by the Local Authority.'

[70] Paragraph 6 of Annexe D stated that the governing body should set up a discipline committee to review the use of exclusion. Paragraph 7 was as follows:

> '7. If the exclusion is fewer than five days, the Discipline Committee cannot direct re-instatement, but should consider any statement from the parent. For exclusions of more than five days in a term, or where a pupil loses the opportunity to take a public examination, the Discipline Committee should consider the exclusion and decide whether the pupil should be re-instated ...'

[71] Annexe D required the clerk to the discipline committee, on receiving notice from the head teacher that a pupil has been excluded for more than five days, to set up a meeting of the discipline committee to consider the exclusion within specified time limits, and take other preliminary procedural steps.

[72] Chapter 6 and Annexe D of the circular were replaced with effect from January 2003, after, therefore, the events in question in these proceedings, by Department of Education and Science guidance, 'Implementing behaviour and attendance: guidance on exclusion from schools and Pupil Referral Units'. Paragraph 11.1 of Pt 1, dealing with decisions to exclude, is as follows:

> 'A reintegration meeting with parents following the expiry of a fixed period exclusion is good practice. However, a fixed period exclusion should not be extended if such a meeting cannot be arranged in time or the parents do not attend.'

A new Pt 5 is entitled 'police involvement and parallel criminal proceedings'. It had no counterpart in the earlier circular. It includes the following statement:

> '1.1 A school-related incident may sometimes also be the subject of a police investigation which may subsequently result in criminal proceedings. This can mean that the evidence available to head teachers, Discipline Committees and Independent Appeal Panels is very limited. They may not, for example, be able to hear relevant witnesses or to consider relevant material; it may not be known whether a criminal charge is to be brought; if a charge has been brought, the eventual outcome of any court proceedings may be uncertain.'

Under the heading: 'Head teacher's decision to exclude and consideration of the circumstances by the Discipline Committee' are the following statements:

> '2.1 A head teacher should not postpone his or her decision to permanently exclude a pupil simply because of the possibility that criminal proceedings might be brought in respect of the same incident. In these circumstances, a judgement must be made on the basis of the evidence available. Relevant considerations include the fact that: a) a serious allegation has been made against the pupil by another pupil or member of staff at the school which is the subject of a police investigation which may result in criminal proceedings being brought; b) pending the conclusion of

any such criminal proceedings, the pupil's continued presence in the school may have an adverse effect on the complainant and other potential witnesses, and on the promotion of good order and discipline at the school generally.'

[73] Finally, it is necessary to refer to ss 6 and 8 of the Human Rights Act 1998, and to arts 6 and 14 of the European Convention on Human Rights and Fundamental Freedoms 1950, and art 2 of the First Protocol (as set out in Sch 1 to the 1998 Act). The first sentence of the first paragraph of art 6 is:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Article 14, entitled 'Prohibition of discrimination', is as follows:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Article 2 of the First Protocol, headed 'Right to education', is as follows:

'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

THE LEGAL SUBMISSIONS OF THE PARTIES

[74] Ms Carolyn Hamilton accepted that the provisions of the 1996 Act on which the claimant relies do not of themselves give rise to any liability in damages for breach of statutory duty. It follows that the only arguable cause of action of the claimant is that created by ss 6 and 8 of the Human Rights Act 1998, for breach of the claimant's convention rights. The convention rights asserted are those under arts 6 and 14 of the convention and art 2 of the First Protocol.

ARTICLE 6

[75] Ms Hamilton also accepted that, on the basis of the current jurisprudence of the European Court of Human Rights, the right to education under art 2 of the First Protocol is not a civil right within the meaning of art 6. She none the less submitted that damages should be awarded for breach of art 6. She submitted that just as the House of Lords had assumed, in *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 AC 430, that rights under s 193 of the Housing Act 1996 were civil rights within the meaning of art 6, so I should assume that the right to education is such a right, even though (as she conceded) it was not. This submission is irrational. Article 6 applies only to the determination of civil rights and obligations and to criminal charges. It has no application to what is conceded not to be a civil right (or obligation) and is not a criminal charge.

ARTICLE 14

[76] Ms Hamilton submitted that the claimant had been excluded from school because of his suspected conduct and his parents' failure to attend the meeting of 13 July 2001. She submitted that discrimination under art 14 involves a difference

of treatment for which there is no reasonable and objective justification; that there was no such justification for the claimant's exclusion from school; and that therefore he was the subject of unlawful discrimination.

[77] This submission ignores the words 'or other status' in art 14. It is not every difference of treatment that engages art 14. The difference must result from some personal attribute or characteristic of the claimant by which persons or groups of persons are distinguishable from each other (see *Kjeldsen v Denmark* (1976) 1 EHRR 711 at 733 (para 56)). A difference of treatment based solely on conduct does not engage art 14. Ms Hamilton was not able to point to any ground of discrimination that engages art 14.

ARTICLE 2 OF THE FIRST PROTOCOL

**[78]** Ms Hamilton's submissions under this head were more substantial. She submitted that there could be no justification for any interference with the right conferred by this article if that interference was unlawful under domestic law. Any unlawful interference with this convention right, therefore, gives rise to a liability in damages. It followed that if the claimant's exclusion from his school was unlawful under English domestic law (ie our law apart from the convention), there was an unjustified interference with his right to education for which the school authorities, which wrongfully excluded him, are liable in damages. The head teacher is liable as the person who decided on his exclusion; the governors are liable for their failure to establish a discipline committee to consider the claimant's exclusions.

**[79]** Mr Jonathan Moffett disputed these submissions. He accepted that the domestic lawfulness of an exclusion from school (or other prevention from attendance) is relevant to the question whether the convention right has been unlawfully interfered with. But he disputed that domestic unlawfulness of itself constitutes a breach of art 2 of the First Protocol.

**[80]** The authorities on art 2 of the First Protocol are relatively sparse. They were admirably summarised by Mr Moffett in his skeleton argument:

> '23. The broad right to education referred to in the first sentence of art 2 of the First Protocol comprises three individual rights (see *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 at 281 (para 4); *R (on the application of Holub) v Secretary of State for the Home Dept* [2001] 1 WLR 1359 at 1367 per Tuckey LJ): (1) a right of access to such educational establishments as exist; (2) a right to an effective (but not the most effective possible) education. An "effective" education is an education which reaches a minimum standard; and (3) a right to official recognition of academic qualifications. In the present case, only the first two of these individual rights require consideration.
>
> 24. The right to education is not an unqualified right. In particular, the right to education calls for regulation by the state, regulation which will vary in time and place according to particular circumstances (see *Belgian Linguistic Case (No 2)* at 281 (para 5)). Provided such regulation does not injure the substance of the right to education and is "reasonable", it will not breach art 2 of the First Protocol (see *Belgian Linguistic Case (No 2)*; *Campbell and Cosans v UK* (1982) 4 EHRR 293 at 307 (para 41)).
>
> 25. One aspect of the regulation of the right to education is the operation of a system of disciplinary sanctions. Accordingly: (1) the right to education does not preclude disciplinary measures such as suspension and expulsion from an educational establishment (see *Yanasik v Turkey* (1993) 74 DR 14 at 27; *Sulak v Turkey* (1996) 84-A DR 98 at 100); (2) the operation of reasonable

disciplinary sanctions will not give rise to a breach of art 2 of the First Protocol (see *Whitman v UK* App No 13477/87 (4 October 1989, unreported) (para 1)); (3) where, as part of the operation of a system of disciplinary sanctions, a school makes reasonable demands before it will allow a child to return to school, but there is a failure to comply with those demands, the responsibility for any lack of education does not lie with the school (see *Whitman v UK* App No 13477/87 (4 October 1989, unreported)); (4) the fact that there is an opportunity to challenge a disciplinary measure is relevant to the assessment of whether it gives rise to a breach of art 2 of the First Protocol (see *Sulak v Turkey* (1996) 84-A DR 98 at 100); (5) art 2 of the First Protocol does not confer a right to be educated in a particular school (see *Yanasik v Turkey*; *R (on the application of B) v Head Teacher of Alperton Community School* [2001] EWHC Admin 229 at [62], [2001] ELR 359 at [62] per Newman J; *S v Brent London BC* [2002] EWCA Civ 693 at [9], [2002] ELR 556 at [9] per Schiemann LJ); and (6) the fact that a child can be educated otherwise than at school while he is excluded from a school may mean that no breach of art 2 of the First Protocol arises (see *S v Brent London BC*).'

**[81]** I accept these propositions as accurately reflecting the authorities to which reference was made.

**[82]** Of particular relevance is the decision of the European Commission of Human Rights in *Yanasik v Turkey* (1993) 74 DR 14 at 27, in the course of which they stated:

> 'Moreover, the Commission considers that in principle the right to education cannot be allowed to impinge on the State's right to regulate education (cf (*Campbell and Cosans v UK* (1982) 4 EHRR 293 at 307 (para 41))) and that this right does not exclude all disciplinary penalties. It would not be contrary to Article 2 of Protocol No. 1 for pupils to be suspended or expelled, provided that the national regulations did not prevent them from enrolling in another establishment in order to pursue their studies.'

**[83]** In my judgment, it has to be borne in mind that the duty created by art 2 of the First Protocol is imposed on the state, and not on any particular domestic institution. It does not create a right to be educated in any particular institution or in any particular manner. Expulsion from a school of a pupil who has no access to alternative educational facilities, such as enrolment in another school or education through a pupil referral unit, may cause a breach of art 2 of the First Protocol, and if so the school authority may be liable for damages; but if the pupil is able to have access to efficient education elsewhere, no breach of his convention right will be involved. If the cause of the unavailability of alternative efficient education is the action or inaction of the local education authority, on whom duties are imposed by ss 13 and 19(1) of the 1996 Act, it will be the local education authority, rather than the school authority, that will have caused the infringement of the pupil's rights under art 2 of the First Protocol. If suitable and adequate alternative educational facilities are available, but the pupil's parents decide that their child should not use them, then the local education authority will in general not have caused an infringement of art 2 of the First Protocol.

**[84]** In my judgment, this is the position whether or not the expulsion from school is lawful under domestic law. Just as compliance with domestic law may not justify a withdrawal of educational facilities for the purposes of art 2 of the First Protocol (as where, for example, the statutory provisions concerning

disciplinary sanctions permit or require exclusion from education in what are objectively unreasonably wide circumstances and that sanction is imposed unreasonably), so domestic unlawfulness does not of itself necessarily amount to an infringement of art 2 of the First Protocol.

**[85]** Against this legal background, I turn to consider the events in question.

DISCUSSION

**[86]** The first issue to be addressed is the characterisation, under domestic law, of the claimant's absence from school following the fire, between 8 and 20 March 2001. Mr Moffett submitted that the claimant had been given leave of absence. The claimant's case is that he was excluded.

**[87]** The 1996 Act and the 1995 regulations envisage only four categories of absence from school on the part of a child of compulsory school age: exclusions; leave; inability to attend by reason of unavoidable cause, such as illness; and unauthorised absence. Exclusion is enforced absence by decision of the school; leave is absence at the request or instigation of the pupil or his family to which the school has agreed. The fact that a parent accepts that the circumstances warrant exclusion cannot convert an exclusion into leave of absence.

**[88]** Mrs Telfer's note, made on 9 March 2001, states that following the fire and the three boys being taken to the police station she spoke to B and: 'I explained to all the families that it would be sensible for the boys to remain at home on Friday and Monday until we knew what was going to happen.' On that basis, the claimant's absence was, at least so far as his family was concerned, consensual on the Friday and Monday. As mentioned above, however, the claimant did not return to school after the Monday, or indeed at all. In evidence, Mrs Telfer accepted that it was her intention that the boys should not come into school until a decision had been made about them. I find that she made her intention clear to the families, including B. Doubtless all three families accepted the good sense of the decision, following a serious incident in circumstances where it was not known what action would be taken by the police. However, as stated above, that fact does not convert the school's decision that the boys should not come in into an application by the families for leave of absence. In my judgment, the claimant was excluded from school during the period from 8–20 March 2001. It is not surprising that this is how Ms Pavlou subsequently viewed his absence (see her letter of 21 March 2001).

**[89]** The next questions are whether this period of exclusion was reasonable in the circumstances and lawful. Of its reasonableness I have no doubt. The school was faced with a difficult situation, in which what may have been a schoolboy prank but might have been a serious offence had been committed. It was reasonable of the head teacher not to make a decision as to how the matter should be dealt with until she knew the outcome of the criminal proceedings. There would otherwise be a risk that she would deal with it in a manner inconsistent with the criminal court's decision; in particular, she might take the view that the matter was not serious, whereas the youth court, on what might be a more thorough investigation of the facts, might take a far more serious view. Given the potential seriousness of the matter, and the undesirability of the three boys coming together with the pupils who were witnesses against them, it was reasonable for them to be temporarily excluded. A decision had to be taken immediately following the fire and the action of the police: in my judgment it was clearly a reasonable, and indeed sensible, decision in the circumstances.

[90] Neither Mrs Telfer nor subsequently Ms Pavlou interviewed the claimant before making the decision to, in effect, exclude. The omission to do so was inconsistent with the guidance in the circular, and in any event with the general principle that a decision to exclude should not be made without giving the pupil affected an opportunity to meet the case against him (see, e g *R v Head Teacher and Independent Appeal Committee of Dunraven School, ex p B* [2000] ELR 156). I do not criticise them for this. The guidance is not mandatory, but regard must be had to it. I do not think that regard was had to it by either Mrs Telfer or Ms Pavlou, but if they had considered it, I think that their decision would have been the same. The position of a head teacher when a pupil has been accused of a serious crime (and arson is a serious crime) and the police are conducting an investigation that may lead to a prosecution, and even worse if the pupil is charged, is a difficult one. There is a risk that an interview with the pupil will be regarded as an attempt to cause him to incriminate himself. Interviews with other pupil witnesses may lead to accusations that their evidence has been corrupted, or of interference with the criminal process. There are obvious risks of at best friction and at worst intimidation or interference with witnesses if the accused pupil is allowed to return to school and mix with his fellow pupils. If nothing is done, the impression may be given that the incident was unimportant, which carries with it a risk to school discipline. Finally, while the police investigation or prosecution is pending, it may be sensible for the head teacher to take action not on the basis that the accused pupil has been guilty of anything, but on the basis that there is a substantial accusation against him the truth of which has not been determined. I do not therefore find it surprising that the 2003 amendment to the circular is cautious in the advice it contains for head teachers in this situation, or that, significantly, it does not mandate head teachers to interview a pupil suspected of a serious crime before deciding on a temporary exclusion. Of course, very different considerations apply to a permanent exclusion.

[91] Similar concerns are reflected in the judgment of Moses J in *R v Independent Appeal Panel of Sheffield City Council, ex p N* [2000] ELR 700. In that case, he gave leave to apply for judicial review of a decision of an independent appeal panel to reinstate a pupil accused of sexually assaulting another pupil, in circumstances where a prosecution was pending and his alleged victim remained a pupil at the school. Moses J said (at 701–702):

> '(5) ... I am told that on present researches of counsel it is accepted that as a matter of law the panel is bound to consider whether the proposed defendant in the criminal proceedings is in fact guilty of the offence. I find that a startling proposition, and I would, were I deciding it, require a lot of persuasion that it was the true position in law.
>
> (6) It seems to me that by far the best approach would be for the panel to accept that it cannot investigate the truth or otherwise of the charge and consider a free-standing separate issue, namely whether it is in the best interests of the school, all the pupils, the other pupil particularly concerned and of course the pupil who is charged, for that pupil to be excluded, bearing in mind that the truth or otherwise of the accusation cannot be determined until the criminal proceedings. It seems to me that the panel is making all sorts of difficulties for itself in attempting to decide the issue of guilt or innocence with its hands tied behind its back. There will be many pupils who feel unable, on legal advice, to assist the panel because they will want to keep their defence fresh for the criminal charge. Indeed, the complainant herself

might regard it as wholly undesirable that she should have to give an account to the panel while the criminal charge is pending.' a

I agree with these comments.

**[92]** Furthermore, Ms Pavlou had in fact been advised by the police not to interview the pupils who were the subject of their criminal investigation; and that their investigation would not take very long to complete. In addition, it was b reasonable for her to take the view that the arson was a serious matter and that all of the pupils of the school should appreciate that it was so regarded by her. In addition, the local education authority had advised that it was appropriate for the boys to remain at home (see Mrs Telfer's note of 9 March 2001). Lastly, the claimant's family had not objected to his non-attendance.

**[93]** The exclusion was none the less not a lawful exclusion. It was not a c permanent exclusion; nor was it an exclusion for a fixed period. An exclusion must be one or the other. An indefinite temporary exclusion is not known to the law. In addition, none of the requirements of s 65(1) or (3) of the School Standards and Framework Act 1998 was complied with. As a result, the governors could not comply with s 66. These defaults flowed to some extent d from the failure of Mrs Telfer to appreciate that an exclusion was involved, and the failure of Ms Pavlou to address the issue whether the claimant was being excluded and if so the legal requirements relating to exclusion. Clearly, at some stage Ms Pavlou appreciated that there had been an exclusion (see the terms of her letter of 21 March). She did not, however, comply with the guidance in the circular requiring that the exclusion be notified in writing to the parents. That e should have been done.

**[94]** There followed fixed periods of exclusion from 21 March to 13 July. Again, no interview was sought of the claimant. Again, I consider that it was none the less reasonable for Ms Pavlou to decide to exclude the claimant while criminal proceedings were pending against him. However, her letters did not contain f the information required by s 65(1)(c) and (d). In my judgment, the last paragraph of the letter of 21 March was insufficiently specific to comply with the requirements of those provisions. Given that this exclusion was prompted by the local education authority (see Ms Pavlou's witness statement), s 65(4) was complied with so far as it was concerned. The governors were informed of the exclusion by copy of the letter of 21 March, as required by that subsection. However, they did not act as g required by s 66(2) and (3).

**[95]** There were similar defects in relation to the letters of 25 April and 25 May 2001. Moreover, the 20-day exclusion made by the letter of 25 May expired on 15 June, but nothing was done at its expiration to resolve the claimant's position. In any event, the maximum 45 days' temporary exclusion expired on 6 June. It h follows that the claimant's exclusion after that date was unlawful: the school was compelled, by reason of that maximum, in the absence of a request from his parents that he continue to stay away from school, either to exclude the claimant permanently or to permit him to return to school.

**[96]** I do not think that the failure to include in the exclusion letters a notice j complying with s 65(1)(c) and (d) had any practical effect. Ms Pavlou's letters informed the family of the possibility of approaching the governors, and no reason was given why they did not do so. I find that if the letters had complied with the statutory requirement, the family would not have appealed to the governors. The governors (by their discipline committee) did not comply with the requirement of s 66 that they consider the exclusion of the claimant.

[97] Complaint is made of the delay between the school learning of the discontinuation of the prosecution and 13 July. I think it was reasonable of the school to await formal notification of the discontinuation. They received that on 3 July and the parents were written to on that date. Given that the requirement of a reintegration meeting is good practice, and understandably so, that Ms Pavlou considered (reasonably, as I find) such a meeting crucial to the successful integration of the claimant, that she could not organise a meeting at which those required could be present before 13 July because of their commitments, I reject the suggestion that the meeting should have been arranged for an earlier date. In any event, if it had been I have no reason to believe that the outcome would have been any different.

[98] In the absence of reliable evidence from the claimant's family, the true reason for their failure to attend the meeting cannot be known. I have no credible explanation from them. The claimant's sister, who was involved in the telephone calls that day, did not give evidence. No reason for her absence was given. I accept Ms Pavlou's evidence as to the telephone calls on the day relating to transport. Ms Horton's evidence that she told the family that 13 July was the only date available for them to come to the school for a meeting was not disputed. Given that evidence, and the inconsistencies in the family's reasons for their non-attendance, I conclude that, ultimately, they chose not to attend the meeting, and that they had no good reason not to attend. It is conceivable that they feared a civil action, or objected to their son participating in either the redecoration of the room or paying for it. The cost of redecoration would have been substantial for the claimant's family: but they did not know what that cost might be when they decided not to attend. It may be that the family were undecided whether they wanted the claimant to return to the school: they were, I find, undecided when they met Mr Read on 18 October; and this is the most probable reason.

[99] None the less, I have to say that Ms Pavlou's letter of 4 July could and should have been more gently worded, given the means, background and difficulties with English of the claimant's family. The suggestion of civil proceedings was unnecessary. The letter gave the impression that the redecoration of the room was a precondition to the reintegration of the claimant, rather than something that would be discussed at the meeting. It was entirely reasonable for the school to want the three boys to show their community responsibility by undertaking the redecoration of the room. However, the claimant and his family might have had good objections to the requirement, which should be considered by the school. A firm decision should have awaited the meeting rather than preceded it.

[100] I regret that I also criticise Ms Pavlou's letter of 13 July. While I fully sympathise with her insistence on a reintegration meeting, her response was precipitate. First, given that neither she nor Mrs Telfer had spoken to anyone in the claimant's family, so that Ms Pavlou was relying on messages passed on to her, and the differences in the information she had received, it was appropriate to try to find out why the family had not attended. Secondly, there was a real risk that by acting as she did she was punishing the claimant for a decision of his parents (cf para 6.4 of the circular). Thirdly, the school was dealing with a family whose parents knew little English. The possibility of misunderstanding or confusion could not be excluded. Even if it would have been very difficult to have organised a similar reintegration meeting for a later date, an explanation of the claimant's non-attendance should have been sought. If necessary, Ms Pavlou would have

had to consider the possibility of a reduced meeting, or a different reintegration task for the claimant.

**[101]** Mr Moffett submitted that the letter of 13 July was intended to precipitate the claimant's return to the school, and indeed according to Ms Pavlou's evidence that was her purpose. Regrettably, the terms of the letter were such as to be more likely to have the opposite effect.

**[102]** In addition, the information given to the family was that the claimant was being immediately removed from the school roll. There were no legal grounds to do so. As a matter of law, the letter constituted his permanent exclusion. However, the information before Ms Pavlou did not justify permanent exclusion. A wilful refusal by the claimant personally to attend a reintegration meeting or to accept any responsibility for his failure to raise the alarm on 8 March might have given grounds for exclusion: but his part in the non-attendance at the meeting was unknown.

**[103]** The governors should also have considered Ms Pavlou's letter of 13 July as effecting the claimant's permanent exclusion and fulfilled the duty imposed on them by s 66 of the School Standards and Framework Act 1998, taking into account the guidance in the circular. If there was not one already, a discipline committee should have been established for the purpose.

**[104]** However, the claimant failed to plead, before the beginning of the hearing, that if the governors had fulfilled their statutory duty, and (through their discipline committee) considered the claimant's exclusion, they would have directed his reinstatement, and that accordingly their failure to perform their statutory duty resulted in his inability to return to the school, and interfered with his rights under art 2 of the First Protocol. As a result, no witness statement had been served by any governor of the school, and in particular no witness was available to say what they would have done if they had considered the claimant's exclusion. It was for this reason that the only plea made in the amended claim form for which I gave leave to amend was that the failure to hold a discipline committee hearing to consider the exclusion, of itself, contravened the claimant's convention rights under art 6, and art 2 of the First Protocol. So far as art 2 of the First Protocol is concerned, this plea is insufficient: a claimant seeking damages for breach of his rights under art 2 of the First Protocol must show that the breach of domestic law which he alleges caused the interference with his right to education under that article.

**[105]** The removal of the claimant from the school roll, in the autumn of 2001, was also in my judgment unlawful. The only relevant sub-paragraph of reg 9(1) of the 1995 regulations, and that relied upon, is sub-para (g). I have considerable doubt as to its application. It is intended to relate to voluntary absence from school, not to absence caused by the school. It was hardly surprising that the claimant was absent from school following Ms Pavlou's letter of 13 July. The sub-paragraph that should have been applicable to the registration of the claimant at the school was (k), but the school cannot rely on it by reason of reg 9(4)(d). It is difficult to see that both (k) and (g) can apply to the same set of facts. Be that as it may, however, in my judgment, neither the school nor the local education authority made reasonable inquiry to locate the claimant before his removal. The only inquiry made by the local education authority, so far as the evidence shows, consisted of three telephone calls to the claimant's home on 1, 2 and 3 October 2001. The suggestion that he had gone to Bangladesh appears to have been pure surmise. The only inquiries made by the school consisted of Mrs Telfer's attempts to telephone the family early in the term. Those telephone

calls were made 'without success'. How often, on what dates and at what times of day she telephoned is not in evidence. No letter was sent to the claimant's home by either the local education authority or the school to cover the possibility that no one was at home when the calls were made. No one sought to visit his home. These telephone calls did not amount to reasonable inquiry. Regulation 9(1)(g) requires that both the local education authority and the school should have made reasonable inquiry to locate the pupil in question (see *R (on the application of M) v Barking and Dagenham London BC* [2002] EWHC 2483 (Admin), [2002] All ER (D) 64 (Aug)).

**[106]** These failures of the school and the local education authority to observe the requirements of the relevant statutes and regulations disclose a regrettable ignorance of those requirements. They could and should have been challenged at the time. It is unfortunate that they were not. It is understandable that an immigrant family, whose parents' command of English is poor, should not have done so. However, as I have held, apart from the failure to comply with its statutory obligations, the school's decisions to exclude the claimant until the termination of the prosecution and then until a reintegration meeting could be held was sensible and reasonable, and in my judgment does not give rise to liability for breach of art 2 of the First Protocol.

**[107]** Different considerations apply to the claimant's exclusion from school after 13 July. His exclusion and removal from the register were not reasonable nor justified under domestic law. In the circumstances, the only defence to the claim for damages for breach of art 2 of the First Protocol is that appropriate educational facilities were none the less available to the claimant but that either he chose not to avail himself of them or that the responsibility for the missed period of education was that of the local education authority.

**[108]** The local education authority had undertaken responsibility for the claimant's education as a result of his exclusion. That responsibility arose under s 19(1) of the 1996 Act. It may be that the words 'by reason of ... exclusion from school' should be read as referring to a lawful exclusion (although this would be contrary to the general rule that an unlawful administrative action is valid and effective unless and until it is quashed), but if so an unlawful exclusion is in my judgment within the expression 'or otherwise'. The local education authority did not provide tuition for the claimant because, as I have found, the family declined the offer of tuition. It follows that the school was not the cause of the claimant's lack of suitable education between the 13 July and the end of the summer term.

**[109]** The cause of the claimant's lack of schooling or education during the autumn of 2001 is more complex to ascertain. There is no explanation for the family's failure to contact Mr Read or Ms Gurney, who were referred to in Ms Pavlou's letter of 13 July, until October 2001. In addition, I find that until early November 2001 he and his family were uncertain whether they wanted him to return to the Lord Grey School (see eg Mr Read's letter of 22 October). If that uncertainty was the result of the school's unreasonable or unlawful actions, it might be responsible for it. However, I have no evidence from the family as to whether it was caused by, for example, Ms Pavlou's letter of 13 July, or resulted from the fact that the claimant had been accused of involvement in arson. B's evidence, that at the meeting with Mr Read the family expressed their wish that A should return to the Lord Grey School, is inconsistent with Mr Read's letter and his evidence, and I reject it.

**[110]** Furthermore, nothing had occurred to bring to an end the local education authority's responsibility for the claimant's education under s 19(1).

Although Mr Read said that he was unaware, during the autumn of 2001, that the claimant was out of school, he and Ms Gurney and Ms Barby had all been copied into the letter of 13 July, from which it was apparent that he had not returned to the Lord Grey School, so that the section applied. It was the local education authority's responsibility to provide suitable education for him. a

[111] It follows that there were educational facilities available to the claimant. The evidence, which consists only of the cross-examination of Mr Read, does not justify a finding that if the claimant had sought access to the tuition services of the Manor Road pupil referral unit, they would have been inadequate. Moreover, it must be the case that if the family had made contact with Mr Read (or, presumably, Ms Gurney) soon after receipt of Ms Pavlou's letter of 13 July, the claimant would have been admitted to another school much earlier, and possibly in time for the beginning of the autumn term. b c

[112] In these circumstances, the claimant has not proved that his lack of schooling in the autumn, prior to his father's letter of 6 November 2001, was caused by the school.

[113] After the school had refused to permit the claimant to return, on the ground that its roll was full, it continued to be the responsibility of the local education authority (who were notified of the refusal by copy of the letter of 14 November 2001) to provide tuition pending the claimant's admission to an alternative school. d

[114] It follows that, although the decisions to exclude the claimant and to remove him from the roll were unlawful, and could have been challenged by judicial review, they did not give rise to a liability in damages for breach of his rights under art 2 of the First Protocol. e

*Claim dismissed.*

Aaron Turpin Barrister.

# Graham v Entec Europe Ltd (trading as Exploration Associates)

[2003] EWCA Civ 1177

COURT OF APPEAL, CIVIL DIVISION

POTTER, CHADWICK LJJ AND CRESSWELL J

6 AUGUST 2003

*Limitation of action – Latent damage – Three-year limitation period – Three-year limitation period for negligence actions where facts relevant to cause of action not known at date of accrual – Claimant seeking to rely on three-year limitation period in negligence action in respect of latent damage – Loss adjuster aware of potential claim – Whether knowledge of loss adjuster appointed by claimant's insurers in subrogated claim attributable to claimant – Whether claimant's cause of action prima facie time-barred – Limitation Act 1980, s 14(5).*

In 1991, following the development of cracks in his bungalow, the claimant claimed upon an insurance policy with his insurers. The claimant also obtained advice from a structural engineer on his own behalf. The engineer concluded that the cracking was caused by shallow foundations coupled with clay shrinkage exacerbated by the presence of at least one oak tree. The insurers retained H, a chartered surveyor and loss adjuster, to investigate the damage on their behalf. In April 1991, H reported to the insurers, and the defendant geotechnical engineers were appointed. They gave advice supporting the installation of underpinning to the foundations and the remedial works were completed in August 1992. Within weeks, minor cracking appeared within the part of the property which had been underpinned. By the end of summer 1995, it became apparent that the cracking was significant and continuing. H was again instructed by the insurers to investigate the further movement and report on the adequacy of the work carried out. After further investigation, it became apparent that the defendant had not followed national guidance for house-building near trees. In November 1996, H was told that a geotechnical engineer had reported that the principal cause of the problem was clay shrinkage caused by the root water demands of the surrounding oak trees, but he did not receive that information in writing until July 1997, whereupon he reported back to the insurers. After consideration, it was decided that the cost of further works could not be justified and the bungalow was 'written off'. Accordingly, when proceedings were brought in July 2000 for the wasted costs of the defendant's work, the claim was brought by the insurers in the name of the claimant, the insurers having become subrogated to the claimant's rights of recovery on payment of his original claim under his policy. A preliminary issue arose as to whether the claim was barred under the Limitation Act 1980. The judge determined that the claimant personally did not have the relevant knowledge for the purpose of time starting to run until he was given a copy of the report in July 1997. She went on to find, however, that H, as an experienced loss adjuster, had the necessary knowledge prior to July 1997, since he had been made aware of the contents of the expert report in November 1996. She concluded that H's knowledge was knowledge which was to be imputed to the

claimant for the purpose of s 14A[a] of the 1980 Act and that the claim was therefore time-barred. On the claimant's appeal, it fell to be determined whether a loss adjuster appointed by a claimant's insurers in a subrogated claim could have knowledge attributable to the claimant for the purpose of s 14A of the 1980 Act. Section 14A(5) provided that: 'For the purpose of this section, the starting date for reckoning the period of limitation under sub–s (4)(b) above [i e three years] is the earliest date upon which the plaintiff or any other person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and the right to bring such an action.'

**Held** – In relation to a subrogated claim, for the purposes of consideration of the date upon which the claimant acquired the relevant knowledge under s 14A of the 1980 Act so as to start time running for limitation purposes, the nominal claimant was fixed with the knowledge of the insurer for whose benefit the action was brought. Section 14A(5) appeared to have particularly in mind the situation where a plaintiff sued as the assignee of another. However, it plainly contemplated that, at any given time, it was the knowledge of the person in whom the cause of action was vested that was relevant. The effect of the doctrine of subrogation in relation to contracts of indemnity by way of insurance was similar to that of an assignment of the assured's policy rights against a tortfeaser. The doctrine conferred upon the insurer, on payment of the loss, the right to receive the benefit of all rights and remedies of the assured against third parties. In those circumstances, it was plainly appropriate to construe the word 'plaintiff' in s 14A(5) as extending to a plaintiff whether suing in his or her own name, or in the name of another by way of subrogation. The knowledge of a loss adjuster investigating and advising on a claim on behalf of insurers for the purpose of pursuing a subrogated claim by those insurers was to be treated as knowledge of the insurers for the purposes of s 14A(5). Moreover, the judge's finding that the loss adjuster had the requisite knowledge by November 1996 was a finding which she had been entitled to make on the evidence. Accordingly, the appeal would be dismissed (see [36]–[39], [43]–[46], below).

**Notes**

For negligence actions where the damage was not discoverable within the limitation period, see 28 *Halsbury's Laws* (4th edn reissue) paras 888, 1071.

For the Limitation Act 1980, s 14A, see 24 *Halsbury's Statutes* (4th edn) (1998 reissue) 713.

**Cases referred to in judgments**

*Mirza v Birmingham Health Authority* [2001] All ER (D) 449 (Jul).

*Nash v Eli Lilly & Co* [1993] 4 All ER 383, [1993] 1 WLR 782, CA.

*South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd, Mortensen v Laing* [1992] 2 NZLR 282, NZ CA.

*Spargo v North Essex District Health Authority* [1997] PIQR 235, CA.

a Section 14A, so far as material, is set out at [22]–[25], below

**Appeal**

James Graham appealed with the permission of Judge Alton sitting as a High Court judge at Birmingham given on 24 January 2003 from her order of that date whereby she held, as a preliminary issue, that Mr Graham's claim against the respondent, Entec Europe Ltd (trading as Exploration Associates) in respect of negligent advice as to the causes of and recommendations for remedial works in respect of subsidence of a bungalow was time-barred pursuant to s 14A(4)(b) of the Limitation Act 1980. The facts are set out in the judgment of Potter LJ.

*Graeme Sampson* (instructed by *Beachcroft Wansbroughs*, Birmingham) for the claimant.

*Kristina Stern* (instructed by *Eversheds*, Newcastle-upon-Tyne) for the defendant.

*Cur adv vult*

6 August 2003. The following judgments were delivered.

**POTTER LJ.**

INTRODUCTION

[1] This is an appeal from the judgment dated 24 January 2003 of Judge Alton sitting as a High Court judge at Birmingham on a preliminary issue, whereby she held that the claim of the claimant against the defendant in respect of negligent advice as to the causes of and recommendations for remedial works in respect of subsidence at the bungalow, Offchurch, Leamington Spa, Warwickshire, was time-barred pursuant to s 14A(4)(b) of the Limitation Act 1980.

[2] The remedial works were completed by August 1992. However, further cracking in the structure of the bungalow became evident within a month thereafter, which later developed to the extent that further works of rectification were necessary, thus giving rise to these proceedings. Given the appearance of cracking in September 1992, the primary limitation period in respect of the claimant's cause of action expired well before proceedings were commenced on 14 July 2000. The question before the judge was whether or not, for the purposes of s 14A of the 1980 Act, the claimant was possessed of the requisite knowledge as to his cause of action prior to 14 July 1997. The defendant asserted that the claimant knew or ought reasonably to have known of the cause of the damage shortly after it allegedly occurred in 1992–93. The claimant asserted that the requisite knowledge was not available until he was aware of the final conclusions of experts appointed to advise his insurers' loss adjusters in September 1997.

[3] The principal question raised by the appeal is whether a loss adjuster appointed by a claimant's insurers in a subrogated claim can have knowledge attributable to the claimant for the purposes of s 14A of the 1980 Act. A subsidiary question arises as to whether that loss adjuster should be deemed himself to have knowledge at a point prior to delivery of the report of an expert appointed by him to investigate the cause of the loss to which the claim relates.

THE FACTS

[4] In 1991, following the development of cracks in his bungalow, the claimant claimed upon an insurance policy with his insurers, the (Royal &) Sun

Alliance (the insurers). Since the insurers would only finance remedial work designed to rectify actual damage and would not bear the cost of additional works designed to prevent the risk of future damage to parts of the property not currently affected, the claimant obtained advice from Chmiel Overton, structural engineers, on his own behalf. Chmiel Overton reported their view that the cracking was attributable to a combination of shallow foundations together with clay shrinkage exacerbated by the proximity of at least one oak tree which suggested to them that either mini-piling or traditional underpinning might be required.

**[5]** The insurers retained Mr Handford, a chartered surveyor and loss adjuster, to investigate the damage on their behalf. In April 1991 he reported to them the substance of Chmiel Overton's report.

**[6]** The defendants, who are geotechnical engineers, were instructed. Between July 1991 and 6 August 1992 they made reports and gave advice supporting the installation of traditional underpinning to the foundations, which scheme was adopted by the claimant with the approval of the insurers, the claimant having decided not to finance the additional costs of installing underpinning to the property as a whole.

**[7]** The remedial works were completed in August 1992. Within weeks, minor cracking appeared within that part of the property which had been underpinned. The claimant was initially advised that this might simply be 'bedding down' of the works; however, monitoring was instituted under the supervision of Chmiel Overton. The monitoring confirmed that the property continued to be subject to subsidence movement in the area which had been underpinned and, by the end of summer 1995, it was clear that the cracking was significant and continuing.

**[8]** Mr Handford was again instructed on behalf of the underwriters. He sought authority to investigate the suitability and adequacy of the works carried out, already being concerned that the works might not have been appropriate. He sought authority to appoint other structural engineers to investigate the further movement and to report upon the adequacy of the work carried out stating in a letter to insurers dated 14 November 1995:

> 'There are two very large mature oak trees in close proximity to the property and, in hindsight, the scheme of stabilisation work with traditional underpinning may not have been appropriate. We therefore propose to instruct the other engineers to investigate the cause of further movement, ascertain whether any further remedial work is required and finally to consider whether or not there has been any negligence on the part of the insured's own engineers.'

**[9]** The insurers then authorised Mr Handford to instruct engineers, and Mr Turner, of Robert Turner and Partners, a civil/structural engineer, was appointed, his letter of retainer making clear that he was instructed to undertake whatever investigation was required to determine the cause of the further movement and whether the rectification works undertaken were structurally sufficient, particularly in view of the proximity of two of the mature oak trees.

**[10]** After visiting the site Mr Turner sought the advice of Mr Finch, an arboriculturist, to advise on the influence of the oak trees. In his letter of instruction dated 4 March 1996 Mr Turner informed Mr Finch:

'I have not, as yet, written my report on the present condition of the building, as I would like you to visit the property, inspect the damage, and let me have your preliminary views concerning the possible influence of three mature oak trees that surround the structure.'

[11] On 4 June 1996 Mr Finch reported to Mr Turner, the report being copied to Mr Handford and the claimant.

[12] In that report Mr Finch noted that, while extensive ground investigations and soil tests had been carried out by the defendants, their engineering report had made no reference to the likely effects of the adjacent trees and they had concluded that there was little evidence that the adjacent oaks were contributing to the movement. He noted that the underpinning depth recommended by the defendants for remedial works at the front of the property did not correspond with the guidance provided in National House-Building Council Practice Note Number 3 (1985) *Building Near Trees*, which suggested that significantly greater foundation depths would be appropriate in the context of high water demand deciduous trees on medium-shrinkability soil. He concluded:

'Based on the information to date it is highly likely the adjacent trees are involved in the movement that have led to the recurrence of structural damage. It is vitally important for the cracks to be monitored together with the building level on a monthly basis for a period of at least 12 months and that the extent and depth of the underpinning is established. When these facts are available I can then submit a tree management programme for your consideration.'

[13] Monitoring was instituted and maintained in accordance with Mr Finch's recommendation. Meanwhile, in July 1996, Mr Turner appointed Mr Eaton, a geotechnical engineer, to attend on site and open trial holes to enable an independent view of ground conditions to be given. Mr Eaton investigated in August 1996 but did not submit a report until November. Meanwhile, Mr Handford reported direct to the claimant, stating that no conclusions had been reached at the site meeting and that boreholes were required. On 12 September 1996 he reported to the claimant:

'Having recently discussed the matter with Mr Turner, we understand that he is awaiting receipt of the arboriculturist's and geotechnical reports but the suggestion is that possibly root growth from the rear oak trees is causing desiccation of the soil at a lower level than the depth of the underpinning, hence the need for bore-hole investigation.'

[14] Mr Eaton reported in November 1996 to Mr Finch the arboriculturist. The conclusion to his findings was as follows:

'It is impossible to escape the conclusion therefore that the principal cause of the distress of the perimeter elevations is, and always has been, clay shrinkage due to the root water demands of the surrounding oak trees, in particular. It is inconceivable that this degree of desiccation could have imposed itself upon the foundation soil in the short period that had intervened since the completion of the underpinning.'

[15] His recommendation as to necessary further works of rectification was that further underpinning be undertaken based upon piles. He said the scheme

would be structurally complex and costly as a result, which in turn placed doubt on the long-term viability of the existing dwelling.

[16] Mr Finch did not copy Mr Eaton's report to Mr Handford or submit a report of his own at that stage. However, the judge found that, Mr Handford having spoken to Mr Turner shortly after Mr Finch had sent his report to Mr Turner, he would have been told a summary of Mr Eaton's findings.

[17] Mr Turner did not submit a written report to the claimant or the insurers at this stage, as he was continuing to await monitoring results from Chmiel Overton. Having received these in February 1997, he forwarded them to Mr Finch with a request to submit his report as soon as possible. Mr Finch reported on 8 April 1997. While concurring with Mr Eaton as to the most likely cause of desiccation, he concluded that, though he had no specific evidence, he suspected that the building was suffering from seasonal movement superimposed on heave as a result of root severance during the underpinning works. He recommended that level monitoring was continued and past results reviewed and recalculated.

[18] Following further monitoring, on 17 July 1997 Mr Finch again reported, saying:

> 'Based on the evidence to hand I consider the cause of the structural damage to this property is the result of the indirect actions of the adjacent oak tree on the clay soil supporting the foundation.'

[19] He concluded there was no available tree management solution to the problem and supported Mr Eaton's proposal for sleeve piling.

[20] Mr Turner finally reported to Mr Handford by letter dated 30 July 1997 which concluded:

> 'Quite independently the geologist, the arboriculturist and ourselves have come to the conclusion that the scheme of underpinning that was carried out did not properly address the problem of desiccation of the clay sub-soil caused by the presence of the mature oak trees, and this had led to the ongoing and progressive damage that started within a month or so of the work being completed. In fact it is debatable in the view of the geologist and ourselves if any scheme of repair will be entirely successful due to the maturity and close proximity of the trees to the building.'

[21] Mr Handford reported back to the insurers. After further consideration it was decided that the cost of further piling work guaranteed to stabilise the building (if indeed a contractor could be found to guarantee the work) could not be justified and the claimant's bungalow was 'written off'. Accordingly when proceedings were eventually brought in July 2000 for the wasted costs of the original work of piling, they were brought by the insurers suing in the name of the claimant, the insurers having become subrogated to the claimant's rights of recovery upon payment of his original claim under his policy.

SECTION 14A OF THE 1980 ACT

[22] Section 14A(5) provides:

> 'For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above [ie three years] is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for

damages in respect of the relevant damage and a right to bring such an action.'

[23] Section 14A(6) provides:

'In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—(a) of the material facts about the damage in respect of which damages are claimed; and (b) of the other facts relevant to the current action mentioned in subsection (8) below.'

[24] For the purposes of this appeal we are not concerned with the 'other facts ... mentioned in subsection (8)'. However, s 14A(7) provides:

'For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.'

[25] Finally, s 14A(10) provides:

'For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—(a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek; but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.'

THE JUDGE'S DECISION

[26] On the basis of the facts found by the judge as already summarised, she held that the claimant did not *personally* have the relevant knowledge for the purposes of time starting to run until he was given a copy of the Turner report. She observed:

'50. ... Nor is it appropriate, ignoring for the moment questions of agency, to impute to the claimant any further knowledge which the experts may have had but which had not as yet been communicated to him. The 1980 Act deals specifically with the question of constructive knowledge by s 14A(10) quoted above. Here the experts—a whole range of them—were instructed promptly. I accept that the final report of Mr Turner was delayed ... It may well be that a point does arrive when it is no longer reasonable to tolerate delays by an expert instructed on a claimant's behalf. But I do not find that such point had been reached in this case such as to warrant the imputing of knowledge to the claimant pursuant to s 14A(10).'

[27] That finding is not challenged on this appeal.

[28] The judge went on to find, however, that Mr Handford, as 'an experienced loss adjuster with prior experience in the handling of subsidence claims', had the necessary knowledge well prior to July 1997, having been made

aware of the contents of the report of Mr Eaton, the geotechnical engineer, in November 1996 (see [14]–[16], above).

[29] The judge stated:

> '55. Whilst it does not appear that he was sent a copy of Mr Eaton's November 1996 report, I accept that as he spoke to Mr Turner shortly after its receipt that it was likely that he was informed at the time of Mr Eaton's conclusions although he does not now recall. I also accept that he would have understood those conclusions.
>
> 56. By this point I find that Mr Handford did have the necessary knowledge as to the material facts about the damage, attributability of that damage to the act or omission of the defendants and the identity of the defendants. True it was that he was waiting for and pressing for Mr Turner's final report and was being told that more monitoring results were wanted/expected, and later that a further report from Mr Finch was expected/had been received. But the reality was that no one was anticipating that there would be some new information negating the findings already reported; rather that any further information would confirm those findings and assist in finally determining what if any scheme of remedial works should be adopted. In so far as he needed that final report, it was also to provide the evidence to pursue a recovery and to reinforce any recommendations he might make. Given Mr Handford's knowledge of these facts, they were facts also ascertainable by the claimant in the period pre-July 1997 had he chosen to inquire rather than to leave everything to Mr Handford and underwriters.'

[30] Finally, the judge held that Mr Handford's position as loss adjuster was that of an investigator appointed as agent of the insurers to investigate and progress the claim rather than himself being an expert whose help was sought and awaited in order to ascertain the facts upon which a claim might be based, and that, as such, Mr Handford's knowledge was knowledge which was to be imputed to the claimant for the purposes of s 14A of the 1980 Act. She made that finding on the following grounds.

[31] The judge stated:

> '39. The defendant's case is not so much that knowledge of persons such as Mr Handford or Mr Turner should be regarded as knowledge of the claimant on the basis that their knowledge was to be attributed to the claimant pursuant to s 14A(10)(b) but that where, as here, the original advice, though addressed to the claimant was passed to underwriters who thereafter proceeded to finance the work in reliance thereon and hence ... [were] ... responsible for ensuring that any works be redone or that appropriate compensation was given to the insured and ... [were] ... subrogated to the claim as a consequence, then one should treat the knowledge of underwriters' expert loss adjuster as the claimant's knowledge for the purposes of s 14A(10)(a). Effectively, counsel was submitting that underwriters should be treated as being tantamount to the claimant or at least the claimant's agents for the purposes of acquiring knowledge. Accordingly, it was submitted that the knowledge of Mr Handford the loss adjuster was the relevant knowledge on the basis that Mr Handford had in turn been appointed by underwriters to investigate the claim as their and their claimant's agent and not as an expert

and hence his knowledge was both their knowledge and the claimant's knowledge.

40. In factual terms, it to a very great extent reflects the reality of what was happening if the court were able to treat underwriters through Mr Handford as 'the claimant' for the purposes of the Act. Underwriters had paid/reimbursed the cost of the original design and underpinning works, although it would appear that the contract was in the name of the claimant himself. Apparently, and I derive this from the evidence of Mr Handford, where potential problems arise in respect of rectification works funded by insurers, they do hold the claim/book open and hence regard themselves as responsible for ensuring that any further losses to the insured are made good ... Indeed it was plain that Mr Handford's approach was not to consider whether the *claimant* could pursue a claim but whether his "principals" (ie underwriters) could pursue recovery ... It appears to have been treated as a foregone conclusion that underwriters would make whatever payment was necessary to reimburse the claimant's losses and would themselves make whatever decisions as to who should be sued for what and when. As a consequence of this ... the claimant ... left matters very much in the hands of loss adjusters and underwriters to deal as they thought fit. There was no conflict between him and underwriters; it was their problem what to do, not his ...

43. ... where as here, the claimant ... [leaves] ... all decisions about any potential claim, whether it existed, against whom and what investigations ought to be pursued to establish the strength of the claim and whether or not legal proceedings should be commenced, to others in circumstances where the claimant would, in the event of proceedings be a claimant in name only, there is powerful argument for construing the section, if the wording permits, as embracing the knowledge of the real claimants and treating that as the knowledge of the claimant. That result would give effect to the spirit of the Act by concentrating upon the knowledge of the person or body who in reality had the right and interest in pursuit of the claim. It can be achieved without doing violence to the wording of the section as it would be appropriate to treat underwriters' (and their loss adjuster charged with investigating and reporting on the claim) knowledge of facts as facts ascertainable by the claimant for the purposes of s 14A(10)(a) in the same way as a solicitor's knowledge derived from investigations carried out on behalf of a client must surely be treated as the client's knowledge (see *Mirza v Birmingham Health Authority* [2001] All ER (D) 449 (Jul) at paras 39–40).'

THE GROUNDS OF APPEAL

[32] Two grounds of appeal have been argued in this case. As originally drafted, the first ground asserted that the judge erred in law in finding that Mr Handford, the loss adjuster appointed by the claimant's insurers, was the plaintiff/claimant for the purposes of s 14A of the 1980 Act. However, as argued by Mr Sampson for the appellant, this resolved into a submission that Mr Handford was the agent of the insurers and not of the claimant and that therefore his knowledge could not be attributed to the claimant for the purposes of s 14A. Albeit the claimant relied upon the information acquired and reported on by Mr Handford as the de facto investigator of the claim, that

was a matter of convenience only. Nor was Mr Handford, as opposed to the insurers, the person subrogated to the claimant's claim. Nor, finally, was he a person in a position analogous to that of a solicitor to the claimant (cf *Mirza's* case, above), being in no contractual or other agency relationship with the claimant for the purpose of investigating the claim.

**[33]** I accept as a matter of analysis that Mr Handford was not the agent of the claimant. He was the loss adjuster appointed by the insurers for the purpose of investigating the claim upon their behalf and, as such, his responsibility was to report to the insurers. It is true that, at one point in his evidence, Mr Handford spoke of his 'primary function' as being 'to deal with the claim and to assist the policy holder'. However, he summed it up in this way:

> 'I believe that we have a duty of care to the policyholder. As I said at the beginning, loss adjusters are bound to deal with the claim impartially and assist the policyholder as best we can. But at the end of the day our client is the insurer and it is from them that we take instructions.'

**[34]** In acknowledging that loss adjusters owe a duty of care to the policyholder when acting in the course of their retainer for the insurance company, Mr Handford was making a concession which was neither necessary to the issues nor, as yet, recognised by English law (cf the view of the New Zealand Court of Appeal in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd, Mortensen v Laing* [1992] 2 NZLR 282 and the discussion in Clarke *The Law of Insurance Contracts* (3rd edn, 1997) pp 842–845 (para 30–12)). However, that is by the way. If Mr Handford had reported to the claimant information sufficient to endow the claimant with the requisite knowledge to start time running, then the claimant would have been fixed with that knowledge; however, the judge held that Mr Handford did not do so and that finding is not the subject of appeal.

**[35]** More pertinently, however, upon my reading of the judgment, it appears that Mr Sampson's fire is misdirected. Its seems clear that in paras 39, 40 and 43 of the judgment quoted at [31], above, the judge was not attributing knowledge of Mr Handford to the *claimant*, but was treating it as the knowledge of the *insurers* and was going on to treat the insurers' knowledge as being knowledge of the person 'who in reality had the right and interest in pursuit of the claim'.

**[36]** In the course of the appeal before us, Mr Sampson eventually conceded that, in relation to a subrogated claim, for the purposes of consideration of the date upon which the plaintiff acquires the relevant knowledge under s 14A so as to start time running for limitation purposes, the nominal plaintiff/claimant is fixed with the knowledge of the insurer for whose benefit the action is brought. In my view Mr Sampson was right so to concede. Like the judge, I consider that the spirit and purpose of the 1980 Act is to concentrate upon the knowledge of the person who has the right and interest in pursuing the claim.

**[37]** Section 14A(5) treats the starting date for reckoning the period of limitation under sub-s (4)(b) as the earliest date on which the plaintiff 'or any person in whom the cause of action was vested before him' first had the requisite knowledge. That provision would appear to have particularly in mind the situation where a plaintiff sues as the assignee of another. However, it

plainly contemplates that, at any given time, it is the knowledge of the person in whom the cause of action is vested which is relevant. The effect of the doctrine of subrogation in relation to contracts of indemnity by way of insurance is similar to that of an assignment of the assured's rights of action against a tortfeasor. The doctrine confers upon the insurer, on payment of the loss, the right to receive the benefit of all rights and remedies of the assured against third parties which, if satisfied, will extinguish or diminish the ultimate loss sustained. Accordingly the insurer is entitled to exercise in the name of the assured whatever rights he possesses to seek compensation for the loss from third parties. One of the differences between subrogation and assignment is that an insurer exercising rights of subrogation against third parties must do so in the name of the insured. However, this does not detract from the fact that the subrogated rights of the insurer vest in him by operation of law upon the payment of the assured's loss and, if an assured is unco-operative in this respect, the court will act to compel him to lend his name to proceedings brought by the insurer provided the insurer tenders an indemnity as to costs. In those circumstances, as it seems to me, it is plainly appropriate to construe the words 'the plaintiff' in s 14A(5) as meaning/extending to a plaintiff whether suing in his own name or the name of another by way of subrogation. That, as I understand it, is the construction favoured by the judge and it is one which I would adopt.

**[38]** I would also hold that the knowledge of a loss adjuster investigating and advising on a claim on behalf of insurers for the purpose of pursuing a subrogated claim by those insurers is to be treated as the knowledge of the insurers for the purposes of s 14A(5). In the course of argument, Mr Sampson acknowledged that it is the custom of many insurers to investigate claims through their own 'in-house' loss-adjusting department. He was unable to suggest any logical reason for distinguishing between the position of such an insurer, who plainly would be fixed with the knowledge of his employee, and the position of an insurer who, for purposes of economy or business efficiency, delegates the task to an independent loss adjuster such as Mr Handford.

**[39]** Accordingly, I would reject the first ground of appeal.

**[40]** The second ground of appeal is that the judge erred in law and fact in concluding that Mr Handford had obtained sufficient knowledge for the purposes of s 14A(10) when he was still awaiting a report from an expert consulting engineer whom he had instructed to report on the cause of the subsidence. As a general proposition, Mr Sampson submitted that a claimant (in this case the insurers suing by way of subrogation) who properly seeks the advice of an expert to establish grounds of claim against a defendant should not be fixed with knowledge prior to the delivery of that expert's report. Mr Sampson relied in support of that proposition upon the observations of Purchas LJ in *Nash v Eli Lilly & Co* [1993] 4 All ER 383 at 396, [1993] 1 WLR 782 at 796 when, in considering the almost-identical provisions of s 14(3) of the 1980 Act, he stated:

> 'It is to be noted that a firm belief held by the plaintiff that his injury was attributable to the act or omission of the defendant, but in respect of which he thought it necessary to obtain reassurance or confirmation from experts, medical or legal, or others, would not be regarded as knowledge until the result of his inquiries was known to him or, if he delayed in

obtaining that confirmation, until the time at which it was reasonable for him to have got it.' a

[41] He relies also upon various other observations in cases of personal injury in which the court has made clear that belief or suspicion is not sufficient to establish knowledge. See for instance *Spargo v North Essex District Health Authority* [1997] PIQR 235 at 242 per Brooke LJ: b

'(4) On the other hand she will not have the requisite knowledge ... if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was.' c

[42] Mr Sampson submits that, given that it was reasonable for Mr Handford to seek expert advice, it follows that it was reasonable for him to wait for delivery of a final report from Mr Turner, rather than reporting back to the insurers with what he understood would be the effect of that report when received, but which had not yet been confirmed. d

[43] In my view there is no substance in this ground of appeal. So far as the general submission is concerned, it does not seem to me that any broad rule of thumb can be applied in cases of this kind. Nor does it seem to me that the observations of the court in relation to the state of knowledge of, or appropriate inferences to be drawn by, claimants in personal injury cases who e lack experience of claims or dealing with experts are of real assistance in relation to the position of an experienced loss adjuster investigating a case of the instant kind on behalf of an insurance company. Between paras 51 and 56 of her judgment, the judge looked with care at the state of knowledge of Mr Handford based upon the series of experts' reports which he received. I f have already quoted her findings at [29], above. The judge, having studied the reports and heard the witnesses, made findings of fact which cannot be open to successful challenge on this appeal and which were plainly apt to imbue Mr Handford with the requisite knowledge well before the final report of Mr Turner was to hand by the end of July 1997. Even when those facts were confirmed in July 1997, for reasons which are obscure, the claimants none the g less delayed for a period of some three years before issuing proceedings.

CONCLUSION

[44] For the reasons set out above, I would dismiss this appeal.

h

**CHADWICK LJ.**

[45] I, too, would dismiss this appeal. I agree that, for the purposes of s 14A(5) of the Limitation Act 1980, the relevant knowledge is the knowledge of the insurers; and that, in the circumstances of this case, the knowledge of the loss adjuster, Mr Handford, is to be treated as the knowledge of his principals, j the insurers. I agree, also, that the judge's finding that Mr Handford had the requisite knowledge by November 1996—after speaking to Mr Turner—was a finding of fact which she was entitled to make on the evidence. For my part I would treat that as a finding of actual knowledge: I do not think that s 14A(10) of the 1980 Act is engaged in this case.

**CRESSWELL J.**

a [46] I agree that the appeal should be dismissed for the reasons given by Potter LJ. I also agree with the additional observations of Chadwick LJ.

*Appeal dismissed.*

Alexander Horne Barrister.

# Note

## Wardlaw v Farrar

### [2003] EWCA Civ 1719

COURT OF APPEAL, CIVIL DIVISION
DAME ELIZABETH BUTLER-SLOSS P, BROOKE AND LATHAM LJJ
11, 27 NOVEMBER 2003

*Practice – Civil litigation – Case management – Directions – Clinical negligence actions – Published and unpublished literature upon which expert witness proposing to rely – Best practice in multi-track actions in county courts and High Court.*

In the course of giving judgment, with which Latham LJ and Butler-Sloss P agreed, **BROOKE LJ** said:

'[23] The standard form of order made by the High Court masters in the Queen's Bench Division in clinical negligence cases now contains these provisions:

> "Any unpublished literature upon which any expert witness proposes to rely shall be served at the same time as service of his statement together with a list of published literature and copies of any unpublished material. Any supplementary literature upon which any expert witness proposes to rely shall be notified to all other parties at least one month before trial. No expert witness shall rely upon any publications that have not been disclosed in accordance with this direction without leave of the trial judge on such terms as he deems fit ... Parties to agree the trial bundle ... not less than seven days before the hearing."

[24] Now that so many relatively heavy clinical negligence actions in the multi-track are being conducted in county courts, in addition to district registries of the High Court, it is essential that best practice should be followed throughout the country in relation to case-management directions in the multi-track in this specialist field.'

Kate O'Hanlon Barrister.

End of Volume 4